

FOIL-AO-11232

From: Robert Freeman
To: Internet:ccinfo@stny.lrun.com
Date: 1/4/99 2:43PM
Subject: FOI request

I just received your email message. For future inquiries, please note my email address so that you can contact me directly.

With respect to your question, I believe that the information sought is available in great measure, if not in its entirety. Nevertheless, I offer the following points.

First, the Freedom of Information Law pertains to existing records, and section 89(3) states in part that an agency need not create a record in response to a request. If no list exists or can be generated electronically, the County would not be required to prepare a new record on behalf of the applicant.

Second, insofar as the information sought does exist in the form of a record or records, with one exception, I believe that it would be available. If a violation was found, even if it was later corrected, the determination that a person or entity failed to comply with law would, in my view, clearly be a matter of public record. Inspection reports would constitute "intra-agency materials" that fall within the coverage of section 87(2)(g) of the FOIL. Portions of those materials consisting of opinions, advice, recommendation and the like may be withheld. However that provision specifies that statistical or factual information or final agency determinations, for example, found within those materials must be disclosed.

If an inspection report includes factual information reflective of the inspector's observations, that aspect of the report would be available. If the inspector also offers recommendations in the report, those portions could be withheld. Again, if a report does not contain recommendations, but rather findings of violations of a health code, I do not believe that there would be any basis for denying access to the violations.

If you want to discuss the matter, please feel free to call me at (518) 474-2518.

I hope that I have been of assistance.



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11233

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Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

January 5, 1999

Mr. Adrian Hernandez
95-A-7635
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. Hernandez:

I have received your letter of December 9. You have sought assistance in obtaining a "pedigree" of a DD-5, a complaint follow up report prepared by the New York City Police Department. It is your view that the report is "bogus", and you want a means of ascertaining its "legitimacy." Based on a review of your correspondence, I offer the following comments.

First, since you referred to 5 USC 552 and 552a, which are, respectively, federal Freedom of Information and Privacy Acts, I note that those provisions do not apply to state or local government; they apply only to records maintained by federal agencies.

Second, the Freedom of Information Law, the New York statute that deals with records of state and local government, 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. As I understand your request, you are seeking a description or explanation relating to the preparation of the report in question. If no description or explanation exists, the Department would not be obliged to create such a record on your behalf.

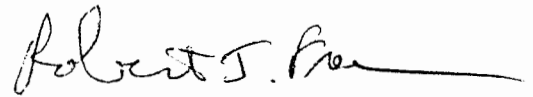
Third, it appears that you would like to obtain the report in conjunction with an indictment or docket number. In this regard, the Police Department makes arrests; it does not assign docket or indictment numbers. Those identification numbers are assigned by the office of a district attorney and a court. As such, it may be that the Police Department has no means of relating a complaint follow up report to an indictment or docket number based on its filing or recordkeeping systems.

Mr. Adrian Hernandez
January 5, 1999
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In short, the Department indicated that it would disclose the report to the extent required by the Freedom of Information Law, and it is my view that is the extent of its obligations under that statute.

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

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:tt



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL No-11234

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Executive Director

Robert J. Freeman

January 5, 1999

Ms. CherylAnn Armeno
M & C Plastering Co.
P.O. Box 574
Margaretville, NY 12455-0574

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

Dear Ms. Armeno:

I have received your letter of December 11 and the correspondence attached to it.

You described difficulty experienced in obtaining records under the Freedom of Information Law from the Village of Fleischmanns. You referred specifically to a request for "tapes of a Public Workshop held between the Village Board, the Planning Board and a business owner submitting plans to the village." In what you characterized as a "typical response" from the Mayor, he acknowledged the receipt of the request and wrote that "Normally, FOIL requests can be granted or denied within 30 days" of their receipt. With respect to the request for the tapes, which was acknowledged on October 30, you had received no further response as of the date of your letter to this office.

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

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

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

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, I believe that recordings of open meetings are clearly accessible and that a lengthy delay in disclosure would be inconsistent with the requirements of the Freedom of Information Law. That statute pertains to agency records, and §86(4) of the Law defines the term "record" expansively to include:

Ms. CherylAnn Armeno
January 5, 1999
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"any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

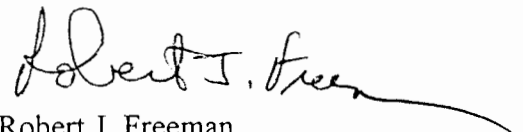
In view of the foregoing, when a public body, such as a village board of trustees, maintains tape recordings of its meetings, any such tape would constitute a "record" that falls within the coverage of the Freedom of Information Law.

Further, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, a tape recording of an open meeting is accessible, for any person could have been present, and none of the grounds for denial would apply. Moreover, case law indicates that a tape recording of an open meeting is accessible for listening and/or copying under the Freedom of Information Law [see Zaleski v. Board of Education of Hicksville Union Free School-District, Supreme Court, Nassau County, NYLJ, December 27, 1978].

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 Mayor.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Donald E. Kearney, Mayor



STATE OF NEW YORK
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FOIL-10-11235

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Robert J. Freeman

January 5, 1999

Mr. Marty Glennon
Meyer, Suozzi, English & Klein, P.C.
One Commerce Plaza, Suite 1810
Albany, NY 12260

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

Dear Mr. Glennon:

I have received your letter of December 3 in which you requested a declaratory ruling on behalf of the Laborers' International Union of North America, Local Union No. 17, based on "the failure" of the New York State Department of Transportation ("DOT") "to provide access under FOIL to a certain lease agreement" between DOT and Cargex Newburgh Limited Partnership ("Cargex").

Before addressing the substance of the matter, I point out that the Committee on Open Government is not empowered to issue declaratory rulings. Rather, pursuant to §89(1)(b) of the Public Officers Law, it is authorized to render advisory opinions. Consequently, the ensuing commentary should be considered wholly advisory in nature.

By way of background, the correspondence attached to your letter indicates that a request was made on April 15 for a copy of the "proposed lease agreement." The request was denied on May 12 by DOT's Records Access Officer "pursuant to Article 6 §87(2)(c) of the Public Officers Law as the subject lease is not yet approved and disclosure would impair present or imminent contract awards or collective bargaining negotiations." In your appeal of June 22, you contended "that the only term in the contract that could possibly interfere with the contract award would be the price" and that the contract should be disclosed following the redaction of the "amount of the agreement." In a determination of your appeal rendered on July 7, Ms. Marie Corrado, the Appeals Officer, the denial was affirmed, and she wrote that:

"The Cargex lease will not be a final, enforceable contract until it is approved by both the NYS Attorney General ('AG') and the NYS Office of the Comptroller ('OSC'). In researching your appeal, I have

Mr. Marty Glennon
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have determined that the lease has now been approved by the AG but not the Office of the State Comptroller. OSC has broad discretion under section 112 of the State Finance Law and could raise questions that would require further refinements of the terms of the lease, including but not limited to the terms involving the payment of rent to the State. It is the Department's judgment that making a draft lease public before it is fully executed could jeopardize the bargaining position of the Department in any negotiations made necessary by the comments of OSC. As a result, it has been a longstanding practice of this Department to withhold draft leases from public access until such time as they have been approved by both the AG and OSC."

Ms. Corrado added that "[a]s soon as OSC executes the lease, it will be available to the public..."

In your letter to me, you wrote that DOT continued its denial of access even though "the terms of the lease agreement, including all construction for the project, had commenced prior to the approval of the Attorney General and the Comptroller" and that "the work was nearly completed before the final approval of the New York State Attorney General and Comptroller" (emphasis yours).

If your description of the facts is accurate, it would appear that the delay in disclosure would have been inconsistent with law.

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 DOT has relied to withhold the record sought, §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 contracting process by diminishing the ability of the government to reach an optimal agreement on behalf of the taxpayers. That a contract has not been approved, 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

Mr. Marty Glennon
Meyer, Suozzi, English & Klein, P.C.
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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)].

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)].

The extent to which the kinds of considerations described in the illustrations described in the preceding paragraphs is pertinent to the instant situation is unclear. Nevertheless, based on the language of §87(2)(c), it is clear in my opinion that the absence of final approvals by the Attorney General or the Comptroller is not determinative of an agency's ability to deny access to records relating to the contracting process. If in the situation at hand the terms of the agreement were being carried out, notwithstanding absence of approvals by the Attorney General and the Comptroller, DOT could not, in my view, justify a denial of access; disclosure would not have "impaired" the award of a contract, for the terms of the agreement (albeit not officially approved) were apparently being executed.

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

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

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

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

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

Mr. Marty Glennon
Meyer, Suozzi, English & Klein, P.C.
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"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:tt

cc: Marie Corrado
John B. Dearstyne



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11236

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Alexander F. Treadwell

January 6, 1999

Executive Director

Robert J. Freeman

E-Mail

TO: "Tom Pritchard" <tap@oet.org>

FROM: Robert J. Freeman, Executive Director

RJF

Dear Mr. Pritchard:

I have received your letter concerning the status of preliminary plans provided by a developer to the Town of Hartwick Planning Board under the Freedom of Information Law.

With this communication, I am also sending a copy of an opinion recently rendered dealing with a similar issue. In brief, it is my view that once the plans, whether preliminary or otherwise, come into the possession of a government agency, they constitute "records" that fall within the scope of the Freedom of Information Law.

While most of the kinds of records that the Planning Board receives would in my opinion be public, I note that §87(2)(d) enables 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..."

If you need additional information, please feel free to contact me. I can be reached at (518) 474-2518.

I hope that I have been of assistance.

RJF:jm



STATE OF NEW YORK
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7010-190-11237

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January 6, 1999

Executive Director

Robert J. Freeman

Mr. Janusz Muszak
Payback Time Ltd.
66 Reddick Lane
Rochester, NY 14624

Dear Mr. Muszak:

I have received your letter of January 2 in which you requested a variety of information from this office based on the provisions of the Freedom of Information Law.

Please be advised that the Freedom of Information Law pertains to agency records and that §89(3) of that statute provides in part that an agency is not required to create or prepare records in response to a request for information. Similarly, while the Freedom of Information Law requires agencies to disclose existing records, it does not require agency officials to answer questions. In short, your request in my opinion is not a request for records made under the Freedom of Information Law.

With respect to your first question, whether there are laws dealing with state employees' "interactions with taxpayers", I know of no such general provisions. Nevertheless, since the jurisdiction of this office involves issues relating to public access to government records, I do not have expertise in relation to your inquiry.

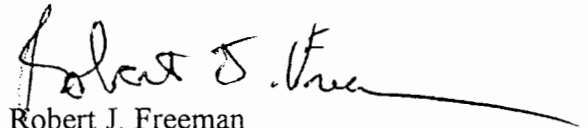
You also referred to the Office of Professional Discipline, which investigates complaints against licensed professionals, and you asked whether there is a similar entity "that taxpayers can turn to with respect to complaints against state employees." I know of no such entity. However, as a general matter, complaints about employees may be directed to their supervisors or the heads of agencies.

Lastly, as you may recall, an opinion sent to your address was rendered on December 21 relating to confidentiality restrictions imposed upon the Commission on Judicial Conduct. In short, due to statutory requirements, that agency cannot disclose its records except in rare circumstances.

Mr. Janusz Muszak
January 6, 1999
Page -2-

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink that reads "Robert J. Freeman". The signature is written in a cursive style with a long horizontal line extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Russell H. Hanks
Robert R. Snashall
Albert Lawrence



STATE OF NEW YORK
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FOIL-AO-11238

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January 6, 1999

Executive Director

Robert J. Freeman

Mr. James D. Wilson
95-B-0367
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. Wilson:

I have received your letter of December 11. You wrote that the Monroe County District Attorney "is repeatedly refusing" to provide access to records sought under the Freedom of Information Law. You added that the requests have been denied "with boilerplate answers" and that it has been contended that records are not available in second degree murder cases.

From my perspective, while some aspects of the records may clearly be withheld, it is likely in my view that blanket denials of access are inappropriate. 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 decision involving access to records of a law enforcement agency, Gould v. New York City Police Department [87 NY 2d 267 (1996)], stating that:

Mr. James D. Wilson

January 6, 1999

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"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.*).

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 kinds of records that you are seeking.

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.

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

Mr. James D. Wilson

January 6, 1999

Page -6-

a vehicle authorizing or requiring disclosure that is separate and distinct from the Freedom of Information Law.

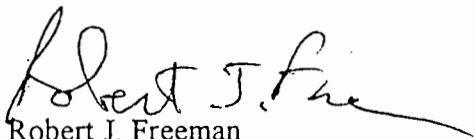
Lastly, in a decision concerning a request for records maintained by the office of a district attorney that would ordinarily be exempted from disclosure under the Freedom of Information Law, it was held that "once the statements have been used in open court, they have lost their cloak of confidentiality 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: Records Access Officer
Office of the Monroe County District Attorney



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11239

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Executive Director

Robert J. Freeman

January 6, 1999

Mr. Henry Greenberg
General Counsel
NYS Department of Health
ESP Corning Tower - Rm. 2438
Albany, NY 12237-0026

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

Dear Mr. Greenberg:

I have received your recent letter in which you requested an opinion concerning the release of certain information under the Freedom of Information Law.

You referred to the decision rendered in New York Times Company and Newsday, Inc. v. New York State Department of Health [243 AD2d 157 (1998)] in which it was held, in brief, that the disclosure of physician identifiers contained in the Statewide Planning and Research Cooperative System ("SPARCS") would not constitute an unwarranted invasion of privacy of patients. Of concern in relation to the decision, according to your letter, "is the release of physician identifiers which would tend to identify the name of any provider who has performed an abortion." You suggested that "[g]iven attacks on abortion providers, including the recent shooting of a physician in western New York, and other activities such as the posting of names of abortion providers on the Internet, it would seem reasonable to withhold information tending to identify abortion providers on the basis that such disclosure would endanger the life or safety of those physicians."

I agree with your contention. 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 the provision to which you alluded, §87(2)(f), which permits an agency to withhold records or portions thereof which if disclosed "would endanger the life or safety of any person." As you are aware, an agency has the burden of defending secrecy and demonstrating that

Mr. Henry Greenberg
January 6, 1999
Page -2-

records that have been withheld clearly fall within the scope of one or more of the grounds for denial [see §89(4)(b)]. However, in the case of the assertion of the provision at issue, the standard developed by the courts is somewhat less stringent. In citing §87(2)(f), it has been found that:

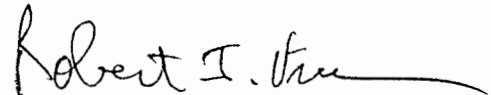
"This provision of the statute permits nondisclosure of information if it would pose a danger to the life or safety of any person. We reject petitioner's assertion that respondents are required to prove that a danger to a person's life or safety will occur if the information is made public (see, *Matter of Nalo v. Sullivan*, 125 AD2d 311, 312, lv denied 69 NY2d 612). Rather, there need only be a possibility that such information would endanger the lives or safety of individuals...."[*Stronza v. Hoke*, 148 AD2d 900,901 (1989)].

It is noted that the principle enunciated in Stronza has appeared in several other decisions [see Ruberti, Girvin & Ferlazzo v. NYS Division of the State Police, 641 NYS 2d 411, 218 AD2d 494 (1996), Connolly v. New York Guard, 572 NYS 2d 443, 175 AD 2d 372 (1991) and McDermott v. Lippman, Supreme Court, New York County, NYLJ, January 4, 1994.] Additionally, it was determined in American Broadcasting Companies, Inc. v. Siebert that when disclosure would "expose applicants and their families to danger to life or safety", §87(2)(f) may properly be asserted [442 NYS2d 855, 859 (1981)].

In sum, in view of the violence that has been committed in New York and elsewhere in relation to abortion providers, I believe that the Department could properly withhold the names of those physicians contained within the SPARCS database.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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Alexander F. Treadwell

Executive Director

Robert J. Freeman

January 6, 1999

Mr. Kenneth Jenkins
86-B-2167
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. Jenkins:

I have received your letter of December 7 in which you sought assistance in obtaining records pertaining to your case from the New York City Police Department.

In this regard, I offer the following comments.

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

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

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

Mr. Kenneth Jenkins

January 6, 1999

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

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

Mr. Kenneth Jenkins

January 6, 1999

Page -4-

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:

Mr. Kenneth Jenkins

January 6, 1999

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- i. interfere with law enforcement investigations or judicial proceedings;
- ii. deprive a person of a right to a fair trial or impartial adjudication;
- iii. identify a 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:

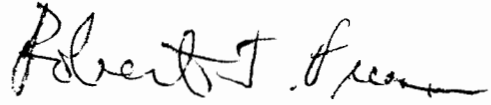
"...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of 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).

Mr. Kenneth Jenkins
January 6, 1999
Page -6-

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and is positioned above the printed name and title.

Robert J. Freeman
Executive Director

RJF:tt

cc: Susan Petito, Special Counsel



STATE OF NEW YORK
DEPARTMENT OF STATE
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FOIL-AP-11241

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January 7, 1999

Executive Director

Robert J. Freeman

Mr. Henry F. Sobota
Ferrara, Fiorenza, Larrison,
Barrett & Reitz, P.C.
5010 Campuswood Drive
East Syracuse, NY 13057

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

Dear Mr. Sobota:

As you are aware, I have received your letter of December 15. You have sought an advisory opinion under the Freedom of Information Law concerning the responsibility of a village to disclose certain records.

According to your letter, the village has received a request for "an agreement to settle a disciplinary case it brought against an employee for on-the-job misconduct", as well as other "available documents" pertaining the proceedings against the employee. You made specific reference to paragraph 16 of the agreement, which states that:

"The parties further agree not to make any public comments about the terms of this Agreement, and pledge to use their best efforts to maintain the confidentiality of this settlement, **to the extent permitted by law**. It is understood that if this Agreement must be disclosed pursuant to a valid request filed under the Freedom of Information Law, such Agreement will be released, and the parties may comment upon the Agreement in connection with such release at such time, provided that any such comment shall not disparage the other party or this Agreement in any manner" (emphasis added).

You added that the agreement requires the employee to retire by a specified date, and that the village agreed to pay the employee certain sums of money and to withdraw the disciplinary charges. The employee did not admit his guilt in relation to the charges.

Mr. Henry F. Sobota
January 7, 1999
Page -2-

You have asked whether the village must disclose the settlement agreement, notwithstanding paragraph 16, the disciplinary charges "or other pre-settlement documents, such as correspondence suspending the employee or transmitting the charges." You also indicated that while the employee was suspended pending a hearing on the charges, he filed for unemployment insurance benefits. A hearing was held, and it was determined that the employee "committed misconduct, making him ineligible for unemployment benefits." You asked whether the decision of the Administrative Law Judge is accessible.

In this regard, I offer the following comments.

First, paragraph 16 in my view has no impact on the village's duty to disclose under the Freedom of Information Law. From my perspective, it is likely that the parties could validly agree not to speak about the settlement. However, the Freedom of Information Law pertains to records, not to speech. In a decision that is somewhat analogous to the matter that you described, Paul Smith's College of Arts and Sciences v. Cuomo, it was stated that:

"Plaintiff was the subject of a complaint made by a former employee who alleged that he was a victim of age discrimination. Prior to a scheduled hearing and with the assistance of an employee of defendant State Division of Human Rights (hereinafter SDHR), plaintiff entered into a stipulation of settlement with the complaining employee. Plaintiff's stated purpose for settling was to eliminate any negative publicity resulting from a public hearing on the allegations. The order after stipulation signed by defendant Commissioner of Human Rights on August 23, 1989 provided for absolute confidentiality except for enforcement purposes. The order also provided for the withdrawal of the charges and discontinuance of the administrative proceeding. Plaintiff did not admit to a Human Rights violation. On October 27, 1989, SDHR issued a press release detailing the allegations, disclosing that the matter had been settled and set forth certain parts of the settlement terms" [589 NYS2d 106,107, 186 AD2d 888 (1992)].

The Appellate Division determined that the issuance of the press release "was both arbitrary and capricious and an abuse of discretion" (id.), but it also found that the stipulation of settlement was subject to rights of access conferred by the Freedom of Information Law.

I note that 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:

Mr. Henry F. Sobota

January 7, 1999

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"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)].

Second, I believe that the settlement agreement 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.

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 in my view serve to justify a denial of access.

Perhaps of greatest significance is §87(2)(b), which permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". In addition, §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 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. 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..."

Perhaps most pertinent to the instant situation is a decision rendered approximately a month ago in which the subject of a settlement agreement with a town that included a confidentiality clause brought suit against the town for disclosing the agreement under the Freedom of Information Law. In considering the matter, the court stated that:

"Plaintiff argues that provisions of FOIL did not mandate disclosure in this instance. However, it is clear that any attempt to conceal the financial terms of this expenditure would violate the Legislative declaration of §84 of the Public Officer's Law, as it would conceal access to information regarding expenditure of public monies.

"Although exceptions to disclosure are provided in §§87 and 89, plaintiff has not met his burden of demonstrating that the financial provisions of this agreement fit within one of these statutory exceptions (see Matter of Washington Post v New York State Ins. Dept. 61 NY2d 557, 566). While partially recognized in Matter of LaRocca v Bd. of Education, 220 AD2d 424, those narrowly defined exceptions are not relevant to defendants' disclosure of the terms of a financial settlement (see Matter of Western Suffolk BOCES v Bay Shore Union Free School District, ___ AD2d ___ 672 NYS2d 776). There is no question that defendants lacked the authority to subvert FOIL by exempting information from the enactment by simply promising confidentiality (Matter of Washington Post, supra p567).

"Therefore, this Court finds that the disclosure made by the defendant Supervisor was 'required by law', whether or not the contract so

Mr. Henry F. Sobota

January 7, 1999

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provided" (Hansen v. Town of Wallkill, Supreme Court, Orange County, December 9, 1998).

While I believe that the settlement agreement must be disclosed for the reasons discussed in the preceding paragraphs, the charges, which were never proven, could, in my view, be withheld. When allegations or charges of misconduct have not yet been determined or did not result in 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.

The other correspondence to which you referred would appear to consist of intra-agency material. To the extent that it is predecisional and does not contain the kinds of information required to be disclosed under subparagraphs (i), (ii) or (iii) of §87(2)(g), or if disclosure would constitute an unwarranted invasion of privacy, I believe that it may be withheld.

With respect to records reflective of a suspension, such records must in my view be disclosed, in this instance, for either of two reasons.

Although a suspension in some situations might not reflect an agency's final determination of a matter, it would represent factual information that must be made available under §87(2)(g)(i). Further, with respect to privacy, it has been established that attendance records of public employees must be disclosed. In Capital Newspapers v. Burns [109 AD 2d 292, aff'd 67 NY 2d 562 (1986)], it was held that records indicating days and dates of sick leave claimed by a particular police officer must be made available. On the basis of that decision, which was reached unanimously by both the Appellate Division and the Court of Appeals, it is clear in my opinion that time sheets, attendance records and similar documentation, including those elements that indicate the reasons for absences, must be disclosed. A member of the public could request and obtain the attendance records of any public employee and ascertain from those records the identity of a person who was suspended.

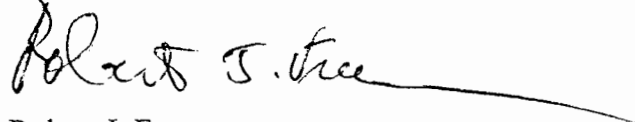
Perhaps more importantly, the suspension would apparently have been referenced in the decision of the Administrative Law Judge who determined eligibility for unemployment insurance benefits, and that decision, in my view, would clearly be public. In Herald Company v. Weisenberg [59 NY2d 378 (1983)], the Court of Appeals held that "an unemployment insurance hearing is presumed to open, and may not be closed to the public unless there is demonstrated a compelling reason for closure and only after the affected members of the news media are given an opportunity to be heard" (id. at 380). Further, the Court based its holding on "the strong public policy in this State of public access to judicial and administrative proceedings", which "has found expression through legislative language in a variety of contexts", one of which included a citation of the Freedom of Information Law (id., 381).

Because unemployment insurance hearings are presumptively open to the public, not only are transcripts of those portions of the hearings that are open accessible under the Freedom of Information Law; the decisions are also available, and based on a telephone contact, it is the routine practice of the Unemployment Insurance Appeal Board to disclose them.

Mr. Henry F. Sobota
January 7, 1999
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I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and extends across the page with a long horizontal flourish.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11242

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Alexander F. Treadwell

January 8, 1999

Executive Director

Robert J. Freeman

Mr. Philip Penna
98-A-2594
Collins Correctional Facility
P.O. Box 340
Collins, NY 14034

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

Dear Mr. Penna:

I have received your letter of December 10. You have sought guidance concerning your ability to obtain the criminal history record of a person who testified against you, as well as records from an insurance company that the person allegedly defrauded.

In this regard, I offer the following comments.

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

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

Based on the foregoing, the Freedom of Information Law applies to records of state and local government; it does not apply to private entities, such as an insurance company. As such, the insurance company would not be obligated to disclose its records to you.

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

Mr. Philip Penna
January 8, 1999
Page -2-

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

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman", followed by a long horizontal line extending to the right.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI-AO-11243

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Alexander F. Treadwell

Executive Director

Robert J. Freeman

January 8, 1999

Mr. George Williams
98-A-3733
Marcy Correctional Facility
P.O. Box 5000
Marcy, NY 13403

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

Dear Mr. Williams:

I have received your letter of December 12. You wrote that you have attempted to obtain records indicating the dates of your incarceration at Riker's Island, but that you have received no response to your requests.

In this regard, I offer the following comments.

First, pursuant to the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), each agency is required to designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests, and requests should ordinarily be sent 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 Mr. Thomas Antenen, Records Access Officer, Department of Correction, 6th Floor, 60 Hudson Street, New York, NY 10013.

Second, for future reference, I point out that the Freedom of Information Law provides direction concerning the time and manner in which agencies are required to respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

Mr. George Williams
January 8, 1999
Page -2-

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

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

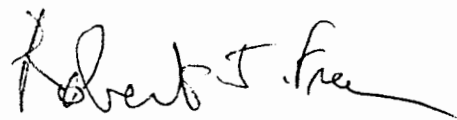
"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial,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

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

Lastly, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, the records of your interest should be disclosed, for none of the grounds for denial would be applicable.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Thomas Antenen



STATE OF NEW YORK
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FOIL-AO-11244

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Alexander F. Treadwell

January 8, 1999

Executive Director

Robert J. Freeman

Mr. Thomas Broadhurst
98-R-2060
Mid-State Correctional Facility
P.O. Box 2500
Marcy, NY 13403

Dear Mr. Broadhurst:

I have received your letter of January 6 in which you appealed a denial of access to a record sought on December 6. You indicated that the Department of Correctional Services has delayed disclosure in a manner that precluded you from using the record in an appeal relating to a disciplinary hearing.

In this regard, first, 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. The provision that pertains 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 by the Department of Correctional Services to determine appeals is Anthony J. Annucci, Counsel to the Department.

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:

Mr. Thomas Broadhurst
January 8, 1999
Page -2-

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

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

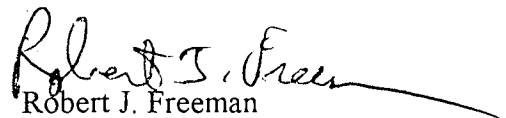
"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial,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

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

Third, I point out 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)].

I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:jm

cc: Anthony J. Annucci



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FOIL-AO-11245

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Alexander F. Treadwell

January 11, 1999

Executive Director

Robert J. Freeman

Mr. Serafin Quinones
97-A-3936
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. Quinones:

I have received your letter of December 15. You have sought guidance concerning your ability to obtain your mental health records from two hospitals where you were treated.

In this regard, while the statute within the Committee's advisory jurisdiction, the Freedom of Information Law, pertains generally to government records in New York, a different provision of law, §33.16 of the Mental Hygiene Law, deals specifically with the records in question.

As I understand §33.16 of the Mental Hygiene Law, it provides rights of access to clinical mental health records, with certain exceptions, to "qualified persons," and paragraph 7 of subdivision (a) of that section defines that phrase to include "any properly identified patient or client." It appears that you are a "qualified person" and that you may assert rights of access under that statute.

I note that §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

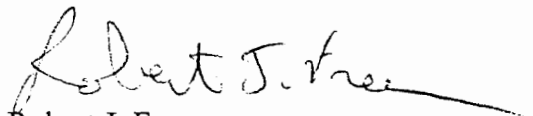
Mr. Serafin Quinones
January 11, 1999
Page -2-

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,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in dark ink and extends across the width of the typed name below it.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FODL-AO- 11246

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Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

January 11, 1999

Executive Director

Robert J. Freeman

Mr. Nicholas Caldero
91-A-6511
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. Caldero:

I have received your letter of December 10, which reached this office on December 21. Please note that the address of the Committee on Open Government has changed.

As I understand the matter, you requested records from a parole aide at your facility, and you were informed that the rules of the Division of Parole limit the time during which an individual can seek the records in question to two months before or after an appeal. You have questioned the validity of such a rule.

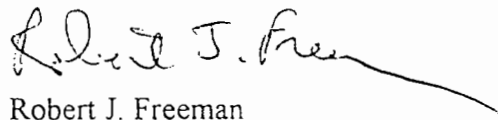
If there is a rule that limits the ability of individuals to seek records to a certain time period, I believe that the rule would be invalid. In short, any person can request records under the Freedom of Information Law at any time, and the status or interest of the person making the request is irrelevant to that person's rights of access [see M. Farbman & Sons v. New York City Health and Hosps. Corp., 62 NY 2d 75 (1984) and Burke v. Yudelson, 368 NYS2d 779, aff'd 51 AD2d 673, 378 NYS2d 165 (1976)]. From my perspective, when a request is made under the Freedom of Information Law, the only issue involves the extent to which the records must be disclosed in accordance with §87(2) of that statute.

It is suggested that you resubmit your request to the Division of Parole's Records Access Officer, Mr. David Molik.

Mr. Nicholas Caldero
January 11, 1999
Page -2-

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman". The signature is written in dark ink and extends across the width of the page.

Robert J. Freeman
Executive Director

RJF:jm

cc: David Molik
Ms. Palmer



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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

January 11, 1999

Executive Director

Robert J. Freeman

Mr. Yarvey Alston
96-R-3229
Butler Minimum Security Correctional Facility
P.O. Box 388
Red Creek, NY 13143

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

Dear Mr. Alston:

I have received your letter of December 16. You have sought assistance in relation to unanswered requests for records of the New York City Police Department and Queens County Supreme 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

Mr. Yarvey Alston
January 11, 1999
Page -2-

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 any request for court records be made to the clerk of the court, citing an appropriate provision of law as the basis for the request.

With respect to the New York City Police Department, which is an agency, 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 has the duty of coordinating an agency's response to requests, and a request should ordinarily be made 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, Room 110C, One Police Plaza, New York, NY 10038.

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

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

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

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

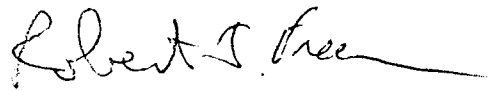
In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge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

For your information, the person designated by the Department to determine appeals is Susan Petito, Special Counsel.

Mr. Yarvey Alston
January 11, 1999
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I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and has a long, sweeping horizontal line extending to the right.

Robert J. Freeman
Executive Director

RJF:jm



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DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11248

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Alexander F. Treadwell

January 11, 1999

Executive Director

Robert J. Freeman

Mr. Richard Arlen

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

Dear Mr. Arlen:

I have received your letter of December 17 and the correspondence attached to it. You requested the 1997 vacation schedule pertaining a certain employee of the Bronx Civil Court. It is your belief that the records sought are accessible to the public and you asked that I inform you of "the correctness of [your] assumption."

In this regard, I offer the following comments.

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

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

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

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

If the records in which you are interested are maintained by a court and can be characterized as court records, the Freedom of Information Law in my opinion would not apply. It has been determined that the Office of Court Administration is not a court, but rather is an "agency" and, therefore, is subject to the Freedom of Information Law [see Babigian v. Evans, 427 NYS 2d 699,

aff'd 97 AD 2d 827 (1984) and Quirk v. Evans, 455 NYS 2d 918, 97 AD 2d 992 (1983)]. As its name suggests, that entity oversees and administers the court system. In this instance, it appears that the records sought are not court records, but rather administrative or personnel records that would constitute agency records. If that is so, they are 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. While two of the grounds for denial are relevant to an analysis of rights of access, neither in my opinion could validly be asserted to withhold the information in which you are interested.

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

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

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

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

The records in question would constitute "intra-agency materials." However, they would appear to consist solely of statistical or factual information that must be disclosed under §87(2)(g)(i), unless a different ground for denial could properly be asserted.

The other provision 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." 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].

In a case dealing with attendance records indicating the dates and dates of sick leave claimed by a particular employee that was affirmed by the Court of Appeals, it was found, in essence, that disclosure would result in a permissible rather than an unwarranted invasion of personal privacy. Specifically, the Appellate Division found that:

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

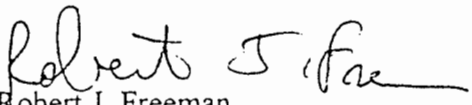
Insofar as attendance records or time sheets include reference to reasons for an absence, it has been advised that an explanation of why sick time might have been used, i.e., a description of an illness or medical problem found in records, could be withheld or deleted from a record otherwise available, for disclosure of so personal a detail of a person's life would likely constitute an unwarranted invasion of personal privacy and would not be relevant to the performance of an employee's duties. A number, however, which merely indicates the amount of sick time or vacation time accumulated or used, or the dates and times of attendance or absence, including the reason for the 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.

Mr. Richard Arlen
January 11, 1999
Page -4-

In sum, I agree with your view that a public employee's vacation schedule should be made available under the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Joseph Monastra, Chief Clerk
John Eiseman



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DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMLAG-2983
FOIL-AO-11249

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January 11, 1999

Executive Director

Robert J. Freeman

Hon. Lawrence L. Marmet
Richfield Town Justice
491 Richfield Hill Road
Richfield Springs, NY 13429

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

Dear Justice Marmet:

I have received your communication of December 20 in which you referred to delays in response to requests for records of the Town of Richfield and constructive denials of access by the Town.

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 rule or policy to the contrary, I believe that a public official should not generally be required to resort to the Freedom of Information Law in order to seek or obtain records.

However, viewing the matter from a more technical perspective, one of the functions of a public body involves acting collectively, as an entity. A 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 member of the board or other officer such as yourself 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 additional right conferred by means of law or rule. In such a case, a public officer seeking records could presumably be treated in the same manner as the public generally.

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

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

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

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

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

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).

Lastly, since you referred to minutes of Town Board meetings, I point out that subdivision (3) of §106 of the Open Meetings Law states that:

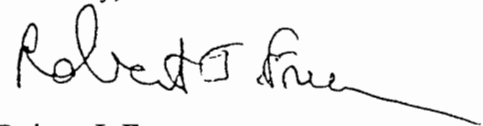
"Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week 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, not ten days as you suggested in your letter. Further, there is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. Nevertheless, as a matter of practice or policy, many public bodies approve minutes of their meetings. In the event that minutes have not been approved, to comply with the Open Meetings Law, it has consistently been advised that minutes be prepared and made available within two weeks, and that 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 the requirements of the Freedom of Information Law, copies of this opinion will be forwarded to the Town Board and the Town Clerk.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm
cc: Town Board
Hon. Monica Harris, Town Clerk



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DEPARTMENT OF STATE
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FOIL-AO-11250

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January 11, 1999

Executive Director

Robert J. Freeman

Mr. Eric Birdsall
93-A-1028
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. Birdsall:

I have received your letter of December 17. You have sought my opinion concerning a request made under the Freedom of Information Law sent to the Ulster County District Attorney.

In addition, you wrote that you were told that if you send a request to one agency, that agency can "play unfair" and deliver its records to another agency, in which case, the first agency would have the ability to indicate that it does not have possession of the records. From my perspective, once a request for records has been received by an agency, the cannot destroy or dispose of the records [see Freedom of Information Law, §89(8)].

With respect to your request, it is noted at the outset that the Freedom of Information Law pertains to records, and that §89(3) states in part that an agency is not required to create or prepare a record in response to a request. Since you referred to telephone conversations, for example, if there is no record of conversations, the Freedom of Information Law would not apply. Similarly, in the "index" attached to your letter, reference was made to "socks, shoes, earrings, jewelry, keys", etc. Here I point out that it has been held that items of physical evidence do not constitute "records" that fall within the scope of the Freedom of Information Law [see Allen v. Strojnowski, 70 NY2d 871 (1989)].

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)]). 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". Several areas of the records of your interest would likely fall within statutes that exempt certain records from disclosure. For instance, records of 911 calls in an enhanced 911 system are confidential under §308 of the County Law;

Mr. Eric Birdsall
January 11, 1999
Page -5-

autopsy reports and related records prepared by a coroner or medical examiner are confidential under §677 of the County Law; grand jury related records are exempt from disclosure under §190.25 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:

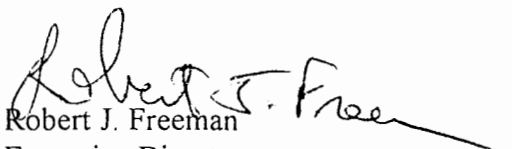
"...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of 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).

Enclosed, as you requested, are materials that may be useful to you.

I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:jm
Encs.
cc: Records Access Officer, Office of the Ulster County
District Attorney



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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Alexander F. Treadwell

January 12, 1999

Executive Director

Robert J. Freeman

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 December 16 and the material attached to it. You have sought an advisory opinion concerning your right to obtain an evaluation prepared pursuant to the Merle Cooper Program.

From my perspective, your rights may be dependent upon the nature of the record. In this regard, I offer the following comments.

If rights of access to the evaluation are governed by the Freedom of Information Law, it is likely in my view that substantial portions or perhaps the entire evaluation could 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.

Relevant to analysis of rights conferred by that statute is §87(2)(g), which permits an agency to withhold records that:

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

- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations; or

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

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

I point out that a decision rendered in 1989 might have dealt with records similar to 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)].

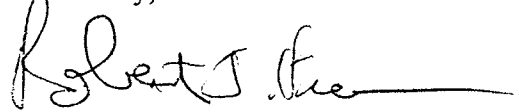
Insofar as the record sought is analogous to those described in Rowland D., it appears that they could be withheld.

If, however, the evaluation could be characterized as a "clinical record" as that phrase is defined in §33.16 of the Mental Hygiene Law, that statute, in my opinion, would govern rights of access. In brief, under §33.16, with certain limitations, the subject of a clinical record, a "qualified person", has rights of access to that record. I note that among the limitations involves the situation in which disclosure to the subject "can reasonably be expected to cause substantial and identifiable harm to the patient or client or others which would outweigh the qualified person's right of access to the record..." [see §33.16(c)].

Mr. Dale D'Amico
January 12, 1999
Page -3-

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11252

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

January 12, 1999

Executive Director

Robert J. Freeman

Mr. Marcus Rivera
94-A-7498
Green Haven Correctional Facility
Drawer B
Stormville, NY 12582-0010

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

Dear Mr. Rivera:

I have received your letter of December 7, which reached this office on December 21. You have sought guidance in relation to a request for records of the Office of the Bronx 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 appeal, 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. 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)]. 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". Several areas of the records of your interest would likely fall within statutes that exempt certain records from disclosure. For instance, records of 911 calls in an enhanced 911 system are confidential under §308 of the County Law; autopsy reports and related records prepared by a coroner or medical examiner are confidential under §677 of the County Law; grand jury related records are exempt from disclosure under §190.25 of the Criminal Procedure Law.

Third, 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).

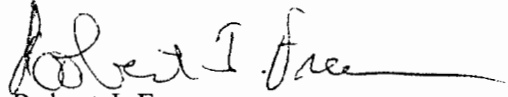
Mr. Marcus Rivera
January 12, 1999
Page -6-

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, several aspects of your appeal appear to refer to provisions of the Personal Privacy Protection Law. Please be advised that the cited statute pertains only to state agencies and specifically excludes offices of district attorneys from its coverage.

I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:jm

cc: Elizabeth F. Bernhardt



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11253

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Alexander F. Treadwell

Executive Director

Robert J. Freeman

January 13, 1999

Ms. Estelle Levy

[REDACTED]

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

Dear Ms. Levy:

I have received your letter of December 19 in which you raised questions concerning the Freedom of Information Law.

You asked initially whether there is "a Step III and Step IV Appeal." In this regard, The Freedom of Information Law provides what might be characterized as a "one step" appeal process. Moreover, it has been held that an agency's addition of another "step" is inconsistent with law.

When an agency denies access to records, the applicant has the right to appeal pursuant to §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)].

Perhaps most pertinent to the question is a decision in which an agency's "two-tiered" appeal procedure included within a local law was found to be invalid. As stated by the court:

"Given the scope, history and legislative declaration of FOIL, it is apparent that the Legislature has evidenced its intent to preempt the field of regulation. Additionally, the 'prerequisite 'additional restrictions' on rights under State law (F.T.B. Realty Corp. v. Goodman, 300 NY 140,147-148) which Local Law No. 8-1978 imposes, namely, a two-tiered appeals procedure before Article 78 CPLR review can be had, would be sufficient to invalidate the local law (See Con Ed v. Town of Red Hook, 60 NY2d 99), as being inconsistent with the state law's single tier appeals procedure. Accordingly, respondents' reliance upon the local law in support of their argument that petitioners have failed to exhaust their administrative remedies is misplaced" (Reese v. Mahoney, Supreme Court, Erie County, June 28, 1984).

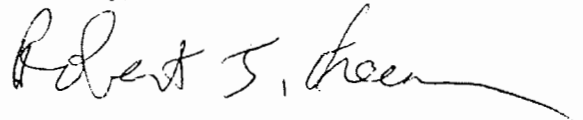
If an appeal is denied, or if an agency fails to determine the appeal within ten business days as required by law, the applicant would have exhausted his or her administrative remedies. At that point, the applicant could seek judicial review of the denial by initiating a proceeding under Article 78 of the Civil Practice Law and Rules. In such a proceeding, the issue is whether a government agency or official acted unreasonably, i.e. was arbitrary and capricious, or failed to perform a duty required to be performed by law. An Article 78 proceeding is initiated in Supreme Court in the county in which the agency's determination was made. While a person may initiate such an action pro se, in my experience, that is relatively rare.

Ms. Estelle Levy
January 13, 1999
Page -3-

With respect to the role of the Committee on Open Government, as a matter of policy and fairness, the Committee does not prepare formal written opinions or otherwise participate in any official manner following the commencement of litigation. Prior to the initiation of litigation, the Committee prepares advisory opinions at the request any person or agency. Opinions are frequently used in judicial proceedings as exhibits, and many judicial decisions have cited opinions rendered by the Committee.

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

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:tt



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Alexander F. Treadwell

Executive Director

January 14, 1999

Robert J. Freeman

Mr. Donald Robideau

[REDACTED]
[REDACTED]

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

Dear Mr. Robideau:

I have received your undated letter, which reached this office on December 28. You have sought assistance in obtaining certain bills from the Town of Brandon.

From my perspective, the records of your interest 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. In my opinion, none of the grounds for denial would be pertinent with respect to the records sought.

Second, I believe that the records in question must be maintained and made available pursuant to §29(4) of the Town Law. That provision states that the 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:

Mr. Donald Robideau
January 14, 1999
Page -2-

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

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

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

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

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

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

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

In an effort to enhance compliance with and understanding of applicable law, copies will be forwarded to Town officials.

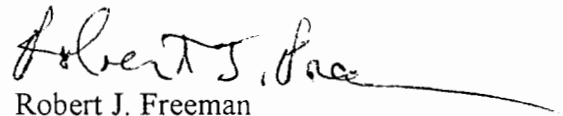
Mr. Donald Robideau

January 14, 1999

Page -3-

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman", with a long horizontal line extending to the right.

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Kenneth Pelkey, Supervisor
Hon. Mary Duryea, Town Clerk



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-190-11255

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Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

January 14, 1999

Mr. Melvin Castro
98-A-2950
Green Haven Correctional Facility
Drawer B
Stormville, NY 12582-0100

The staff of the Committee on Open 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 December 20. You asked "who would have information on an Albany appointed disciplinary hearing officer in the Department of Correctional Services." You added that you would like to know how many inmates he has found guilty or not guilty, the sentences of those found guilty, and the "nationalities" of those found guilty.

In this regard, first, if the information of your interest exists, it would appear that the only source would be the Department of Correctional Services. Insofar as an agency maintains 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.

Second, it is emphasized that the Freedom of Information 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 in response to a request for information. If there are statistics or tabulations indicating the number of persons found guilty or not guilty, I believe that any such figures would be available under the law. I note that §87(2)(g)(i) of the Freedom of Information Law generally requires that "statistical or factual tabulations or data" found within "inter-agency or intra-agency materials" must be disclosed. On the other hand, if no such statistics or tabulations have been prepared, the Department would not be required to create a record containing those figures on your behalf.

I would conjecture that no records exist that deal with the ethnicity or nationality of the persons who have been the subjects of disciplinary proceedings. Again, if that is so, the Freedom of Information Law would not apply.

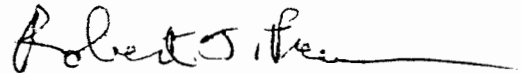
Mr. Melvin Castro
January 14, 1999
Page -2-

If there are no statistics containing the information sought, in the alternative and if the Department maintains them in a manner in which they can be retrieved, you might request copies of the determinations rendered by the individual in question. As I understand the nature of your inquiry, determinations in which there have been findings of guilt would be accessible under the Freedom of Information Law [see §87(2)(g)(iii)]. In situations in which an individual was found not guilty or where charges were dismissed, the name and other identifying details concerning the subject of the charges could in my opinion be withheld or deleted on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see §87(2)(b)].

Lastly, I note that an agency may charge up to twenty-five cents per photocopy when making copies available.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman", followed by a long horizontal line extending to the right.

Robert J. Freeman
Executive Director

RJF:tt



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AP-11256

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

January 14, 1999

Mr. Francis X. Stock
First Ward Trustee
Village of Lancaster
25 Sherborne Avenue
Lancaster, NY 14086-3115

The staff of the Committee on 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 Stock:

I have received your letter of December 19, as well as the materials relating to it. In brief, in your capacity as a member of the Village of Lancaster Board of Trustees, you described a series of difficulties in obtaining records involving the use of a cellular telephone by a Village employee, an individual who serves as code enforcement officer and building inspector. While some aspects of the records sought have been disclosed, substantial portions have been withheld.

In this regard, I offer the following comments.

First, from my perspective, the Freedom of Information Law is intended to enable the public to request and obtain accessible records. Further, it has been held that accessible records should be made equally available to any person, without regard to status or interest [see e.g., Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976) and M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)]. Nevertheless, if it is clear that records are requested in the performance of one's official duties, the request might not be viewed as having been made under the Freedom of Information Law. In such a situation, if a request is reasonable, and in the absence of a board rule or policy to the contrary, I believe that a mayor or member of the board should not generally be required to resort to the Freedom of Information Law in order to seek or obtain records.

However, viewing the matter from a more technical perspective, one of the functions of a public body involves acting collectively, as an entity. A board of trustees, as the governing body of a public corporation, generally acts by means of motions carried by an affirmative vote of a majority of its total membership (see General Construction Law, §41). In my view, in most instances, a board, including a mayor, 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, pursuant to the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), each agency is required to designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests, and requests should ordinarily be sent to that person. As I understand the matter, the Village Clerk is the records access officer, and it is his responsibility, therefore, to coordinate Village's response to requests for records. I note that the Village's request form includes the following as a possible response: "Record is Not maintained by this officer." Assuming that the Clerk is the only person designated by the Board of Trustees as records access officer, I believe that his duties would involve all Village records, and not only those in his physical possession.

I point out, too, that the Freedom of Information Law provides direction concerning the time and manner in which agencies are required to respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

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

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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, and the introductory language of §87(2) refers to the capacity to withhold "records or portions thereof" that fall within the scope of the grounds for denial that follow. In my opinion, the phrase quoted in the preceding sentence indicates that a single record may be both accessible or deniable in whole or in part. I believe that the quoted phrase also imposes an obligation on agency officials to review records sought, in their entirety, to determine which portions, if any, may justifiably be withheld.

In my view, two of the grounds for denial may be relevant to an analysis of rights of access to the records in question.

Section 87(2)(g) states that an agency may withhold records that:

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

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

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

If the records are generated by the Village, I believe that they could be characterized as intra-agency materials. Nevertheless, in view of their content, they would apparently consist solely of statistical or factual information accessible under §87(2)(g)(i) unless another basis for denial applies. As such, §87(2)(g) would not, in my opinion, serve as a basis for denial. If the bills were generated by a telephone company, an entity outside of government that is not an agency, §87(2)(g) would not apply.

The other ground for denial of relevance is §87(2)(b), which permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy."

Although the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public employees. It is clear that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others.

Trustee Francis X. Stock

January 14, 1999

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

When a public officer or employee uses a telephone in the course of his or her official duties, records involving the use of the telephone would, in my opinion, be relevant to the performance of that person's official duties. On that basis, I do not believe that disclosure would result in an unwarranted invasion of personal privacy with respect to an officer or employee serving as a government official.

Since phone bills often list the numbers of callers or the person called, the time and length of calls and the charges, it has been contended by some that disclosure of the phone numbers might result in an unwarranted invasion of personal privacy, not with respect to a public employee, but rather with respect to the person who called a public employee or the recipient of a call made by a public employee.

There is but one decision of which I am aware that deals with the issue. In Wilson v. Town of Islip, one of the categories of the records sought involved bills involving the use of cellular telephones. In that decision, it was found that:

"The petitioner requested that the respondents provide copies of the Town of Islip's cellular telephone bills for 1987, 1988 and 1989. The court correctly determined that the respondents complied with this request by producing the summary pages of the bills showing costs incurred on each of the cellular phones for the subject period. The petitioner never specifically requested any further or more detailed information with respect to the telephone bills. In view of the information disclosed in the summary pages, which indicated that the amounts were not excessive, it was fair and reasonable for the respondents to conclude that they were fully complying with the petitioner's request" [578 NYS 2d 642, 643, 179 AD 2d 763 (1992)].

The foregoing represents the entirety of the Court's decision regarding the matter; there is no additional analysis of the issue. I believe, however, that a more detailed analysis is required to deal adequately with the matter.

When phone numbers appear on a bill, those numbers do not necessarily indicate who in fact was called or who picked up the receiver in response to a call. Therefore, an indication of the phone number would disclose nothing regarding the nature of a conversation. Further, even though the numbers may be disclosed, nothing in the Freedom of Information Law would require an individual to indicate the nature of a conversation. In short, I believe that the holding in Wilson is conclusory in nature and lacks a substantial analysis of the issue.

This is not to suggest, however, that the numbers appearing on every phone bill must be disclosed in every instance. Exceptions to the general rule of disclosure might arise if, for example, a telephone is used to contact recipients of public assistance or persons seeking certain health services. It has been advised in the past that if a government employee contacts those classes of persons as part of the employee's primary ongoing and routine duties, there may be grounds for withholding phone numbers listed on a bill. For instance, disclosure of numbers called by a caseworker who phones applicants for or recipients of public assistance might identify those who were contacted. In my view, the numbers could likely be deleted in that circumstance to protect against an unwarranted invasion of personal privacy due to the status of those contacted. Similarly, if a law enforcement official phones informants, disclosure of the numbers might endanger an individual's life or safety, and the numbers might justifiably be deleted pursuant to §87(2)(f) of the Freedom of Information Law.

In my opinion, a person serving as code enforcement officer or building inspector does not likely engage in calls analogous to the caseworker or law enforcement official, for the numbers appearing on a bill could not be used to identify a class of individuals in conjunction with a certain characteristic.

The only situation in which a deletion would appear to be justified would involve a clearly personal call, i.e., to or from the employee's home. In that circumstance, assuming that the employee reimburses the Village for the cost of the call, the number might properly be deleted. If there is no reimbursement, it must be assumed, in my opinion, that the call was made or received in the performance of one's official duties.

Other items, such as the time and duration of calls, must be disclosed in every instance, even if the number could be withheld. Those items would indicate how a public employee uses time on the job, a matter clearly relevant to the performance of his official duties. If calls are made at times off the job, disclosure might indicate an inappropriate use of the phone and, therefore, would be a matter of public concern.

In one of the decisions cited earlier, Capital Newspapers, supra, the State's highest court determined that the public has the right to obtain records indicating the days and dates of sick leave claimed by a police officer, for the public has economic and safety reasons for acquiring the records. For similar reasons, I believe that the law requires disclosure of records indicating the time or extent of use of a phone by a public employee. In that decision, the Court found that the Freedom of Information Law:

Trustee Francis X. Stock

January 14, 1999

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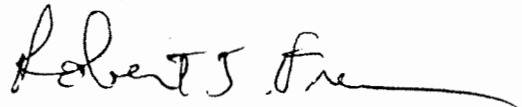
"affords all citizens the means to obtain information concerning the day-to-day functioning of the state and local government thus providing the electorate with sufficient information to 'make intelligent, informed choices with respect to both the direction and scope of governmental activities' and with an effective tool for exposing waste, negligence or abuse on the part of government officers" (id. at 566).

Lastly, I agree with the Village's contention that is not required to obtain records from the phone company. It is required, however, to disclose records in its possession a manner consistent with the Freedom of Information Law.

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

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:tt

cc: Mark S. Aquino
Kevin Kelleher
Board of Trustees



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-RO-11257

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Alexander F. Treadwell

Executive Director

Robert J. Freeman

January 14, 1999

Mr. Gavin Hinckson
96-R-4194
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. Hinckson:

I have received your letter of December 20 and the materials attached to it. You have sought assistance in relation to an unanswered appeal sent on November 30 relating to a denial of your request for records of the Department of Correctional Services. Your request involves an attempt to know whether the name of a certain correction officer "is held in the files as a guard accused of inappropriate behavior." It is your view that the information sought is available based on the decision rendered in Faulkner v. DelGiaccio [529 NYS2d 255 (1988)].

In this regard, I offer the following comments.

First, although you cited §89(5)(c)(2) of the Freedom of Information Law concerning your appeal, the applicable provision is §89(4)(a), 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 note that it has been held that if an agency fails to determine an appeal within ten business days of its receipt, the appellant may consider the appeal to have been denied and may initiate a proceeding for judicial review of the denial under Article 78 of the Civil Practice Law and Rules [see Floyd, cite]

Mr. Gavin Hinckson

January 14, 1999

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Second, notwithstanding the foregoing, as I understand the situation, it is likely that the record or records of your interest may 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.

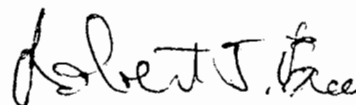
Relevant under the circumstances is §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §50-a of the Civil Rights Law. In brief, that statute provides that personnel records of police and correction officers that are used 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)]. Additionally, 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 pursuant to §87 (2)(b), [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 have not been determined are dismissed or allegations are found to be without merit, I believe that the records related to and including such charges or allegations may be withheld.

Lastly, I believe that the decision rendered in Faulkner, *supra*, in neither controlling nor precedential. That case involved records of the Commission of Correction, which is not subject to §50-a of the Civil Rights Law. Further, it was decided prior to the holding of the State's highest court in 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
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Alexander F. Treadwell

Executive Director

Robert J. Freeman

January 14, 1999

Mr. William Barber
89-A-9497
Mid-Orange Correctional Facility
900 Kings Highway
Warwick, NY 10990-0900

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

Dear Mr. Barber:

I have received your letter of December 21. You have sought assistance in relation to your unanswered requests for records of the New York City Department of Probation.

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

Mr. William Barber
January 14, 1999
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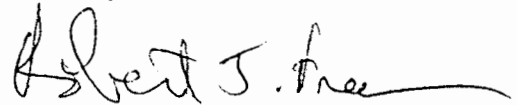
explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

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

Lastly, since you referred to a waiver of fees, I point out that there are provisions in the federal Freedom of Information Act, which applies only to federal agencies, dealing with fee waivers. There are, however, no such provisions in the New York Freedom of Information Law, and it has been held that an agency may charge its established fees in accordance with that statute, 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:tt

cc: Raul Russi, Commissioner
Janice Taylor, Records Access Officer



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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Alexander F. Treadwell

Executive Director

January 15, 1999

Robert J. Freeman

Mr. Luther Brooks
95-A-7076
Green Haven Correctional Facility
665 State Route 216 / Drawer B
Stormville, NY 12582-0010

Dear Mr. Brooks:

I have received your letter of December 17, which reached this office on December 28. You have sought assistance in relation to unanswered requests for records of the Office of the Kings County District Attorney.

In this regard, I offer the following comments.

First, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests 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:

Mr. Luther Brooks

January 15, 1999

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

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

Mr. Luther Brooks

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"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:

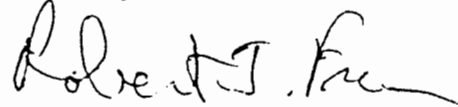
"...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of 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).

Mr. Luther Brooks
January 15, 1999
Page -6-

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and is positioned above the printed name and title.

Robert J. Freeman
Executive Director

RJF:tt

cc: FOIL Appeals Officer



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

7071-190-11260

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Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

January 15, 1999

Inv. J. M. Cassalia
Police Investigator
Town of Manlius Police Dept.
1 Elmbrook Drive West
Manlius, NY 13014

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

Dear Investigator Cassalia:

I have received your letter of December 23. You have questioned whether you must disclose written requests made to gain access to the "level three sub-directory" maintained pursuant to the Sex Offender Registration Act, which is also known as "Megan's Law." You referred to a requirement in the Act that written requests include "biographical data, and a specific reason for viewing."

By way of background, pursuant to §168-l(6)(c) of the Act, "[i]f the risk of repeat offense is high and there exists a threat to the public safety, such sex offender shall be deemed a 'sexually violent predator' and a level three designation shall be given to such sex offender." That provision describes information to be maintained about level three sex offenders, indicates that the information "shall also be provided in the subdirectory established" by the Act, and that, "notwithstanding any other provision of law, such information shall, upon request, be made available to the public."

When there is a request for the subdirectory, which is distributed to police departments pursuant to §168-q of the Act, that provision states that those departments "shall require that a person in writing express a purpose in order to have access to the subdirectory and such department shall maintain these requests." Based on the foregoing, while there is no requirement that a police department obtain "biographical data" from a person seeking access to the subdirectory, the Act requires that a request be made in writing indicating the reason for the request. Having spoken with a representative of the Division of Criminal Justice Services, the reason for a request need not be specific. Personal interest, curiosity, or, in the case of the news media, news gathering, would be sufficient expressions of purposes for gaining access.

With respect to your question, I believe that identifying details pertaining to persons who seek access to the subdirectory may 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.

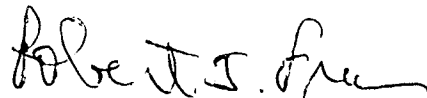
In view of the content of the subdirectory, it is likely in my view that many of those submitting requests would be victims of a sex offense, family members related to those persons, women, and parents of children who may want to ascertain whether sex offenders reside near their residences, schools or other locations that members of the public may frequent. In short, from my perspective, it is simply nobody's business that an individual has expressed an interest in the subdirectory, irrespective of that person's reason for gaining access.

In conjunction with the foregoing, two of the grounds for denial are pertinent. Section 87(2)(b) permits an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy"; §87(2)(f) authorizes an agency to deny access to records to the extent that disclosure "would endanger the life or safety of any person." I believe that either of those provisions would justify a police department's denial of access to those portions of written requests that might identify applicants for the subdirectory.

I note that when records are accessible under the Freedom of Information Law, it has been held that they must be made equally available to any person, regardless of one's status or interest [see M. Farbman & Sons v. New York City Health and 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)]. That being so, if the identities of those requesting the subdirectory were accessible, they would be available to any person, including level three sex offenders. That being so, again, it is my opinion that names or other identifying details regarding persons who submit requests for the subdirectory may be withheld.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt



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DEPARTMENT OF STATE
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FOIL-40-11261

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Alexander F. Treadwell

Executive Director

Robert J. Freeman

January 15, 1999

Mr. John Washington
95-A-2552
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. Washington:

I have received your letter of December 7, which reached this office on December 31. You have sought assistance in relation to unanswered requests for records of the Office of the Albany County District Attorney.

In this regard, I offer the following comments.

First, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests 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:

Mr. John Washington

January 15, 1999

Page -2-

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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" which are also known as DD5's, 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)...

"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,

Mr. John Washington
January 15, 1999
Page -5-

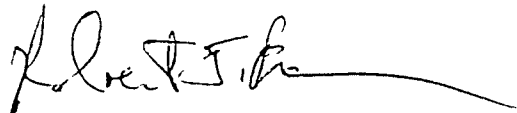
151 AD 2d 677, 679 (1989)]. Based upon that decision, it appears that records introduced into evidence or disclosed during a public judicial proceeding should be available. However, in the same decision, it was also found that:

"...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: FOIL Appeals Officer



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2985
FOIL-AO-11262

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

January 15, 1999

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 23 in which you raised questions relating to the Freedom of Information and Open Meetings Laws.

You referred initially to the acknowledgement of the receipt of your request for records by Martha Krisel, Village Attorney for the Village of Rockville Centre. Although you indicated that correspondence was attached, no materials were included with your letter. Nevertheless, you asked "what legal time obligation the Village has to complete the FOIL request other than just sending an acknowledgement."

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

Mr. Jeffrey H. Greenfield
January 15, 1999
Page -2-

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.

Next, you wrote that you are "somewhat confused as to whether inter-agency and intra-agency materials are subject to disclosure under FOIL." The contents of those records determine the extent to which they must be disclosed. Specifically, §87(2)(g) of the Freedom of Information Law permits an agency to withhold records that:

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

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

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

Lastly, "when a quorum of the Board is present for a political meeting and a notice is given for that meeting", you asked whether "that then constitute[s] a public Village meeting necessitating the minutes to be included with the official Village minutes and approved at a subsequent meeting."

"Political" meetings are generally outside the scope of the Open Meetings Law and the requirements imposed by that statute relating to minutes. Section 108 of the Open Meetings Law exempts from its provisions "deliberations of political committees, conferences and caucuses." Further, §108(2)(b) states that:

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

Mr. Jeffrey H. Greenfield

January 15, 1999

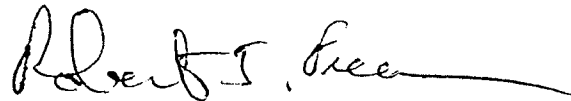
Page -3-

Based on the foregoing, in general, either the majority or minority party members of a legislative body may conduct closed political caucuses, either during or separate from meetings of the public body.

It is also noted that, even when the Open Meetings Law clearly applies, there is no requirement see 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 in accordance with §106 (3), 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.

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

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:tt

cc: Martha Krisel, Village Attorney



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI LAO-11263

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Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

January 15, 1999

Mr. Victor R. Thomas
92-B-1669
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. Thomas:

I have received your letter in which you sought guidance in using the Freedom of Information Law to obtain certain court records.

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:

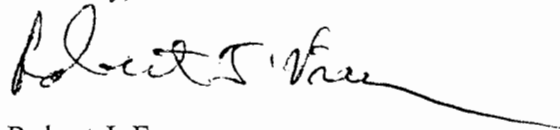
"the courts of the state, including any municipal or district court, whether or not of record."

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 your request.

Mr. Victor K. Thomas
January 15, 1999
Page -2-

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:tt



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11264

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Alexander F. Treadwell

Executive Director

Robert J. Freeman

January 19, 1999

Mr. Johnny Nevarez
95-A-6933
Green Haven Correctional Facility
665 State Route 215/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. Nevarez:

I have received your letter of December 17, which reached this office on December 28. You have sought assistance in relation to unanswered requests for records of the Office of the Bronx County District Attorney.

In this regard, I offer the following comments.

First, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests 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 "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:

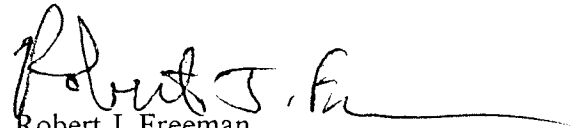
"...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of 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).

Mr. Johnny Nevarez
January 19, 1999
Page -6-

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:tt

cc: FOIL Appeals Officer
Elizabeth Bernhardt



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

4011-10-11265

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Alexander F. Treadwell

January 19, 1999

Executive Director

Robert J. Freeman

Ms. Linda Pew

[REDACTED]

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

Dear Ms. Pew:

I have received your letter of December 30, as well as the correspondence attached to it. You have sought guidance in your efforts in gaining access to records of the Town of Brookhaven. Based on a review of the materials, I offer the following comments.

First, by way of background, §89(1) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural implementation of that statute (21 NYCRR Part 1401). In turn, §87(1) requires the governing body of a public corporation to adopt rules and regulations consistent those promulgated by the Committee and with the Freedom of Information Law. Further, §1401.2 of the regulations provides in relevant part that:

"(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so."

I am unaware of the number of records access officers designated by the Town Board. If there is one access officer for the Town, that person has the duty of coordinating responses to requests for records. For instance, if records are in possession of the Deputy Supervisor, the records access officer, as the "coordinator", would have the responsibility of ascertaining the nature of the

Ms. Linda Pew
January 19, 1999
Page -2-

records sought and reviewing them to determine rights of access or ensuring that the person in possession of the records discloses them to the extent required by law. If there is more than one records access officer, it is suggested that you determine the identity of the proper access officer or officers in relation to your request.

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

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

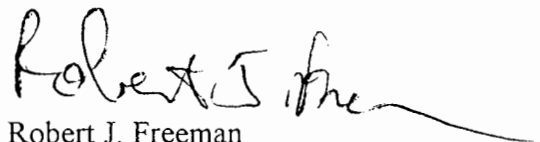
If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively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

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

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

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm
cc: Hon. Stanley Allan
Rosalie Russello



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

COLL-AO-11266

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Alexander F. Treadwell

Executive Director

Robert J. Freeman

January 19, 1999

Ms. Victoria Witt

[REDACTED]
[REDACTED]

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

Dear Ms. Witt:

I have received your letter of December 30 and the materials attached to it. You have sought assistance in obtaining records from the New York City Police Department.

In brief, as I understand the matter, you have requested records, particularly DD5's and memo book entries, relating to a series of complaints involving yourself and the families of two neighbors made at the 115th precinct in Queens. It appears that you have already acquired detailed information, for numerous requests include the date of a complaint, often the time within a two hour period, the complaint number, and the names of complainants and "alleged perpetrators." In another request, you sought all complaints filed against you at the 115th precinct during a period of nearly two years. You were informed in response to that request that the request was "too broad" and that you would need to supply dates and times, in addition to the precinct.

In this regard, I offer the following comments.

First, with respect to the request that was characterized as "too broad", among the issues is whether 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 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. 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 on the response, it appears that complaints may be located based on the precinct, the date and the time; it does not appear that complaints can be found on the basis of the names of those who are the subjects of the complaints. If that is so, the request would not, in my opinion, meet the requirement of reasonably describing the records.

The other requests that include substantial detail, i.e., those involving DD5's and police officers' memo book entries, would likely comply with the requirement that the records sought be reasonably described.

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 the decision by the Court of Appeals to which you referred concerning "complaint follow up reports", also known as DD5's, 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)]. 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. Yudelton, 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. It might also be cited in other circumstances in which, for example, records include intimate personal information or where a person is the subject of a complaint or allegation that was determined to be without merit.

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 of possible significance is §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute, §160.50 of the Criminal Procedure Law, generally requires that records relating to charges that have been dismissed in favor of an accused be sealed. In those situations, the records would be exempted from disclosure.

Lastly, it is emphasized that the Freedom of Information Law pertains to existing records. Insofar as the records sought do not exist, that statute would not apply.

Ms. Victoria Witt
January 19, 1999
Page -6-

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal line extending to the right.

Robert J. Freeman
Executive Director

RJF:tt

cc: Susan Petito
Sgt. Richard Evangelista



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO-249
FOIL-AO-11267

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Alexander F. Treadwell

January 20, 1999

Executive Director

Robert J. Freeman

Mr. Christopher K. Philippo

[REDACTED]

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

Dear Mr. Philippo:

I have received your letter of January 1. In conjunction with your review of opinions rendered by this office pertaining to access to adoption records and adoptees' original birth records, you have raised a series of questions.

First, you sought my opinion concerning the holding in Malowsky v. D'Elia [160 AD2d 798 (1990)], in which the court determined that what you characterized as adoption agencies "must yield to the strong policy considerations underlying FOIL." In this regard, I note that Malowsky dealt with a request for records apparently maintained by a county department of social services, which clearly is an "agency" as that term is defined in §86(3) of the Freedom of Information Law. Adoption agencies and other entities subject to §373-a of the Social Services Law are frequently not governmental in nature and, therefore, not subject to the Freedom of Information Law.

With respect to the Court's statement that you quoted, I see no inconsistency between the general thrust of the Freedom of Information Law and the decision. The former is intended to provide maximum access to government records; §373-a deals with particular records and creates what essentially is a special right of access to medical histories to the subjects of those records, so long as identifying details pertaining to the adoptees natural parents are "eliminated." The thrust of §373-a is analogous to both the Freedom of Information Law and the Personal Privacy Protection Law. Under both of those statutes, in general, an individual cannot invade his or her own privacy; however, both statutes include provisions designed to protect the privacy of others.

In a related vein, you asked whether the Personal Privacy Protection Law "would permit an adoptee to access his or her own birth, foster care, and adoption records." In my view, it would not. That statute pertains only to records maintained by state agencies; it does not apply to records of private entity, a unit of local government or a court. Further, insofar as the records at issue are

Mr. Christopher K. Philippo

January 20, 1999

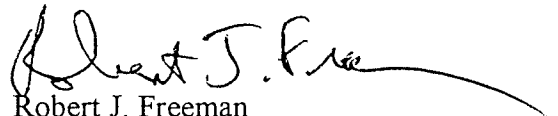
Page -2-

maintained by state agencies, I note that §95(6)(a) specifies that the Personal Privacy Protection Law does not require a state agency to provide the subject of a record with "personal information to which he or she is specifically prohibited by statute from gaining access." Each of the records to which you referred is confidential by statute, and each of those statutes limits the circumstances under which the records may be disclosed. As such, I do not believe that the Personal Privacy Protection Law would serve to grant access to those records.

Lastly, you wrote that you "would like to know what guarantees the public has that the Department of Family Assistance (AKA Social Services) is accountable to the public." While I cannot respond in detail due to my lack of familiarity with the agency in question, I believe that all state agencies strenuously seek to comply with law.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and has a long, sweeping horizontal line extending to the right.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1128

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Alexander F. Treadwell

January 20, 1999

Executive Director

Robert J. Freeman

Mr. Mitchell Kalwasinski
82-A-4795
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. Kalwasinski:

I have received your letter of January 4 in which you sought assistance in relation to unanswered requests for a variety of records. The records sought include medical records pertaining to yourself, grievances and complaints that you filed, including "any and all documents created as a result of" having filed those documents, and complaints and grievances filed by yourself and other inmates "alleging the denial of food by SHUD staff", as well as records created in relation to such complaints and grievances.

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

Mr. Mitchell Kalwasinski

January 20, 1999

Page -2-

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

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

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

As you may be aware, the person at the Department of Correctional Services 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 you cannot invade your own privacy, it appears that you have the right to gain access to medical records pertaining to yourself under both the Freedom of Information Law and §18 of the Public Health Law [see Mantica v. NYS Department of Health, 679 NYS2d 469, ___ AD2d ___ (1998)]. Similarly, I believe that you would have the right to review or obtain complaints or grievances that you submitted. With respect to grievances or complaints submitted by other inmates, I believe that any identifying details pertaining to those persons could be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" pursuant to §87(2)(b).

Third, with respect to records created as a result of the grievances or complaints, again, personally identifiable details relating to inmates other than yourself could in my view be withheld to protect their privacy. In addition, records prepared by facility or Department staff 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

Mr. Mitchell Kalwasinski

January 20, 1999

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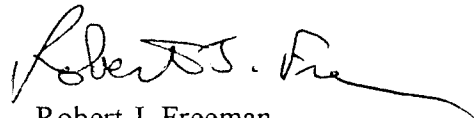
iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

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

While I am unfamiliar with the contents of any such records, there may be other grounds for denial that may be pertinent. For instance, documentation might involve facility security, in which case §87(2)(f) may be relevant. That provision enables an agency to deny access to records insofar as disclosure "would endanger the life or safety of any person."

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and is positioned above the printed name and title.

Robert J. Freeman
Executive Director

RJF:jm

cc: Hans B. Walker, Superintendent



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

7076-AO-11269

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Alexander F. Treadwell

January 22, 1999

Executive Director

Robert J. Freeman

Mr. Charles McAllister
96-A-1243
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. McAllister:

I have received your letter of January 4 and the correspondence attached to it. You have sought assistance in relation to your requests made under the Freedom of Information Act for records from ABC News and WINS, both of which are broadcast media in New York City.

In this regard, the statute that you cited, the federal Freedom of Information Act, applies only to records maintained by federal agencies. Similarly, the New York Freedom of Information Law, the statute within the advisory jurisdiction of the Committee on Open Government, 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 of entities of state and local government in New York. Neither the state nor the federal statutes would apply to records of private companies, such as those referenced in your letter.

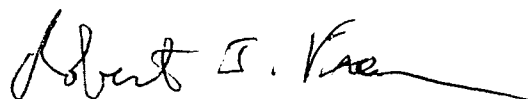
Mr. Charles McAllister

January 22, 1999

Page -2-

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

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-90-11270

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Executive Director

Robert J. Freeman

January 22, 1999

E-MAIL

TO: novoice@webtv.net (John Kinney)

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. Kinney:

I have received your letter of January 6. In brief, you complained with respect to the treatment of a request for records made to the City Auburn and questioned the functions and performance of a variety of government officials and agencies.

In this regard, the Committee on Open Government is authorized to offer advice and opinions concerning public access to government records. As such, my comments will be limited to that issue.

With regard to the request, although you did not include information concerning the nature of the records sought, 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.

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

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

Mr. John Kinney
January 22, 1999
Page -2-

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

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

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

RJF:tt

cc: Corporation Counsel



STATE OF NEW YORK
DEPARTMENT OF STATE
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Alexander F. Treadwell

Executive Director

Robert J. Freeman

January 22, 1999

Mr. Alvaro A. Sanchez

[REDACTED]

The staff of the Committee on Open 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 promised, please consider this to be a response to the question raised in your letter of January 4. If the Department of Records and Information Services (DORIS) possesses records of your interest, you asked whether you may seek those records under the Freedom of Information Law, despite its policy that "only a certified or authorized employee" may obtain such records.

In this regard, as I understand its relationship with the Office of the Queens County District Attorney and other agencies, one of the functions of DORIS involves serving essentially as a storehouse for the preservation of agencies' inactive records. If that is so, records kept by DORIS in that capacity would be in its physical custody but not its legal custody; legal custody and control would remain in the agencies that use DORIS facilities for storage. Therefore, if the Office of the District Attorney has sent records to DORIS for the purpose of storage, that agency would have the responsibility of dealing with a request for those records. My assumption is that a request made to DORIS would be forwarded to the agency that has legal custody of 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

PPPL-AO - 250
FOIL-AO - 11271

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Joseph J. Seymour
Alexander F. Treadwell

January 25, 1999

Executive Director

Robert J. Freeman

Ms. Deborah A. Taylor
Labor Relations Specialist
New York State United Teachers
12 Elm Street
Potsdam, NY 13676

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

Dear Ms. Taylor:

I have received your letter of January 8, as well as the materials attached to it. You have sought an opinion concerning a denial of access by the Malone Central School District to a record requested by the Malone Federation of Teachers and by an employee of the District.

According to your letter, the record sought is a "private investigation report" prepared at the direction and expense of the District in the spring of 1994 by Brian McKee Investigations. The report pertains to "the behavior of Board of Education member Patrick R. White during a wrestling match he attended at a neighboring school district." The employee who made the request sought the report under the Personal Privacy Protection Law because he was interviewed as part of the investigation and believes that he has a right of access to the record. The District denied access on the basis of paragraphs (b) and (c) of §87(2) of the Freedom of Information Law.

In this regard, I offer the following comments.

First, the Personal Privacy Protection Law does not apply. That statute pertains only to state agencies and specifically excludes units of local government, such as school districts, from its coverage [see Personal Privacy Protection Law, §92(1) definition of "agency"].

Second, the correspondence indicates that the request was initially denied because the report "is not part of our school district records..." From my perspective, if the record was prepared for the District, it is a District record that falls within the scope of the Freedom of Information Law, irrespective of its physical location. That statute pertains to agency records, and a school district is clearly an "agency" as that term is defined in §86(3) of the Freedom of Information Law. Section 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."

Since the report in question was commissioned by the District, even though it may have been prepared by a private company, the report in my view clearly constitutes a "record" subject to rights conferred by the Freedom of Information Law. Even if the report never came into the physical custody of the School District, because it was produced for the District, I believe that it is an agency record.

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

In the initial denial, it was contended that the report "is a confidential file between the attorney and client." As I understand the matter, Brian McKee Investigations was not retained as an attorney or to provide legal advice, but rather as an investigator. If that is so, there would have been no attorney-client relationship, and the assertion of confidentiality on that basis would have been misplaced.

The other ground for denial cited initially involves the protection of privacy. In that response and in the appeal, it was found that disclosure would constitute "an unwarranted invasion of personal privacy" in accordance with §87(2)(b). 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].

Ms. Deborah A. Taylor
January 25, 1999
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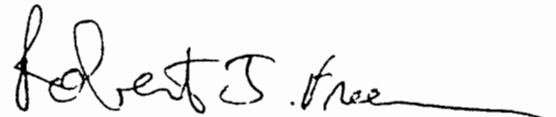
Several of the decisions cited above, for example, Farrell, Sinicropi, Geneva Printing, Scaccia and Powhida, dealt with situations in which determinations indicating the imposition of some sort of disciplinary action pertaining to particular public employees were found to be available. However, when 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 there was no determination to the effect that the Board member engaged in misconduct, I believe the denial based upon considerations of privacy would have been consistent with law. Contrarily, insofar as a determination may have been made indicating that the Board member engaged in misconduct, portions of the report reflective of that finding and upon which the Board relied in reaching such a determination would likely be available. In that event, however, if those portions of the report otherwise available include personally identifiable details pertaining to others, such as students, witnesses, persons interviewed, etc., those details might justifiably be deleted to protect the privacy of those persons.

Lastly, the determination by the Superintendent also cited §87(2)(c), which enables an agency to withhold records insofar as disclosure "would impair present or imminent contract awards or collective bargaining negotiations." As I understand the matter, the conduct of a member of a Board of Education at a wrestling match would have nothing to do with the impairment of a contract or collective bargaining negotiations. If that is so, §87(2)(c) would be irrelevant.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Wayne C. Walbridge, Superintendent



STATE OF NEW YORK
DEPARTMENT OF STATE
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7076-190-11272

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

January 26, 1999

Executive Director

Robert J. Freeman

Mr. Lorin L. Reisner
Debevoise & Plimpton
875 Third Avenue
New York, NY 10022

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

Dear Mr. Reisner:

I have received your recent letter in which you requested an advisory opinion concerning a denial of access to a certain record by the Office of the Suffolk County District Attorney (the "District Attorney").

By way of background, you wrote that you represent a Long Island television station, News 12, which requested "a copy of a videotape played by the District Attorney in open court on November 4 at the trial of Robert Shulman in Suffolk County Criminal Court." You added that the proceeding is the first death penalty trial on Long Island since the reinstatement of capital punishment in New York. The videotape, according to your letter, "depicts images of the location at which the offenses that are the subject of the trial allegedly took place."

In denying the request, it was contended that "because this is a capital case...prudence dictates that we refrain from any action which the defendant may again allege, in the context of an appeal from a conviction, operated to deny his right to a fair trial", citing §87(2)(e)(ii) of the Freedom of Information Law. That provision, as you are aware, permits an agency to withhold records "compiled for law enforcement purposes" to the extent that disclosure would "deprive a person of a right to a fair trial or impartial adjudication..." You indicated that, following an appeal, the County Attorney sustained the denial, also citing §87(2)(e)(ii), and additionally suggesting that disclosure would frustrate the purpose of §160.50 of the Criminal Procedure Law ("CPL"). That statute provides, in brief, that when criminal charges against an accused are dismissed in his or her favor, the records relating to the matter become sealed.

Mr. Lorin L. Reisner

January 26, 1999

Page -2-

From my perspective, based on the language of the Freedom of Information Law and its judicial interpretation, the videotape 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 basis for denial cited by the District Attorney in response to both the request and the appeal, that disclosure might serve to deny the defendant his right to a fair trial, is, in my view, without merit. In my opinion, the purpose and intent of the exception involve the ability of a government agency to withhold records when premature disclosure would adversely impact a person's right to be treated fairly by those empowered to make determinations. The videotape was shown in open court to the jurors and any member of the public present in the courtroom on November 4, 1998, nearly three months ago. To suggest that disclosure of the videotape now, or at any time *after having been presented to the jury*, would in some way prejudice a defendant or "deprive" that person of a right to a fair trial is, in my opinion, contrary to the thrust of the exception.

Further, even when records might ordinarily be withheld under the Freedom of Information Law, it has been held that there is no basis for denial once the records have been presented in a public judicial proceeding. In Moore v. Santucci, a decision rendered by the Appellate Division, Second Department, the Court found that:

"...while statements of the petitioner, his codefendants and witnesses obtained by the respondent in the course of preparing a criminal case for trial are generally exempt from disclosure under FOIL (*see, Matter of Knight v Gold*, 53 AD2d 694, *appeal dismissed* 43 NY2d 841), once the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public" [151 AD2d 677,679 (1989)].

In short, by showing the videotape in open court, a public disclosure has already been made. Once that occurs, unless the record is later sealed, nothing in the Freedom of Information Law would serve to enable an agency to deny access to that record.

That principle appears to have been recognized in a separate but related proceeding. As you are aware, News 12 attempted to obtain the same videotape from the court, which denied the request "based on the court's concerns that the integrity of the evidence in question would be placed in jeopardy" (*see People v. Shulman*, Supreme Court, Suffolk County, NYLJ, December 24, 1998). Although the trial judge's refusal to provide the videotape was based on its fear that the tape, as evidentiary material, might in some way be damaged, he emphasized that:

"...there are other mechanisms which have already been confirmed by the court in that they could simply file a Foil request with the district attorney's office for a copy of the tape, and based on the appellate law,

it's clear that the district attorney's office, if they have a copy, would have to turn it over to News 12...It seems to me that would be the appropriate way to proceed" (Transcript of Order by Hon. Arthur G. Pitts, pp. 5-6, November 6, 1998, County Court, Suffolk County).

In consideration of the foregoing, while the trial judge denied the request for the court's copy of the videotape based on concern for the physical integrity and security of the tape, he essentially recommended that a copy be sought from the District Attorney and recognized that a duplicate must be disclosed by the District Attorney in response to a request made under the Freedom of Information Law.

The suggestion offered by the County Attorney that disclosure would subvert the purpose of §160.50 of CPL in my view is contrary to common law, statutes, and centuries of history. If the possibility of a dismissal of charges against an accused served as a valid basis for withholding records prior to a dismissal, innumerable court records that have routinely been public prior to and during the pendency of judicial proceedings, such as records of indictments and arraignments, motion papers and other documentation, would be beyond public view. Additionally, a variety of other records that have been historically available and found to be accessible under the Freedom of Information Law, such as booking records, police blotter entries, mugshots and the like would arguably be removed from public rights of access if the County Attorney's contention has merit. In my opinion, it does not.

Lastly, the courts have consistently interpreted the Freedom of Information Law expansively. The Court of Appeals reiterated its general view of the intent of the Freedom of Information Law most recently 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)" [89 NY2d 267, 275 (1996)].

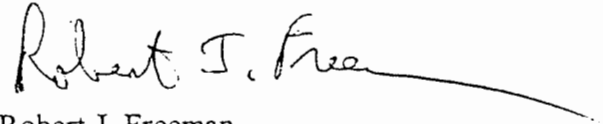
For the reasons expressed in the preceding commentary, I believe that the District Attorney is required to disclose the videotape sought by News 12.

In an effort to enhance compliance with and understanding of the Freedom of Information Law and to obviate the need to engage in litigation, copies of this opinion will be forwarded to the offices of the County Attorney and the District Attorney.

Mr. Lorin L. Reisner
January 26, 1999
Page -4-

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and extends to the right with a long, thin horizontal stroke.

Robert J. Freeman
Executive Director

RJF:jm

cc: Robert J. Cimino
Steven A. Hovani



STATE OF NEW YORK
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January 26, 1999

Executive Director

Robert J. Freeman

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 January 13 in which you sought an opinion concerning the Freedom of Information Law. You wrote that "Newsday reporters have recently had difficulties obtaining crime locations from the Nassau County Police Department." You added that "[i]n connection with a burglary-rape in Elmont...the Police Department stated that it was denying [Newsday] the crime location based upon Section 50-b of the Civil Rights Law."

From my perspective, portions of records indicating the locations of crimes have been historically available to the public and have implicitly been determined to be available under the Freedom of Information Law. In this regard, I offer the following comments.

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

In my view, police records indicating the location of crimes have historically been available as police blotter entries or as portions of equivalent records. The phrase "police blotter" is not specifically defined in any statute. It is my understanding that it is a term that has been used, in general, based upon custom and usage. The contents of what might be characterized as a police blotter may vary from one police department to another, and often police departments use different terms for records or reports analogous to police blotters. In Sheehan v. City of Binghamton [59 AD 2d 808 (1977)], it was determined that, based on custom and usage, a police blotter is a log or diary in which any event reported by or to a police department is recorded. The decision specified that a traditional police blotter contains no investigative information, but rather merely a summary of events

or occurrences and that, therefore, it is accessible under the Freedom of Information Law. When a police blotter or other record is analogous to that described in Sheehan in terms of its contents, I believe that the public has the right to review it in its entirety.

If police blotters or records prepared for a similar purpose are more expansive than the traditional police blotter described in Sheehan, portions might be withheld, depending upon their contents and the effects of disclosure. For instance, a police blotter or equivalent record might include names of witnesses or victims, the disclosure of which might constitute an unwarranted invasion of personal privacy [see §87(2)(b)] or even endanger one's life or safety [see §87(2)(f)]. However, those portions of the records indicating that an event occurred at a particular location, i.e., a crime, an automobile accident, etc., would be the kinds of items found to be clearly accessible.

The statute upon which the Police Department has relied to deny access would not be applicable in my opinion, for the disclosure of the location of an event would not identify the victim. Subdivision (1) of §50-b states that:

"The identity of any victim of a sex offense, as defined in article one hundred thirty or §255.25 of the penal law, shall be confidential. No report, paper, picture, photograph, court file or other documents, in the custody or possession of any public officer or employee, which identifies such victim shall be made available for public inspection. No such public officer or employee shall disclose any portion of any police report, court file, or other document, which tends to identify such a victim except as provided in subdivision two of this section."

When §50-b is pertinent, a record identifying the victim of a sex offense would be exempted from disclosure pursuant to §87(2)(a) of the Freedom of Information Law. Nevertheless, in this instance, if the location of the commission of the crime is disclosed, it would be impossible to identify the victim with any degree of certainty or accuracy. A victim of a rape that occurred at a particular location might have been a resident, a friend, a relative, a cleaning person, a meter reader or any other person performing some sort of function or providing a service at that location.

In short, I believe that the location of a crime is an item of information that has routinely been disclosed both prior to the enactment of and in accordance with the Freedom of Information Law. Further, revelation of the location would not, in my view, enable recipients of that information to ascertain the identity of the victim.

Lastly, it is emphasized that the burden of defending secrecy rests with the agency that denies access and that the Freedom of Information Law has consistently been construed expansively by the courts. The Court of Appeals expressed its general view of the intent of the Freedom of Information Law most recently in a decision focusing on a denial of access to records by another police department. In Gould v. New York City Police Department [87 NY 2d 267 (1996)], the Court determined that:

"To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency

Ms. Carolyn Schurr
January 26, 1999
Page -3-

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).

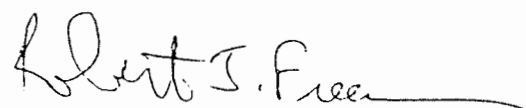
Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the agency contended that complaint follow up reports could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g), an exception separate from that cited in response to Newsday's request. The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (*id.*, 276). The Court then stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (*id.*, 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, directing that:

"...to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents (*Matter of Fink v. Lefkowitz, supra*, 47 N.Y.2d, at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material (*see, Matter of Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 133, 490 N.Y.S. 2d, 488, 480 N.E.2d 74; *Matter of Farbman & Sons v. New York City Health & Hosps. Corp., supra*, 62 N.Y.2d, at 83, 476 N.Y.S.2d 69, 464 N.E.2d 437)" (*id.*).

In an effort to resolve the matter, a copy of this opinion will be forwarded to Nassau County Police Department.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Sgt. Regina Waytowich, Commanding Officer, Legal Bureau



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

Oml-AO-2989
FOIL-AO-11274

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David A. Schulz
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Alexander F. Treadwell

January 26, 1999

Executive Director

Robert J. Freeman

Hon. Victor K. Hamilton II
Councilman
Town of Bath
132 West Morris Street
Bath, NY 14810

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

Dear Councilman Hamilton:

I have received your letter of January 5. In your capacity as a member of the Bath Town Board, you described a situation in which an employee of the Town accused of misconduct reached an agreement with the Town prior to any determination of charges that you prepared against him. Since the matter was considered in executive session, you asked whether there are "criteria, law, regulation, etc...stating what **must** be kept in executive session and is illegal to release to the public" (emphasis yours).

In this regard, I offer the following comments.

First, I note that the Open Meetings Law is permissive. Although a public body **may** enter into an executive session in accordance with the provisions of §105(1) of the Law, there is no obligation to do so. Therefore, even when there is a valid basis for discussing an issue during an executive session, a public body is not required to consider the matter in private.

Moreover, in a case in which the issue was whether discussions occurring during an executive session held by a school board could be considered "privileged", it was held that "there is no statutory provision that describes the matter dealt with at such a session as confidential or which in any way restricts the participants from disclosing what took place" (Runyon v. Board of Education, West Hempstead Union Free School District No. 27, Supreme Court, Nassau County, January 29, 1987). In my opinion, although information may be obtained during an executive session properly held, a claim of confidentiality can only be based upon a statute that specifically confers or requires confidentiality. Unless a statute prohibits disclosure, I know of no law that would preclude a member of a public body from disclosing information acquired during an executive session.

While there may be no prohibition against disclosure of information acquired during executive sessions withheld, the foregoing is not intended to suggest such disclosures would be uniformly appropriate or ethical. Obviously, the purpose of an executive session is to enable members of public bodies to deliberate, to speak freely and to develop strategies in situations in which some degree of secrecy is permitted. Inappropriate disclosures could work against the interests of a public body as a whole and the public generally. The unilateral disclosure by a member of a public body might serve to defeat or circumvent the principles under which those bodies are intended to operate.

Historically, I believe that public bodies were created in order to reach collective determinations, determinations that better reflect various interests within a community than a single decision maker could reach alone. Members of boards need not in my opinion be unanimous in every instance; on the contrary, they should represent disparate points of view which, when conveyed as part of a deliberative process, lead to fair and representative decision making. Nevertheless, notwithstanding distinctions in points of view, the decision or consensus of the majority of a public body should in my opinion generally be recognized and honored by those members who may dissent. Disclosures made contrary to or in the absence of consent by the majority could result the revelation of litigation strategy, in unwarranted invasions of personal privacy, impairment of collective bargaining negotiations or even interference with criminal or other investigations. In those kinds of situations; even though there may be no statute that prohibits disclosure, release of information could be damaging to individuals and the functioning of government.

In the context of the situation that you described, while I believe that the terms of the agreement between the employee and the Town must be disclosed, charges or allegations that were never formally proven, in my opinion, may be withheld. Here I direct your attention to the Freedom of Information Law, which pertains to access to records and states, in part, that an agency may withhold records insofar as disclosure would result in "an unwarranted invasion of personal privacy" [see §87(2)(b)].

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

Hon. Victor K. Hamilton II

January 26, 1999

Page -3-

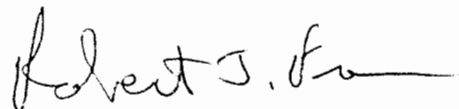
an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

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 there was no determination to the effect that the employee engaged in misconduct, I believe that a denial of access to the charges based upon considerations of privacy would be consistent with law. Nevertheless, there are several decisions indicating that the terms of settlement agreements reached in lieu of disciplinary proceedings must generally be disclosed [see Geneva Printing, *supra*; Western Suffolk BOCES v. Bay Shore Union Free School District, Appellate Division, Second Department, NYLJ, May 22, 1998, ___ AD2d ___; Anonymous v. Board of Education for Mexico Central School District, 616 NYS2d 867 (1994); and Paul Smith's College of Arts and Science v. Cuomo, 589 NYS2d 106, 186 AD2d 888 (1992)].

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11225

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

January 27, 1999

Executive Director

Robert J. Freeman

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 January 10. You referred to an "internal memo" prepared by the attorney for the Hicksville Union Free School District Board of Education and indicated that you requested that document and other communications between the law firm retained by the District and District officials concerning a certain project. Your request was denied on the ground that "the records requested are specifically exempted from disclosure by federal or state statute." You have sought my views on the matter.

In this regard, I offer the following comments.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §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 client, i.e., a board of education, 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 municipal officials and that records prepared in conjunction with an attorney-client relationship are considered privileged under §4503 of the Civil Practice Law and Rules. Further, since the enactment of the Freedom of Information Law, it has been found that records may be withheld when the privilege can appropriately be asserted when the attorney-client privilege is read in conjunction with §87(2)(a) of the Law [see e.g., Mid-Boro Medical Group v. New York City Department of Finance, Sup. Ct.,

Bronx Cty., NYLJ, December 7, 1979; Steele v. NYS Department of Health, 464 NY 2d 925 (1983)]. Similarly, the work product of an attorney may be confidential under §3101 of the Civil Practice Law and Rules.

In a discussion of the parameters of the attorney-client relationship and the conditions precedent to its initiation, it has been held that:

"In general, 'the privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client'" [People v. Belge, 59 AD 2d 307, 399 NYS 2d 539, 540 (1977)].

Based on the foregoing, assuming that the privilege has not been waived, and that records consist of legal advice or opinion sought by District officials and 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.

Another 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:

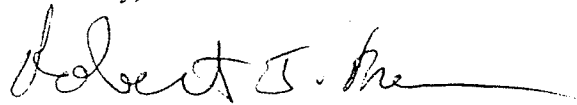
- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations; or
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

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.

Mr. Thomas J. Walsh
January 27, 1999
Page -3-

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

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman", followed by a long horizontal flourish line.

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Guercio and Guercio



STATE OF NEW YORK
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FOIL-AO - 11276

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Alexander F. Treadwell

January 27, 1999

Executive Director

Robert J. Freeman

Mr. Wilbert Hockenbury
Erie County Correctional Facility
11581 Western Avenue
Alden, NY 14004

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

Dear Mr. Hockenbury:

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

According to your letter, you requested a "property receipt" from the Buffalo Police Department pertaining the arrest of a "John Doe". You indicated that you are the John Doe and that you provided personal information sufficient to establish your identity. As I understand the matter, you had received no response to the request 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 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

Mr. Wilbert Hockenbury

January 27, 1999

Page -2-

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

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

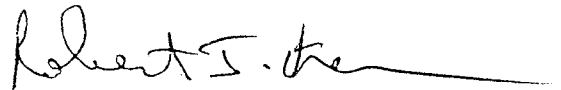
In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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, assuming that you provided adequate information to establish your identity, the record sought would be accessible. In short, none of the grounds for denial would, in my opinion, serve to enable the agency to deny access to that record.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer, Buffalo Police Department



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DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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Alexander F. Treadwell

January 27, 1999

Executive Director

Robert J. Freeman

Mr. Ronald Cheung
95-A-8061 SHU-D N-Z
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. Cheung:

I have received your letter of January 6 in which you sought advice concerning the Freedom of Information Law.

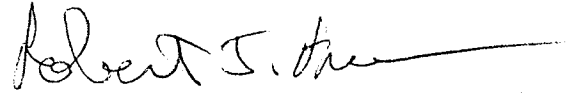
First, you asked how you can know "what exactly is in [your] criminal files" in order that you "can know what specifically to request through F.O.I.L." In my view, there may be no method of knowing the exact contents of a file or the names or titles of each and every document within the file. Nevertheless, the Freedom of Information Law does not require that specific records be requested. By way of background, when the Freedom of Information Law was initially enacted in 1974, it required that an applicant seek "identifiable" records. That standard often resulted in difficulties, for applicants for records were often unaware of the particular records sought and therefore could not identify them. Nonetheless, when the Freedom of Information Law was revised, the standard for requesting records was altered. Since 1978, §89(3) has stated that an applicant must "reasonably describe" the records sought. I point out that it has been held that a request reasonably describes the records when the agency can locate and identify the records based on the terms of a request, and that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [*Konigsberg v. Coughlin*, 68 NY 2d 245, 249 (1986)].

Second, 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."

Mr. Ronald Cheung
January 27, 1999
Page -3-

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

January 27, 1999

Executive Director

Robert J. Freeman

Mr. Corey Lashley
93-A-3842
Drawer B
Stormville, NY 12582

Dear Mr. Lashley:

I have received your letter of January 8 and the correspondence attached to it.

You referred to alleged failures on the part of officials of the Department of Correctional Services to respond to your letters relating to the shock incarceration program. Based on a review of the correspondence, I offer the following comments.

First, your letters to Department officials seek answers to a series of questions. In this regard, I know of no provision of law that would require those officials to answer your questions. While they may do so, in my opinion, there is no obligation to do so.

Similarly, although you did not refer to the Freedom of Information Law, the principle would be the same. While that statute generally requires the disclosure of records, it does not require that agencies supply answers to questions. Further, §89(3) states in relevant part that the Freedom of Information Law pertains to existing records, and that an agency is not required to create or prepare a new record in response to a request for information.

Lastly, in his letter of February 12, Deputy Commissioner Bartlett, in my view, either answered your questions or provided the means to obtain the answers on your own by referring to Article 26-A of the Correction Law, §§865 to 867. If you have not yet reviewed those provisions, it is suggested that you do so, for they include much of the information that you seek.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: George J. Bartlett, Deputy Commissioner



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11279

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Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

January 28, 1999

Executive Director

Robert J. Freeman

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:

I have received your letter of January 11 and the correspondence attached to it. You complained that Robert R. Snashall, Chairman of the Workers' Compensation Board, "did not reply to [your] inquiry within 5 (five) business days, as required by the law."

Based on a review of your letter to Mr. Snashall, your inquiry, in my view, did not constitute a request made under the Freedom of Information Law. Consequently, I do not believe that he would have been required to respond within any particular time period.

In this regard, first, I note that the title of the Freedom of Information Law may be somewhat misleading, for it is not a vehicle that requires agencies to provide information per se; rather, it 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.

Second, the Freedom of Information Law pertains to existing records. Section 89(3) of that statute states in part that an agency need not create a record in response to a request. Therefore, if, for example, an agency does not maintain records containing the information sought, there would be no obligation to prepare new records on behalf of an applicant.

In short, your to Mr. Snashall consisted of questions, not a request for records. While he could choose to respond, I do not believe that he is required to do so, for the inquiries, in my opinion, cannot be equated with a request for records under the Freedom of Information Law.

Ms. Iwona Muszak
January 28, 1999
Page -2-

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

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman".

Robert J. Freeman
Executive Director

RJF:jm

cc: Robert R. Snashall
David Gannon



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AD-11280

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

January 28, 1999

Executive Director

Robert J. Freeman

Hon. A. B. Doyle
Supervisor
Town of Guilford
125 Marble Road
Guilford, NY 13780

Dear Supervisor Doyle:

I appreciate receipt of a copy of your letter of January 26 addressed to Mr. Howard Ostrander.

One element of the letter indicates that an appeal made under the Freedom of Information Law may be made to this office. In this regard, the Committee on Open Government is authorized to issue advice and opinions. 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, §89(4)(a) of the Freedom of Information Law, states in relevant part that:

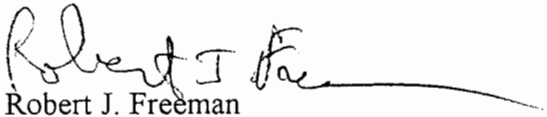
"any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal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

Enclosed are copies of the regulations promulgated by the Committee on Open Government, which deal with the procedural aspects of the Freedom of Information Law, and model regulations designed to enable agencies to adopt appropriate procedural rules.

Hon. A. B. Doyle
January 28, 1999
Page -2-

I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:jm

cc: Howard Ostrander

Encs.



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2990
FOIL-AO-11281

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January 29, 1999

Executive Director

Robert J. Freeman

Mr. Steven L. Fornal



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

Dear Mr. Fornal:

I have received your letter of January 11 and the materials relating to it. In brief, it is your belief that a portion of a tape recording of a meeting of the Town of Rochester Planning Board was erased, and you have sought my views on the matter.

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, when a public body prepares or maintains a tape recording of a meeting, the tape would constitute a "record" that falls within the coverage of the Freedom of Information Law.

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

Second, of possible relevance to the matter 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, which has developed schedules that indicate

Mr. Steven L. Fornal

January 29, 1999

Page -3-

minimum retention periods for various records. I believe that tape recordings and notes of meetings must be retained for a minimum of four months.

Third, and this is not to suggest that they apply, of potential significance 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. If there is a belief that the provisions referenced above apply, it is suggested that you contact the appropriate law enforcement agencies.

Lastly, in the correspondence attached to your letter, you referred to "the right of any citizen of the United States to speak anywhere they want to; a right protected by the U.S. Constitution." In this regard, while individuals may have the right to express themselves and to speak, I do not believe that they necessarily have the right to do so at meetings of public bodies. It is noted that there is no constitutional right to attend meetings of public bodies. Those rights are conferred by statute, i.e., by legislative action, in laws enacted in each of the fifty states. In the absence of a statutory grant of authority to attend such meetings, I do not believe that the public would have the right to attend.

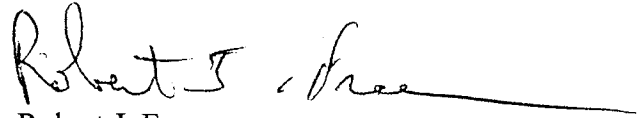
In the case of the New York Open Meetings Law, in a statement of general principle and intent, that statute confers upon the public the right to attend meetings of public bodies, to listen to their deliberations and observe the performance of public officials. However, that right is limited, for public bodies in appropriate circumstances may enter into closed or executive sessions. As such, in my opinion, there is no constitutional right to attend or speak at meetings.

Within the language of the Open Meetings Law, there is nothing that pertains to the right of those in attendance to speak or otherwise participate. Certainly a member of the public may speak or express opinions about meetings or about the conduct of public business before or after meetings to other persons. However, since neither the Open Meetings Law nor any other provision of which I am aware provides the public with the right to speak during meetings, a public body, in my view, is not required to permit the public to do so during meetings. A public body may choose to permit the public to speak, and if it does so, it has been suggested that rules and procedures be developed that regarding the privilege to speak that are reasonable and that treat members of the public equally.

Mr. Steven L. Fornal
January 29, 1999
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I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink that reads "Robert J. Freeman". The signature is written in a cursive style with a long horizontal line extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Planning Board
Town Board



STATE OF NEW YORK
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Alexander F. Treadwell

January 29, 1999

Executive Director

Robert J. Freeman

Mr. Harold Marshall
92-A-7833
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. Marshall:

I have received your letter of January 12. As I understand the matter, you have requested records from the New York City Police Department and the Office of the Queens County District Attorney, but neither agency had responded as of the date of your letter to this office.

In this regard, while you did not detail the nature of the records sought, 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,

Mr. Harold Marshall

January 29, 199

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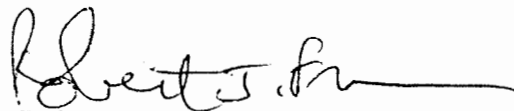
who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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 Police Department designated to determine appeals is Susan Petito, Special Counsel; the person so designated by the District Attorney is Andrew L. Zwerling.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Susan Petito
Andrew L. Zwerling



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January 29, 1999

Executive Director

Robert J. Freeman

Mr. John Thomas
97-B-0811 SHU-A-11
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 January 9. You have questioned the propriety of a delay in determining rights of access to records that you have requested from Monroe County.

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

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

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

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

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

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

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

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

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

Further, in my opinion, if, as a matter of practice or policy, an agency acknowledges the receipt of requests and indicates in every instance that it will determine to grant or deny access to records within a particular period following the date of acknowledgement, such a practice or policy would be contrary to the thrust of the Freedom of Information Law. If a request is voluminous and a significant amount of time is needed to locate records and review them to determine rights of access, a delay beyond five business days, in view of those and perhaps the other kinds of factors

Mr. John Thomas

January 29, 1999

Page -3-

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,

A handwritten signature in black ink, appearing to read "Robert J. Freeman". The signature is written in a cursive style with a long horizontal stroke at the end.

Robert J. Freeman
Executive Director

RJF:jm

cc: John S. Riley, Records Access Officer



STATE OF NEW YORK
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FOIL-AU- 11284

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Alexander F. Treadwell

January 29, 1999

Executive Director

Robert J. Freeman

Mr. L. Blake Morris
Attorney at Law
P.O. Box 3289
Church Street Station
New York, NY 10008-3289

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

Dear Mr. Morris:

I have received your letter of January 14 in which you sought my views concerning a denial by the New York City Economic Development Corporation ("EDC") of your request for copies of responses to a Request for Expressions of Interest "RFEI" concerning Governors Island and communications between all parties relating to the RFEI's. The EDC denied the request in its entirety based on §87(2)(c) of the Freedom of Information Law.

While it is possible that some aspects of the records sought might justifiably be withheld, a blanket denial of access would, in my opinion, be inconsistent with law. 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 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 certain 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). 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.*).

Second, the provision cited by the EDC, §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 how or 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 or, as in this case, RFEI'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 or RFEI's, there is no obligation to accept the proposal reflective of the lowest cost; rather, the agency may engage

Mr. L. Blake Morris

January 29, 1999

Page -3-

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 and RFEI's is generally more flexible and discretionary than the process of awarding a contract following the submission of bids.

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

In the case of the RFEI's, even though the deadline for submission of proposals has passed, I would conjecture that the EDC may be engaged in negotiations or evaluations with several of the submitters that may result in alterations in proposals or costs. Whether disclosure at that juncture would "impair" the process of awarding a contract is, in my view, a question of fact. In some instances, disclosure might impair the process; in others, disclosure may have no harmful effect or even 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 correspondence that proposals and other records pertaining to the kind of process at issue may always be withheld prior to the final award of a contract. In general, I have disagreed with those blanket assertions. Again, unlike the bid process in which an agency essentially has no choice but to accept the low appropriate bid, in this situation, the proposals and figures offered by submitters are subject to negotiation and change; they do not reflect the "bottom line." In view of the flexibility of the process, it is questionable how disclosure would adversely affect an agency's ability to engage in the best contractual arrangement on behalf of the taxpayers.

It has also been contended that the kinds of records at issue should be withheld because the negotiations with an apparently successful submitter may not culminate in an agreement or may be rejected by the ultimate decision maker. It is my understanding that the RFP or RFEI process is intended to encourage creativity on the part of submitters so that they can offer the best possible solutions in terms of an agency's needs or goals. That being so, and because proposals are subject to negotiation and alteration, even if an apparently successful proposal is rejected or set aside for some reason, the agency is not bound but rather is free to continue to attempt to engage in an optimal agreement. If anything, disclosure might encourage submitters to better accommodate the needs of the agency or propose what might be characterized as a better deal. Rather than impairing the process, disclosure might enhance it.

Based on a review of the "Submission Requirements", it appears that numerous aspects of the submissions would not, if disclosed, impair the ability of EDC to engage in appropriate agreements.

Mr. L. Blake Morris

January 29, 1999

Page -4-

For instance, since the deadline for submission of RFEI's has passed, the names of submitters and general descriptions their proposals would in my opinion be accessible, as would several aspects of financial information, including the submitters' indications regarding economic benefits to the City. Among what may be extensive portions of the submissions that would appear to be available are descriptions of "the development projects completed in New York City or other metropolitan areas by each member" of a submitter's development team, "specifying the member's role and the cost of the project."

Without additional knowledge regarding the project and the contents of the records sought, I cannot offer unequivocal guidance concerning the extent to which the records should be disclosed. However, it is clear in my opinion that some elements of the records must be disclosed and that a blanket denial of your request was inappropriate.

Lastly, while the EDC did not cite any other basis for denial, I believe that §87(2)(d) would also be pertinent to an analysis of rights of access. That provision 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 and the area of commerce in which a commercial entity is involved, as well as other similar considerations, 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.

Of possible significance 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

Mr. L. Blake Morris
January 29, 1999
Page -5-

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...

"...as explained in Worthington:

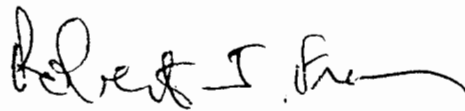
Because competition in business turns on the relative costs and opportunities faced by members of the same industry, there is a potential windfall for competitors to whom valuable information is released under FOIA. If those competitors are charged only minimal FOIA retrieval costs for the information, 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).

In conjunction with the foregoing, it is likely in my view that portions of the records sought would fall within the coverage of §87(2)(d).

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

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm
cc: Judy E. Fensterman
Zsa Johnstone-Mosher



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11085

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February 1, 1999

Executive Director

Robert J. Freeman

Mr. Briant George
94-A-3921
Auburn Correctional Facility
P.O. Box 618
Auburn, NY 13021

Dear Mr. George:

I have received your letter of January 12 concerning requests made under the Freedom of Information Law to the Legal Aid Society and the Office of the New York County District Attorney.

In this regard, I point out that the Freedom of Information Law pertains to records maintained by agencies. Section 86(3) of that statute defines the term "agency" to mean:

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

Therefore, in general, the Freedom of Information Law is applicable to entities of state and local government, including offices of district attorneys.

It is my understanding that there are a variety of entities within New York that use the name "Legal Aid Society". Some are a part of the federal Legal Services Corporation, some may be private not-for profit corporations, and some may be parts of units of local government. While legal aid societies which are agencies of local government may be subject to the Freedom of Information Law, most are not "agencies" as that term is defined in the Freedom of Information Law and, as such, are not subject to that statute.

Although I am not fully familiar with the specific status of the Legal Aid Society, I believe that it is a corporate entity separate and distinct from government, and that it is not an "agency" subject to the Freedom of Information Law. If that is so, the records of that entity are outside the scope of public rights of access.

Mr. Briant George
February 1, 1999
Page -2-

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,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman", followed by a long horizontal flourish line extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Paul Liu

FOIL-AD-11286

From: Robert Freeman
To: [REDACTED]
Date: 2/1/99 12:56PM
Subject: Re: Recent cases involving -Reply

Dear Collette and Mike:

While there are no judicial decisions on the subject of your inquiry of which I am aware, section 87(2) of the FOIL requires that accessible records be made available for inspection and copying, and the regulations promulgated by the Committee on Open Government state in part that: "...each agency shall designate the locations where records shall be available for inspection and copying" (21 NYCRR section 1401.3). In my view, neither the FOIL nor the regulations requires that records be transferred from their usual locations to accommodate an applicant at a site convenient to that person. If the applicant cannot travel to the location where the records are routinely kept, he or she can obtain copies upon payment of the appropriate fee.

With regard to the other aspect of your communication, there is no requirement that agencies report to the Committee on Open Government on an annual basis. Further, I do not know the nature of the logs that you referenced. If you provide additional information, perhaps I could respond more appropriately.

I hope that I have been of assistance.



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 11287

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Alexander F. Treadwell

February 1, 1999

Executive Director

Robert J. Freeman

Mr. Milton Jones
98-A-0151
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. Jones:

I have received your letter of January 11 in which you sought assistance in relation to unanswered requests for records made to the New York City Police Department, a court, and a hospital.

In view of your comments, I note that the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee is not empowered to determine appeals or otherwise compel an entity to grant or deny access to records. In an effort to assist you, however, I offer the following remarks.

First, 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."

Mr. Milton Jones
February 1, 1999
Page -2-

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 seeking court records, it is suggested that a request be made to the court clerk, citing an appropriate provision as the basis for the request.

Second, with respect to your request for medical records pertaining to you maintained by a hospital, if the facility is a governmental entity, its records would be subject to the Freedom of Information Law.

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

With regard to medical records, the Freedom of Information Law, in my view, likely permits that some of those records may be withheld in whole or in part, depending upon their contents. For instance, medical records prepared by Hospital personnel could be characterized as "intra-agency materials" that fall within the scope of §87(2)(g) of the Freedom of Information Law. To the extent that such materials consist of advice, opinion, recommendation and the like, I believe that the Freedom of Information Law would permit a denial.

Nevertheless, a different statute, §18 of the Public Health Law, generally grants rights of access to medical records to the subjects of the records. As such, that statute may provide greater access to medical records than the Freedom of Information Law. It is suggested that you send your request to the hospital and make specific reference to §18 of the Public Health Law when seeking medical records.

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

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

Third, the Police Department is an "agency" required to comply with the Freedom of Information Law. Since you indicated that your request was made to the Commissioner, I point out that the regulations promulgated by the Committee (21 NYCRR Part 1401) require that each agency designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests, and requests should ordinarily be made to that

Mr. Milton Jones
February 1, 1999
Page -3-

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 the request to the records access officer, it is suggested that you might renew your request and send it to the records access officer, whose office is located in Room 110C at One Police Plaza.

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:

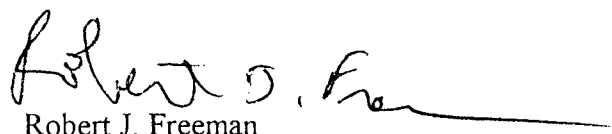
"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial,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

For your information, the person designated by the Police Department to determine appeals is Susan Petito, Special Counsel.

I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:jm



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February 2, 1999

Executive Director

Robert J. Freeman

Mr. Paul E. Cabo
94-A-1117
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. Cabo:

I have received your letter of January 17 in which you sought my views concerning the propriety of a partial denial of access to records by the Office of the Kings County District Attorney. The records in question involve "grand jury voir dire testimony", statements of witnesses scheduled to testify, statements of witnesses who did not testify at trial, a "chronological record" of the criminal proceeding, and the work product of prosecuting attorneys.

In this regard, I offer the following comments.

First, since you suggested that some of the records at issue may constitute Rosario material or may be exculpatory, 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].

In sum, I believe that the Freedom of Information Law imposes a duty to disclose records, as well as the capacity to withhold them, irrespective of the status or interest of the person requesting them. To be distinguished are other provisions of law that may require disclosure based upon one's status, e.g., as a defendant, and the nature of the records or their materiality to a proceeding. Therefore, even if records might be available in the context of Rosario in criminal discovery, it does not necessarily follow that they would be available under the Freedom of Information Law.

Second, when the Freedom of Information Law is applicable, 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 respect to the records of the voir dire to which you referred, pertinent in my view is §87(2)(a), which states that an agency may deny access 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

Mr. Paul E. Cabo

February 2, 1999

Page -3-

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.

With regard to the witness statements, the decision rendered in Moore v. Santucci [151 AD 2d 677 (1989)], which involved a request made to the office of a district attorney, may be pertinent to the matter. In Moore, it was found that:

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

Based on the foregoing, insofar as witnesses' statements are submitted into evidence or disclosed by means of a public judicial proceeding, I believe that they must be disclosed. On the other hand, if witness statements have not been previously disclosed, two grounds for denial appearing in the Freedom of Information Law would appear to be relevant.

Section 87(2)(b) permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy. Since you referred to the possibility of deleting identifying details from the statements and disclosing the remainder, the propriety of so doing would, in my opinion, be dependent on the facts. In some instances, the deletion of identifying details would adequately serve to protect personal privacy. In others, however, deletions of names or other identifiers would still enable a recipient of the records to ascertain the identities of witnesses. In that circumstance, I believe that the statements could be withheld in their entirety.

Also potentially relevant is §87(2)(e), which states in part that:

"are compiled for law enforcement purposes and which, if disclosed, would...

iii. identify a confidential source or disclose confidential information relating to a criminal investigation..."

The extent to which the foregoing would be applicable would, again, be dependent on the facts and circumstances.

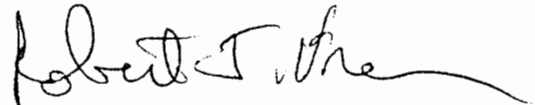
Mr. Paul E. Cabo
February 2, 1999
Page -4-

Lastly, with respect to the other records at issue, §3101(c) of the CPLR provides that "[t]he work product of an attorney shall not be obtainable." In my view, when that provision applies, the records would be exempted from disclosure by statute in conjunction with §87(2)(a). 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 attorneys involved in a particular matter that had "not been communicated or shown to individuals outside of that law firm [Estate of Johnson, 538 NYS 2d 173 (1989)]. While the office of a district attorney is not a law firm, I believe that the principle would apply nonetheless.

Also relevant with respect to those records may be §87(2)(g), which permits an agency to withhold internal documents insofar as they consist of opinions, advice, conjecture, ideas and the like.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Jodi Mandel
Sholom Twersky



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 11289

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Alexander F. Treadwell

February 2, 1999

Executive Director

Robert J. Freeman

Mr. David Hagenbuch
98-B-1324
Elmira Correctional Facility
Box 500
Elmira, NY 14902

Dear Mr. Hagenbuch:

I have received your letter of January 28 in which you asked for copies of agencies' procedures and regulations concerning the inspection and copying of records. You referred to records of the State Police, court clerks, sheriffs, district attorneys and grand juries.

In this regard, this office does not maintain copies of the procedures or regulations that you requested. However, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate general rules and regulations pertaining to the procedural implementation of the Freedom of Information Law. Enclosed is a copy of those regulations, which are published in 21 NYCRR Part 1401. In turn, §87(1) of the Freedom of Information Law requires each agency to adopt its own procedural rules and regulations consistent with the Law and the Committee's regulations.

It is noted 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."

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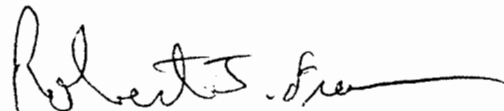
Mr. David Hagenbuch
February 2, 1999
Page -2-

Based on the provisions quoted above, the Freedom of Information Law generally applies to entities of state and local government, but the courts and court records are not subject to its provisions. 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.

Since you referred to grand juries, I point out that records pertaining to grand jury proceedings are generally confidential under §190.25(4) of the Criminal Procedure Law and are outside the coverage of the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and is positioned above the printed name and title.

Robert J. Freeman
Executive Director

RJF:jm

Enc.



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February 1, 1999

Executive Director

Robert J. Freeman

Mr. Milton Jones
98-A-0151
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. Jones:

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In view of your comments, I note that the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee is not empowered to determine appeals or otherwise compel an entity to grant or deny access to records. In an effort to assist you, however, I offer the following remarks.

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Mr. Milton Jones
February 1, 1999
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Second, with respect to your request for medical records pertaining to you maintained by a hospital, if the facility is a governmental entity, its records would be subject to the Freedom of Information Law.

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

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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:

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Troy, NY 12180

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Mr. Milton Jones

February 1, 1999

Page -3-

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 the request to the records access officer, it is suggested that you might renew your request and send it to the records access officer, whose office is located in Room 110C at One Police Plaza.

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

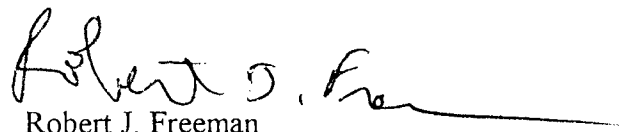
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For your information, the person designated by the Police Department to determine appeals is Susan Petito, Special Counsel.

I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

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February 2, 1999

Executive Director

Robert J. Freeman

Mr. Paul E. Cabo
94-A-1117
Green Haven Correctional Facility
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Stormville, NY 12582

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Dear Mr. Cabo:

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In this regard, I offer the following comments.

First, since you suggested that some of the records at issue may constitute Rosario material or may be exculpatory, 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.

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In sum, I believe that the Freedom of Information Law imposes a duty to disclose records, as well as the capacity to withhold them, irrespective of the status or interest of the person requesting them. To be distinguished are other provisions of law that may require disclosure based upon one's status, e.g., as a defendant, and the nature of the records or their materiality to a proceeding. Therefore, even if records might be available in the context of Rosario in criminal discovery, it does not necessarily follow that they would be available under the Freedom of Information Law.

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Mr. Paul E. Cabo

February 2, 1999

Page -3-

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.

With regard to the witness statements, the decision rendered in Moore v. Santucci [151 AD 2d 677 (1989)], which involved a request made to the office of a district attorney, may be pertinent to the matter. In Moore, it was found that:

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

Based on the foregoing, insofar as witnesses' statements are submitted into evidence or disclosed by means of a public judicial proceeding, I believe that they must be disclosed. On the other hand, if witness statements have not been previously disclosed, two grounds for denial appearing in the Freedom of Information Law would appear to be relevant.

Section 87(2)(b) permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy. Since you referred to the possibility of deleting identifying details from the statements and disclosing the remainder, the propriety of so doing would, in my opinion, be dependent on the facts. In some instances, the deletion of identifying details would adequately serve to protect personal privacy. In others, however, deletions of names or other identifiers would still enable a recipient of the records to ascertain the identities of witnesses. In that circumstance, I believe that the statements could be withheld in their entirety.

Also potentially relevant is §87(2)(e), which states in part that:

"are compiled for law enforcement purposes and which, if disclosed, would...

iii. identify a confidential source or disclose confidential information relating to a criminal investigation..."

The extent to which the foregoing would be applicable would, again, be dependent on the facts and circumstances.

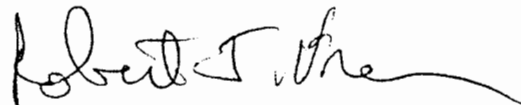
Mr. Paul E. Cabo
February 2, 1999
Page -4-

Lastly, with respect to the other records at issue, §3101(c) of the CPLR provides that "[t]he work product of an attorney shall not be obtainable." In my view, when that provision applies, the records would be exempted from disclosure by statute in conjunction with §87(2)(a). 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 attorneys involved in a particular matter that had "not been communicated or shown to individuals outside of that law firm [Estate of Johnson, 538 NYS 2d 173 (1989)]. While the office of a district attorney is not a law firm, I believe that the principle would apply nonetheless.

Also relevant with respect to those records may be §87(2)(g), which permits an agency to withhold internal documents insofar as they consist of opinions, advice, conjecture, ideas and the like.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Jodi Mandel
Sholom Twersky



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 11289

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

February 2, 1999

Executive Director

Robert J. Freeman

Mr. David Hagenbuch
98-B-1324
Elmira Correctional Facility
Box 500
Elmira, NY 14902

Dear Mr. Hagenbuch:

I have received your letter of January 28 in which you asked for copies of agencies' procedures and regulations concerning the inspection and copying of records. You referred to records of the State Police, court clerks, sheriffs, district attorneys and grand juries.

In this regard, this office does not maintain copies of the procedures or regulations that you requested. However, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate general rules and regulations pertaining to the procedural implementation of the Freedom of Information Law. Enclosed is a copy of those regulations, which are published in 21 NYCRR Part 1401. In turn, §87(1) of the Freedom of Information Law requires each agency to adopt its own procedural rules and regulations consistent with the Law and the Committee's regulations.

It is noted 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."

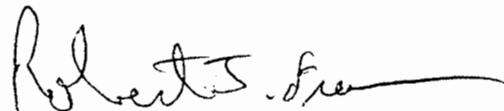
Mr. David Hagenbuch
February 2, 1999
Page -2-

Based on the provisions quoted above, the Freedom of Information Law generally applies to entities of state and local government, but the courts and court records are not subject to its provisions. 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.

Since you referred to grand juries, I point out that records pertaining to grand jury proceedings are generally confidential under §190.25(4) of the Criminal Procedure Law and are outside the coverage of the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and is positioned above the printed name and title.

Robert J. Freeman
Executive Director

RJF:jm

Enc.



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

Oml-AO-2993
FOIL-AO-11290

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Alexander F. Treadwell

February 2, 1999

Executive Director

Robert J. Freeman

Mr. Terry Wilbert

[REDACTED]

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

Dear Mr. Wilbert:

I have received your letter of January 17 in which you requested an advisory opinion under the Open Meetings Law.

According to your letter, "it would appear that the Albion Central School District School Board had a meeting prior to the regularly scheduled public meeting in July." You wrote that the Board discussed possible candidates for president and vice president and indicated that those interested in those positions "were asked to discuss their ideas for the office and what they hoped to accomplish if elected to the office." You added that after "this private meeting, the Board of education swore in its new members and proceeded to nominate, in public, people for these same offices", and that even though more than one candidate had been nominated for president, "only one candidate was nominated for each position in the public session."

In this regard, I offer the following comments.

First, by way of background, it is emphasized at the outset that the Open Meetings Law has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

I point out that the decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that so-called "work sessions" and similar gatherings held for the purpose of

discussion, but without an intent to take action, fell outside the scope of the Open Meetings Law. In discussing the issue, the Appellate Division, whose determination was unanimously affirmed by the Court of Appeals, stated that:

"We believe that the Legislature intended to include more than the mere formal act of voting or the formal execution of an official document. Every step of the decision-making process, including the decision itself, is a necessary preliminary to formal action. Formal acts have always been matters of public record and the public has always been made aware of how its officials have voted on an issue. There would be no need for this law if this was all the Legislature intended. Obviously, every thought, as well as every affirmative act of a public official as it relates to and is within the scope of one's official duties is a matter of public concern. It is the entire decision-making process that the Legislature intended to affect by the enactment of this statute" (60 AD 2d 409, 415).

The court also dealt with the characterization of meetings as "informal," stating that:

"The word 'formal' is defined merely as 'following or according with established form, custom, or rule' (Webster's Third New Int. Dictionary). We believe that it was inserted to safeguard the rights of members of a public body to engage in ordinary social transactions, but not to permit the use of this safeguard as a vehicle by which it precludes the application of the law to gatherings which have as their true purpose the discussion of the business of a public body" (id.).

Based upon the terms of the Open Meetings Law and its judicial interpretation, if a majority of the Board gathered to conduct public business, any such gathering would have constituted 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.

It is also noted that the phrase "executive session" is defined in §102(3) of the Open Meetings Law to mean a portion of an open meeting during which the public may be excluded. As such, an executive session is not separate and distinct from a meeting, but rather is a portion of an open meeting. The Law also contains a procedure that must be accomplished during an open meeting before an executive session may be held. Specifically, §105(1) states in relevant part that:

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

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

It has been consistently advised and held that a public body cannot schedule or conduct an executive session in advance of a meeting, because a vote to enter into an executive session must be taken at an open meeting during which the executive session is held. In a decision involving the propriety of scheduling executive sessions prior to meetings, it was held that:

"The respondent Board prepared an agenda for each of the five designated regularly scheduled meetings in advance of the time that those meetings were to be held. Each agenda listed 'executive session' as an item of business to be undertaken at the meeting. The petitioner claims that this procedure violates the Open Meetings Law because under the provisions of Public Officers Law section 100[1] provides that a public body cannot schedule an executive session in advance of the open meeting. Section 100[1] provides that a public body may conduct an executive session only for certain enumerated purposes after a majority vote of the total membership taken at an open meeting has approved a motion to enter into such a session. Based upon this, it is apparent that petitioner is technically correct in asserting that the respondent cannot decide to enter into an executive session or schedule such a session in advance of a proper vote for the same at an open meeting" [Doolittle, Matter of v. Board of Education, Sup. Cty., Chemung Cty., July 21, 1981; note: the Open Meetings Law has been renumbered and §100 is now §105].

For the reasons expressed in the preceding commentary, a public body cannot in my view conduct or schedule an executive session in advance of a meeting. In short, because a vote to enter into an executive session must be made and carried by a majority vote of the total membership during an open meeting, technically, it cannot be known in advance of that vote that the motion will indeed be approved.

Second, in my opinion, discussions regarding the election of officers would not have fallen within any of the grounds for entry into executive session. The only provision that appears to be relevant, §105(1)(f), permits a public body to conduct an executive session to discuss:

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

Although the discussion and election of officers involves consideration of particular individuals, it is unlikely that any of the specific subjects included within §105(1)(f) would have been applicable in conjunction with deliberations involving the selection of school board officers. In short, while

Mr. Terry Wilbert

February 2, 1999

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"matters leading to" certain actions relating to specific persons may be discussed during executive sessions, matters leading to the election of officers is not among them.

Third, with respect to the absence of any record indicating how the members voted at the closed session, I point out in passing that, as a general rule, a public body may take action during a properly convened executive session [see Open Meetings Law, §105(1)]. If action is taken during an executive session, minutes reflective of the action, the date and the vote must be recorded in minutes pursuant to §106(2) of the Law. If no action is taken, there is no requirement that minutes of the executive session be prepared. Various interpretations of the Education Law, §1708(3), however, indicate that, except in situations in which action during a closed session is permitted or required by statute, a school board cannot take action during an executive session [see United Teachers of Northport v. Northport Union Free School District, 50 AD 2d 897 (1975); Kursch et al. v. Board of Education, Union Free School District #1, Town of North Hempstead, Nassau County, 7 AD 2d 922 (1959); Sanna v. Lindenhurst, 107 Misc. 2d 267, modified 85 AD 2d 157, aff'd 58 NY 2d 626 (1982)]. Stated differently, based upon judicial interpretations of the Education Law, a school board generally cannot vote during an executive session, except in rare circumstances in which a statute permits or requires such a vote, none of which would have been present in the situation in question.

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

"Each agency shall maintain:

(a) a record of the final vote of each member in every agency proceeding in which the member votes..."

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

In terms of the rationale of §87(3)(a), it appears that the State Legislature in precluding secret ballot voting sought to ensure that the public has the right to know how its representatives may have voted individually with respect to particular issues. Although the Open Meetings Law does not refer specifically to the manner in which votes are taken or recorded, I believe that the thrust of §87(3)(a) of the Freedom of Information Law is consistent with the Legislative Declaration that appears at the beginning of the Open Meetings Law and states that:

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

The people must be able to remain informed if they are to retain control over those who are their public servants."

Moreover, in an Appellate Division decision that was affirmed by the Court of Appeals, it was found that "The use of a secret ballot for voting purposes was improper." In so holding, the Court stated that: "When action is taken by formal vote at open or executive sessions, the Freedom of Information Law and the Open Meetings Law both require open voting and a record of the manner in which each member voted [Public Officers Law §87[3][a]; §106[1], [2]" Smithson v. Ilion Housing Authority, 130 AD 2d 965, 967 (1987); aff'd 72 NY 2d 1034 (1988).

Further, there is case law dealing with the notion a consensus reached at a meeting of a public body. In Previdi v. Hirsch [524 NYS 2d 643 (1988)], which involved a board of education, 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 intentment of the statute is that 'final action' refers to the matter voted upon, not final determination of, as in this case, the litigation discussed or finality in terms of exhaustion or remedies" (id. 646).

As such, if a public body reaches a "consensus" that is reflective of its final determination of an issue, I believe that minutes must be prepared that indicate the manner in which each member voted. I recognize that the public bodies often attempt to present themselves as being unanimous and that a ratification of a vote is often carried out in public. Nevertheless, if a unanimous ratification does not indicate how the members actually voted behind closed doors, the public may be unaware of the members' views on a given issue. If indeed a consensus represents action upon which the a public body relies in carrying out its duties, I believe that the minutes should reflect the actual votes of the members.

With respect to the enforcement of the Open Meetings Law, §107(1) states in relevant part that:

"Any aggrieved person shall have standing to enforce the provisions of this article against a public body by the commencement of a proceeding pursuant to article seventy-eight of the civil practice law and rules, and/or an action for declaratory judgment and injunctive relief. In any such action or proceeding, the court shall have the power, in its discretion, upon good cause shown, to declare any action

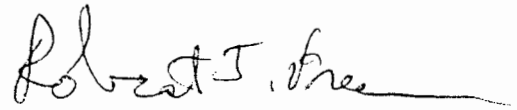
Mr. Terry Wilbert
February 2, 1999
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or part thereof taken in violation of this article void in whole or in part."

It is noted that the time for initiating a proceeding under Article 78 expires four months after the date of an agency's final determination. Since the meeting in question was held in July, it appears that the statute of limitations would preclude any meaningful action that might otherwise have been taken. However, in an effort to enhance compliance with and understanding of applicable statutes, a copy of this opinion will be forwarded to the Board of Education.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education



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DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11291

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David A. Schulz
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Alexander F. Treadwell

February 2, 1999

Executive Director

Robert J. Freeman

Mr. Deyon Thompson
93-A-8164 D-27-04
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. Thompson:

I have received your letter of January 18. As in the case of your previous correspondence, you have sought assistance in obtaining a recommendation that you believe has been sent by the Department of Correctional Services to the Immigration and Naturalization Service. You have been informed by the Department's records access and appeals officers that the Department maintains no such record, and it is your view that the Department has failed to comply with §147 of the Correction Law.

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

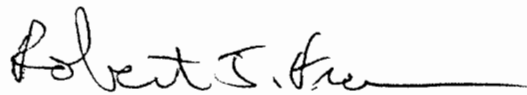
Lastly, the authority of the Committee on Open Government is limited to matters relating to public access to government information. Interpreting §147 of the Correction Law is within the province of Department officials and beyond the scope of the Committee's jurisdiction or expertise.

As you requested, your correspondence is being returned to you.

Mr. Deyon Thompson
February 2, 1999
Page -2-

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and extends across the width of the page.

Robert J. Freeman
Executive Director

RJF:jm

Enc.



STATE OF NEW YORK
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FOIL-A - 11292

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Alexander F. Treadwell

February 3, 1999

Executive Director

Robert J. Freeman

Mr. Bruce T. Reiter

[REDACTED]
[REDACTED]

The staff of the Committee on Open 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 January 19 and the correspondence attached to it. You have requested an opinion concerning your efforts in obtaining records pursuant to the Freedom of Information Law from Senior Citizens of Green Island, Inc.

In this regard, it appears that you misunderstand the scope of the Freedom of Information Law. That statute pertains to agency records, and §86(3) defines the term "agency" to mean:

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

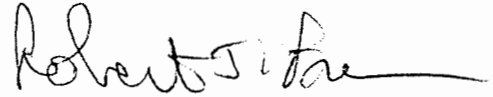
Based on the foregoing, the Freedom of Information Law applies to records of entities of state and local government.

Your correspondence indicates that the entity of your interest is a not-for-profit corporation that is not part of any unit of government. If that is so, it would be outside the coverage of the Freedom of Information Law.

Mr. Bruce T. Reiter
February 3, 1999
Page -2-

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

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Senior Citizens of Green Island, Inc.



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 11293

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Alexander F. Treadwell

February 3, 1999

Executive Director

Robert J. Freeman

Mr. David Rivera
98-A-3187
P.O. Box 51
Comstock, NY 12821-0051

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

Dear Mr. Rivera:

I have received your letter of January 25 in which you requested an advisory opinion.

You indicated that you requested records pertaining to your conviction from the New York City Police Department. The Department acknowledged receipt of the request and "estimated" that locating and reviewing the records to determine the extent to which they must be disclosed would be completed within 120 days. It is your view that the Department has placed you "in a catch-22 position for requesting 120 days (4 months) the exact amount of time that could preclude judicial review."

I disagree with your conclusion. When the Department completes its review of the records and grants or denies access in whole or in part, that would represent its initial determination. If any aspect of the request is then denied, the Department would be required to inform you of the right to appeal. Pursuant to §89(4)(a) of the Freedom of Information Law, you would then have thirty days to appeal the denial. Upon receipt of the appeal, the appeals officer would have ten business days to render a final agency determination. At that time, from the time of the final determination, you would have four months to initiate a proceeding under Article 78 of the Civil Practice Law and Rules.

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

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

Mr. David Rivera

February 3, 1999

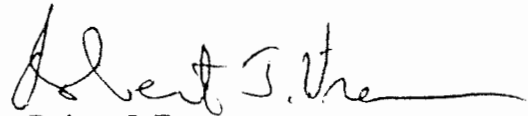
Page -2-

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

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

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

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Sgt. Richard Evangelista



STATE OF NEW YORK
DEPARTMENT OF STATE
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FOIL-A0-11294

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Alexander F. Treadwell

February 3, 1999

Executive Director

Robert J. Freeman

Mr. Michael Jones
85-A-1962
Wallkill Correctional Facility
Box G, Route 208
Wallkill, NY 12589-0286

Dear Mr. Jones:

As you are aware, your letter addressed to the Attorney General has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State, is authorized to provide advice and opinions concerning the Freedom of Information Law. You have sought assistance in obtaining certain statistical information from the Department of Correctional Services.

Specifically, you requested "statistical records of all violent parole applicants that appear each month before the Parole Board between the years of January first of 1995 and December of this year 1998 that have sentences of ten (10) years or longer or have been placed on a six (6) to twenty-four (24) month hold status, effectively denying parole."

In this regard, it is emphasized that the Freedom of Information Law pertains to existing records. Moreover, §89(3) of that statute provides in relevant part that an agency is not required to prepare a new record in response to a request.

Based on the response to your request offered by Mark E. Shepard, the Records Access Officer for the Department of Correctional Services, the information sought does not exist. That being so, there would be no obligation imposed on the Department to review its records for the purpose of creating the statistical data of your interest on your behalf.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Mark E. Shepard



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FOIL-AO-11295

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Walter Grunfeld
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Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

February 3, 1999

Executive Director

Robert J. Freeman

Mr. Jeff Blocker
M.C.C.F.
CN900
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 January 21 in which you referred to an opinion addressed to you on December 22. Among the points offered in the opinion was my belief that records maintained by the Nassau County District Attorney fall within the scope of the New York Freedom of Information Law, rather than the federal Freedom of Information Act, even though the records are kept in accordance with provisions of federal law. You have questioned that aspect of the opinion.

In this regard, I direct your attention to a recent decision of the Court of Appeals, Citizens for Alternatives to Animal Labs, Inc. v. Board of Trustees of the State University of New York (___ NY2d ___, October 22, 1998). In that case, even though records were kept pursuant to federal law by a state agency, the Court determined that the records fell within the coverage of the New York Freedom of Information Law and were subject to rights conferred by that statute. In short, the fact that records are kept or held by an agency brings them within the coverage of the Freedom of Information Law, irrespective of "the function or purpose for which an agency's documents are generated or held." The Court held further that "FOIL's scope...is not to be limited based on the [Federal] purpose' for which the certifications were kept 'or the function to which [they] relate [],' i.e., serving to comply with a Federal mandate..."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Tammy J. Smiley, Assistant District Attorney

From: Robert Freeman
To: [REDACTED]
Date: 2/3/99 12:46PM
Subject: Status of Labor Unions under the Freedom of Information Law

Dear Mr./Ms. Abbate:

Your email of January 26 sent to the Department of State was delivered to this office, the Committee on Open Government, today. The Committee is authorized to provide advice and opinions concerning the Freedom of Information Law.

You have asked whether "labor unions headquartered in New York State with a not-for-profit status [are] covered under the Freedom of Information Law. From my perspective, it is clear that labor unions are not subject to that statute.

In this regard, the Freedom of Information Law pertains to agency records, and section 86(3) of the Law defines the term "agency" to mean:

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

Based on the foregoing, the Freedom of Information Law includes entities of state and local government within its scope. Labor unions, which are not governmental entities, are not agencies and, therefore, are not subject to that statute.

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



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO / 11297

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February 3, 1999

Executive Director

Robert J. Freeman

Mr. Gavin Hinckson
96-R-4194
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. Hinckson:

I have received your letter of January 21 in which you referred to a determination of an appeal rendered under the Freedom of Information Law by Anthony J. Annucci, Counsel to the Department of Correctional Services.

You criticized the determination based on "failure and bad faith effort to follow Article 6 section 89(5)(c)(2) time limit of (10) days to respond to [your] appeal infringed and created an unwarranted hindrance to appellant to file an Article 78 pursuant to the guideline requirements of Article 6 section 89(5)(d)." You also questioned Mr. Annucci's citation of §87(2)(f) based on your contention that a conclusion that disclosure "may" endanger the life or safety of any person is inadequate.

In this regard, I offer the following comments.

First, the provisions relating to the appeal to which you referred are not pertinent or applicable. Subdivision (5) of §89 pertains only to situations in which a commercial enterprise has asked that records be kept confidential by a state agency on the ground that disclosure would result in substantial injury to its competitive position. If your interest involves initiating an Article 78 proceeding to seek judicial review of Mr. Annucci's determination, you have the ability to do so pursuant to §89(4)(b) of the Freedom of Information Law within four months of the determination.

Second, as you are likely aware, §87(2)(f) permits an agency to withhold records to the extent that disclosure "would endanger the life or safety of any person." In cases involving the assertion of that provision, it has been determined that an agency is not required to demonstrate that disclosure "would" endanger life or safety. In citing §87(2)(f), it has been found that:

Mr. Gavin Hinckson

February 3, 1999

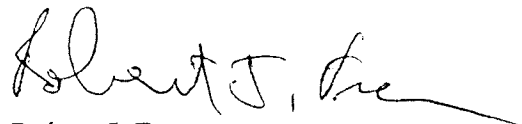
Page -2-

“This provision of the statute permits nondisclosure of information if it would pose a danger to the life or safety of any person. We reject petitioner’s assertion that respondents are required to prove that a danger to a person’s life or safety will occur if the information is made public (see, *Matter of Nalo v. Sullivan*, 125 AD2d 311, 312, lv denied 69 NY2d 612). Rather, there need only be a possibility that such information would endanger the lives or safety of individuals...” [Stronza v. Hoke, 148 AD2d 900, 901 (1989)].

It is noted that the principle enunciated in Stronza has appeared in several other decisions [see Ruberti, Girvin & Ferlazzo v. NYS Division of the State Police, 641 NYS2d 411, 218 AD2d 494 (1996), Connolly v. New York Guard, 572 NYS2d 443, 175 AD2d 372 (1991) and McDermott v. Lippman, Supreme Court, New York County, NYLJ, January 4, 1994]. Additionally, it was determined in American Broadcasting Companies, Inc. V. Siebert that when disclosure would “expose applicants and their families to danger to life or safety”, §87(2)(f) may properly be asserted [442 NYS2d 855, 859 (1981)].

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: Anthony J. Annucci



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11298

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February 4, 1999

Executive Director

Robert J. Freeman

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 January 20 in which you sought an advisory opinion concerning the calculation of fees that may be assessed under the Freedom of Information Law in conjunction with the scenario that you presented.

In this regard, as you are aware, the Freedom of Information Law pertains to agency records and §86(4) defines the term "record" expansively to include:

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

Based upon the 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, *Szikszy v. Buelow*, 436 NYS 2d 558 (1981)].

Mr. Wallace S. Nolen

February 4, 1999

Page -2-

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

In Brownstone Publishers Inc. v. New York City Department of Buildings, the question involved an agency's obligation to transfer electronic information from one electronic storage medium to another when it had the technical capacity to do so and when the applicant was willing to pay the actual cost of the transfer. As stated by the Appellate Division, First Department:

"The files are maintained in a computer format that Brownstone can employ directly into its system, which can be reproduced on computer tapes at minimal cost in a few hours time-a cost Brownstone agreed to assume (see, POL [section] 87[1] [b] [iii]). The DOB, apparently intending to discourage this and similar requests, agreed to provide the information only in hard copy, i.e., printed out on over a million sheets of paper, at a cost of \$10,000 for the paper alone, which would take five or six weeks to complete. Brownstone would then have to reconvert the data into computer-usable form at a cost of hundreds of thousands of dollars.

"Public Officers Law [section] 87(2) provides that, 'Each agency shall...make available for public inspection and copying all records...' Section 86(4) includes in its definition of 'record', computer tapes or discs. The policy underlying the FOIL is 'to insure maximum public access to government records' (Matter of Scott, Sardano & Pomerantz v. Records Access Officer, 65 N.Y.2d 294, 296-297, 491 N.Y.S.2d 289, 480 N.E.2d 1071). Under the circumstances presented herein, it is clear that both the statute and its underlying policy require that the DOB comply with Brownstone's reasonable request to have the information, presently maintained in computer language, transferred onto computer tapes" [166 Ad 2d, 294, 295 (1990)].

Further, in a more recent decision that cited Brownstone, it was held that: "[a]n agency which maintains in a computer format information sought by a F.O.I.L. request may be compelled to comply with the request to transfer information to computer disks or tape" (Samuel v. Mace, Supreme Court, Monroe County, December 11, 1992).

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

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

Therefore, prior to October 15, 1982, a local law, an ordinance, or a regulation for instance, establishing a search fee or a fee in excess of twenty-five cents per photocopy or higher than the actual cost of reproduction was valid. However, under the amendment, only an act of the State Legislature, a statute, would in my view permit the assessment of a fee higher than twenty-five cents per photocopy, a fee that exceeds the actual cost of reproducing records that cannot be photocopied, (i.e., electronic information), or any other fee, such as a fee for search or overhead costs. In addition, it has been confirmed judicially that fees inconsistent with the Freedom of Information Law may be validly charged only when the authority to do so is conferred by a statute [see Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)].

Further, the specific language of the Freedom of Information Law and the regulations promulgated by the Committee on Open Government indicate that, absent statutory authority, an agency may charge fees only for the reproduction of records. Section 87(1)(b) of the Freedom of Information Law states:

"Each agency shall promulgate rules and regulations in conformance with this article...and pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the availability of records and procedures to be followed, including, but not limited to...

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

Mr. Wallace S. Nolen
February 4, 1999
Page -4-

The regulations promulgated by the Committee state in relevant part that:

"Except when a different fee is otherwise prescribed by statute:

(a) There shall be no fee charged for the following:

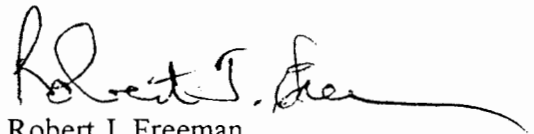
- (1) inspection of records;
- (2) search for records; or
- (3) any certification pursuant to this Part" (21 NYCRR 1401.8)."

Based upon the foregoing, a fee for reproducing electronic information would involve the cost of computer time, plus the cost of an information storage medium (i.e., a computer tape or disk) to which data is transferred. If, for example, the duplication of the data involves a transfer of data from one disk to another, computer time is minimal, likely a matter of seconds. If that is so, the actual cost may involve only the cost of the disks.

I note that in a recent decision (see attached, Simpson v. Town of East Hampton, Supreme Court, Suffolk County, June 4, 1997), it was determined that the fee for the duplication of electronic information would be based on the cost of computer tapes and the energy, i.e., electricity used in the process of duplicating the data onto the tapes.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

Enc.



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COMMITTEE ON OPEN GOVERNMENT

FOIL-AU - 11299

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February 4, 1999

Executive Director

Robert J. Freeman

Mr. James McCoy
96-A-3717
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. McCoy:

I have received your letter of January 25 and the correspondence attached to it. You have sought guidance concerning a delay in response to your request for records by the Office of the Rockland County 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..."

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

Mr. James McCoy
February 4, 1999
Page -2-

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

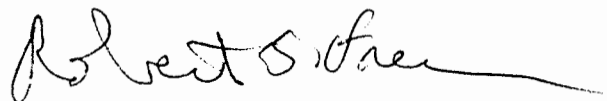
If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively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

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

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

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Joseph F. Suarez



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11300

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Executive Director

Robert J. Freeman

February 8, 1999

Mr. Kent L. Ramsey
97-A-7281
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 facts presented in your correspondence.

Dear Mr. Ramsey:

I have received your letter of January 25. 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."

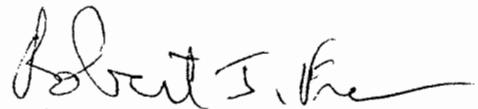
Mr. Kent L. Ramsey
February 8, 1999
Page -2-

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,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and is positioned above the printed name and title.

Robert J. Freeman
Executive Director

RJF:tt



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FOIL-AO-11301

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Executive Director

Robert J. Freeman

February 8, 1999

Mr. Arthur Holmes
90-T-0506
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. Holmes:

I have received your letter of January 27. You have sought assistance in relation to a request for records made to the FOIL officer at your facility that had not been answered.

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

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

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

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

Mr. Arthur Holmes

February 8, 1999

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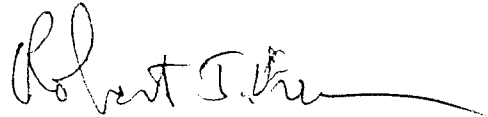
explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

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

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and has a long, sweeping horizontal line extending to the right from the end of the name.

Robert J. Freeman
Executive Director

RJF:tt

cc: Sam Spurgeon



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

Oml-AO-2995
FOIL-AO-11302

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February 8, 1999

Executive Director

Robert J. Freeman

Mr. Steven L. Fornal



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

Dear Mr. Fornal:

I have received your letter of January 27. While some of the issues that you raised were considered in the opinion addressed to you on January 29, for purposes of clarity, I offer the following remarks.

First, you wrote that the Chairman of the Town of Rochester Planning Board stated, in your words, that "by law -- the town planning board is required to keep stenographic notes and the approved/accepted minutes as the official record." In this regard, I know of no law that requires that a planning board or any public body maintain stenographic notes of meetings. In general, the "official record" of a meeting, the information to be memorialized and kept permanently, would be the minutes.

In this regard, 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.

Mr. Steven L. Fornal

February 8, 1999

Page -2-

3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

Based upon the foregoing, minutes must be prepared and made available within two weeks, and it is clear that minutes need not consist of a verbatim account of every comment that was made.

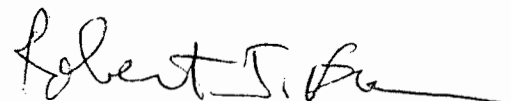
Moreover, there is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. Nevertheless, as a matter of practice or policy, many public bodies approve minutes of their meetings. In the event that minutes have not been approved, to comply with the Open Meetings Law, it has consistently been advised that minutes be prepared and made available within two weeks, and that 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.

Second, for reasons discussed in the earlier correspondence, a tape recording of a meeting constitutes a "record" that falls within the coverage of the Freedom of Information Law. Whether it is characterized as "official" has no bearing on its status under that statute; it is a record subject to rights of public access.

Lastly, since the Chairman apparently recommended that rules be adopted to state that "the tape recorder may be turned off during meetings", again, there is no law of which I am aware that requires that meetings be tape recorded in whole or in part. However, I note that judicial decisions indicate that any person present at a meeting, i.e., any member of the public, may use his or her own device to record an open meeting, so long its use is not disruptive [see Mitchell v. Board of Education of the Garden City Union Free School District, 113 AD2d 924 (1985); Peloquin v. Arsenault, 616 NYS 2d 716 (1994); and People v. Ystueta, 99 Misc. 2d 1105, 418 NYS 2d 508 (1979)].

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Planning Board



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-190-11303

Committee Members

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>

Mary O. Donohue
Alan Jay Gerson
Walter Grunfeld
Robert L. King
Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

February 9, 1999

Executive Director

Robert J. Freeman

Mr. Joseph Thomas
86-A-0070
Drawer B
Stormville, NY 12582-0010

Dear Mr. Thomas:

I have received a copy of your letter to a court reporter in which you requested copies of certain records under the Freedom of Information 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:

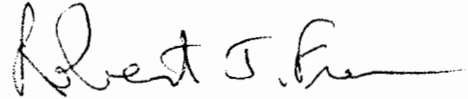
"the courts of the state, including any municipal or district court, whether or not of record."

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 a request for court records be made to the clerk of the appropriate court, citing an applicable provision of law as the basis for the request.

Mr. Joseph Thomas
February 9, 1999
Page -2-

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

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOTL-AO-11304

Committee Members

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Walter Grunfeld
Robert L. King
Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

February 9, 1999

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 January 29 in which you asked whether "a State Assembly member is covered under the Freedom of Information Law."

In this regard, the State Legislature is subject to provisions in the Freedom of Information Law that 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..."

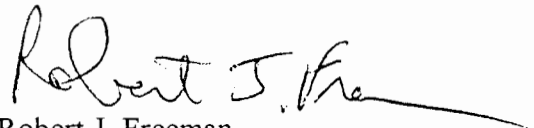
I believe that the Assembly's rules include the designation of a records access officer, whose duty involves the coordination of responses to requests for records of the Assembly. In my view, when a request is made under the Freedom of Information Law for records a member of the Assembly, that person should either respond in a manner consistent with the Freedom of Information Law or forward to the request to the Assembly's records access officer, Ms. Sharon Walsh.

Mr. Jerry Brixner
February 9, 1999
Page -2-

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 records of your interest, if they exist, would fall within the categories of records that must be disclosed by the State Legislature.

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

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and extends to the right with a long horizontal stroke.

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Susan John



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

707-140-11305

Committee Members

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Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

February 9, 1999

Mr. Briant George
94-A-3921
Auburn Correctional Facility
135 State Street/POB 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. George:

I have received your letter of January 25 in which you asked that this office monitor and offer an opinion concerning your request for records sent to the Manhattan Robbery Squad. You also suggested that requests from inmates are frequently ignored.

In this regard, 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, and requests should ordinarily be made to that person. 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. Nevertheless, it is suggested that you resubmit your request to the Records Access Officer, New York City Police Department, Room 110C, One Police Plaza, New York, NY 10038.

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

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

Mr. Briant George

February 9, 1999

Page -2-

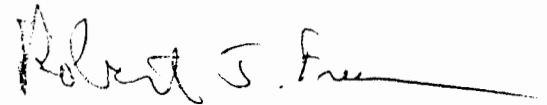
If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively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

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

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

A handwritten signature in black ink that reads "Robert J. Freeman". The signature is written in a cursive style and is followed by a long horizontal line.

Robert J. Freeman
Executive Director

RJF:tt



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI-L-AD-11306

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Robert L. King
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Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

February 9, 1999

Mr. Valrick Johnson
97-R-7660
Cayuga Correctional Facility
Route 38A/P.O. Box 1186
Moravia, NY 13118

Dear Mr. Johnson:

I have received your letter of February 1 in which you requested certain records from this office.

In this regard, first, the Committee on Open Government (formerly known as the Committee on Public Access to Records) is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee does not have custody or control of records generally, and neither this office nor the Department of State has possession of the records of your interest.

Second, since your request appears to involve court records, I note 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

Mr. Valrick Johnson

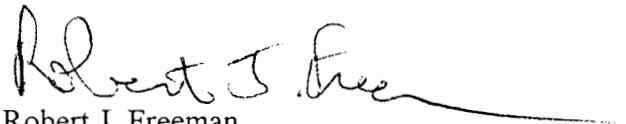
February 9, 1999

Page -2-

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 made to the clerk of the appropriate court, citing an applicable provision of law as the basis for the request.

I hope that the foregoing clarifies your understanding of the matter and that I have been of assistance.

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and extends across the width of the page.

Robert J. Freeman
Executive Director

RJF:tt



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-RO-11307

Committee Members

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Alan Jay Gerson
Walter Grunfeld
Robert L. King
Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

February 17, 1999

Mr. Ray Anthony Brown
97-A-6602
Clinton Correctional Facility
Box 2002
Dannemora, NY 12929

Dear Mr. Brown:

I have received your letter of January 23, which reached this office on February 16. You have appealed an alleged denial of access to court records.

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 entity to grant or deny access to records. The provisions in the Freedom of Information Law pertaining to the right to appeal are found in §89(4)(a) of that statute.

In addition, 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."

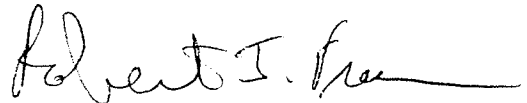
Based on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law (see e.g., Judiciary Law, §255) may grant broad public access to those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

Mr. Ray Anthony Brown
February 17, 1999
Page -2-

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,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:tt



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL No - 11308

Committee Members

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Robert L. King
Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

February 17, 1999

Mr. Gary Hemingway
88-D-0048
Downstate Correctional Facility
P.O. Box F
Red Schoolhouse Road
Fishkill, NY 12524-0445

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

Dear Mr. Hemingway:

I have received your letter of January 29, as well as the correspondence attached to it.

You referred to a delay in response to certain requests for records and asked that this office contact those agencies "to ascertain why [your] requests [have] not been granted...."

In this regard, the primary function of the Committee on Open Government involves providing advice concerning the Freedom of Information Law. The Committee generally does not contact agencies to ascertain why a request might not have been granted. Further, based on a review of the correspondence, the Freedom of Information Law would not be applicable.

It is emphasized that the Freedom of Information Law pertains to agency records. Section 86 (3) of that statute defines the term "agency" to mean:

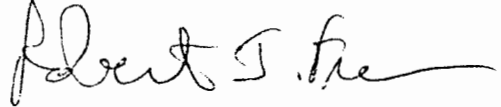
"any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the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

Based on the foregoing, the Freedom of Information Law generally applies to entities of state and local government. Since the entities identified in your correspondence are not governmental in nature, they would fall beyond the coverage and the requirements of the Freedom of Information Law.

Mr. Gary Hemingway
February 17, 1999
Page -2-

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

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman". The signature is written in dark ink and has a long, sweeping horizontal line extending to the right.

Robert J. Freeman
Executive Director

RJF:tt



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL 140-11309

Committee Members

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Robert L. King
Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

February 17, 1999

Mr. Patrick Luis
86-B-1418
Gouverneur Correctional Facility
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. Luis;

I have received your letter of January 25, which reached this office on February 3.

You have asked whether you are entitled to obtain records from the Office of the State Comptroller indicating amounts awarded to inmates in civil litigation by court order or through settlement, as well as the names of any such cases.

In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, the kinds of records in which you are interested would be available, for none of the grounds for denial would appear to be applicable.

Second, however, an issue of likely significance likely involves the extent to which such a request would "reasonably describe" the records 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:

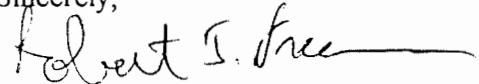
"respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal 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 Office of the State Comptroller, to the extent that the records 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, the request would not in my opinion meet the standard of reasonably describing the records. If the agency maintains all of its records regarding awards to inmates, since the beginning of its existence, in a single file, it may be a simple task to locate the records. If, however, records or awards are not maintained in a separate file or system pertaining to inmates, but rather alphabetically or chronologically, locating the records might involve a search, in essence, for the needle in the haystack. Based on the holding by the State's highest court, an agency is not required to engage in that kind of effort.

I hope that 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 - 2996
FOIL-AO - 11310

Committee Members

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Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

February 17, 1999

Mr. Francis X. Stock
First Ward Trustee
Village of Lancaster
25 Sherborne Avenue
Lancaster, NY 14086-3115

The staff of the Committee on 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 Stock:

I have received your letter of February 12 in which you sought an advisory opinion.

You indicated that you "have periodically sent the Village Board letters and have also had letters at Board meetings", but that the Board "has refused to enter [your] letters into the Village's correspondence" or to include them in minutes of meetings. You added that it is your "feeling that they do not want to accept your correspondence as official correspondence or even enter [your] statements into official Board minutes as a measure to circumvent the Freedom of Information Law." You have sought guidance concerning the requirement in relation to the foregoing.

In this regard, I offer the following comments.

First, the Freedom of Information Law does not distinguish between "official correspondence" and other correspondence. 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."

Mr. Francis X. Stock

February 17, 1999

Page -2-

Based on the language quoted above, when a letter or other item of correspondence comes into the possession of the Village, irrespective of its source, the letter or other correspondence constitutes a "record" that falls within the scope of the Freedom of Information Law. However, there is nothing in the Freedom of Information Law or any other statute of which I am aware that would require the Board of Trustees to acknowledge, "officially accept", or answer your letters or similar items of correspondence.

In short, while the items to which you referred are Village records, the Board is not obliged to take any public or official step in publicly acknowledging their receipt.

Second, with respect to reference to your comments or correspondence in minutes of meetings, I note that the Open Meetings Law contains what might be characterized as minimum requirements concerning contents of minutes. Specifically §106 (1) of the Open Meetings Law pertains to minutes of meetings of public bodies and states that:

"Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon."

Based on the foregoing, minutes need not consist of a verbatim account of everything said at a meeting; 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.

I point out that in an opinion issued by the State Comptroller, it was advised that when a member of a board requests that his statement be entered into the minutes, the board must determine, under its rules of procedure, whether to record the statement in writing, which would then be entered as part of the minutes (1980 Op.St.Comp. File #82-181). From my perspective, a village board of trustees, like other public bodies, functions by means of action taken by a majority vote of its total membership. Pertinent is §41 of the General Construction Law, entitled "Quorum and majority", which states that:

"Whenever three or 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

Mr. Francis X. Stock

February 17, 1999

Page -3-

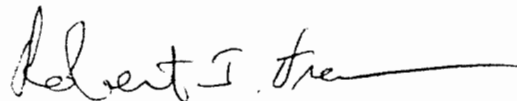
vacancies and were one of the persons or officers disqualified from acting."

Based on §41, a quorum is a majority of the total membership of a public body, notwithstanding absences or vacancies. Further, in order to carry a motion or take action, there must be an affirmative vote of a majority of the total membership of a public body. Therefore, if, for example, the Board consists of five members, three affirmative votes would be required to take action.

In the context of your question, I do not believe that a single member or a minority of members could insist or require that their comments or letters be included in minutes; those additions would be required to be included only following an approval to do so by means of an affirmative vote by a majority of the Board's total membership.

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

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and extends across the width of the page.

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Trustees



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI-AD 11311

Committee Members

41 State Street, Albany, New York 12231

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Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

February 17, 1999

Mr. Ralph R. Martinelli
Publisher
Martinelli Publications
40 Larkin Plaza
Yonkers, NY 10701

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

Dear Mr. Martinelli:

I have received your letter of February 2 in which you sought an advisory opinion concerning the Freedom of Information Law.

According to your letter, you indicated, in brief, that you have been unable to obtain "time sheet records" pertaining to a person employed by Senator Nicholas Spano.

In this regard, I offer the following comments.

First, I point out that §88 of the Freedom of Information Law deals with rights of access to records of the State Legislature. Further, while there have been numerous judicial decisions concerning rights of access to agency records in accordance with provisions applicable to agencies, there are few decisions that have been rendered with respect to access to records of the Legislature.

It is also noted that the structure of the Freedom of Information Law as it pertains to the State Legislature, differs from its structure as it pertains to agencies of state and local government subject to §87 of the Law. Section 86 (3) of the Law defines the term "agency" to mean:

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

Mr. Ralph R. Martinelli

February 17, 1999

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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.

Second, of potential relevance to your inquiry is §88(3)(b), which requires that each house of the State Legislature maintain and make available "a record setting forth the name, public office address, title and salary of every officer or employee." While that record is not the subject of your request, it may relate to the records sought. Among the categories of records available from the State Legislature is §88(2)(e), which requires the disclosure of "internal or external audits and statistical or factual tabulations of, or with respect to, material otherwise available for inspection and copying pursuant to this section or any other applicable provision of law."

I am unfamiliar with the content of the records in which you are interested. However, if they are analogous to some time and attendance records, arguably, they would include "statistical or tabulations of, or with respect to" the payroll record required to be made available pursuant to §88(3)(b); on the other hand, if their contents are different or unrelated to records otherwise available by law, they would be beyond the scope of rights of access.

Lastly, it is noted that in a decision affirmed by the State's highest court dealing with attendance records maintained by an agency (not the State Legislature), specifically those indicating the days and dates of sick leave claimed by a particular employee, it was found that the records are accessible. In that case, the Appellate Division found that:

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

Insofar as an agency's attendance records or time sheets include reference to reasons for an absence, it has been advised that an explanation of why sick time might have been used, i.e., a

Mr. Ralph R. Martinelli

February 17, 1999

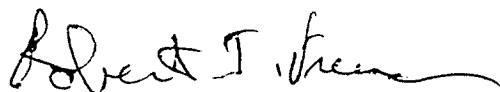
Page -3-

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.

Based on the preceding analysis, it is clear that an agency's attendance records must be disclosed under the Freedom of Information Law. As suggested earlier, whether that is so with respect to similar records maintained by the State Legislature would be dependent upon their contents and their relationship to records that are available pursuant to law.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and is positioned above the printed name and title.

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Nicholas Spano
Kenneth E. Riddett
Steve Boggess



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIC-AO-11312

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Executive Director

Robert J. Freeman

February 17, 1999

Mr. Frank L. Gennuso
85-C-0127
Erie County Correctional Facility
11581 Walden Avenue
Alden, NY 14004

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

Dear Mr. Gennuso:

I have received your letter of January 28. You have sought an advisory opinion concerning a request made to the City of Buffalo Police Department for "the written procedures laboratory testing of alleged controlled substances." You added that 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 section 89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more of the grounds for denial appearing in §87(2)(a) through (i) of the Law. I am unfamiliar with the contents of the records in which you are interested. However, from my perspective, three of the grounds for denial may be relevant to your inquiry.

Specifically, §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 of 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 than 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.

Mr. Frank L. Gennuso

February 17, 1999

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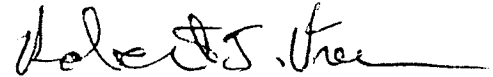
The remaining ground for denial of possible relevance is §87(2)(f). That provision permits an agency to withhold records when disclosure "would endanger the life of safety of any person." To the extent that disclosure would endanger the life of safety of law enforcement officers or others, it appears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

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

Enclosed, as requested, is a copy of the latest report of the Committee on Open Government.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:tt

Encs.



STATE OF NEW YORK
DEPARTMENT OF STATE
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7076-AO-11313

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Alexander F. Treadwell

Executive Director

Robert J. Freeman

February 18, 1999

Ms. Jeanne E. Stives
Village Clerk- Treas.
Village of Portville
P.O. Box 436
Portville, NY 14770

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

Dear Ms. Stives:

I have received your correspondence of February 5 in which you sought guidance concerning public rights of access to water and sewer bills, including customers' or users' names. The bills have been sought by a citizens committee "looking for ways to lower their bills."

From my perspective, the bills should be disclosed, including the names of customers or users of water and sewers. 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 pertinent to an analysis of rights of access is §87(2)(b), which enables an agency to withhold records or portions thereof which "if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article." In my opinion, the use of water or a sewer hardly represents an intimate or personal detail of peoples' lives that could, if disclosed, be characterized as an unwarranted invasion of privacy. It is also noted that the records in question had been available under §51 of the General Municipal Law long before the enactment of the Freedom of Information Law. Further, analogous information is routinely disclosed in other records. For example, assessment records, which are clearly public, indicate the owner and location of real property, its assessed value, details regarding structures on the property, the amount owed or paid by the owner and whether the owner is delinquent in the payment of taxes. The bills in question in my opinion include less information than

Ms. Jeanne E. Stives

February 18, 1999

Page -2-

the assessment records, and disclosure would not be so significant as to result in an unwarranted invasion of privacy.

Third, §89(2)(b) contains a series of examples of unwarranted invasions of privacy. The only example relevant to the facts of the situation presented is §89(2)(b)(iv), which states that an unwarranted invasion of privacy includes:

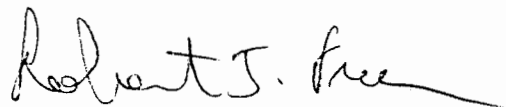
"disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it..."

In construing that provision, it has been found that its language is conjunctive. As stated by the state's highest court, the Court of Appeals, in Gannett Co. Inc. v. County of Monroe, which considered the same provision in 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 another case 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].

In this instance, for reasons described earlier, I do not believe that disclosure would result in personal or economic hardship. Moreover, the records are clearly relevant to the work of the agency. Consequently, again, I believe that the records must be disclosed, including the names found within them.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt



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FOIL-AO-11314

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Executive Director

Robert J. Freeman

February 18, 1999

Ms. Julie L. Carney

[REDACTED]

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

Dear Ms. Carney:

I have received your letter of February 3 and the materials attached to it.

Having submitted a request to the City Clerk of the City of Oneonta under the Freedom of Information Law, you received responses that included "cc's" to several City officials. You have questioned the propriety of the distribution of your request to those officials and asked whether you "have the right to request public information without uninvolved City officials being notified of [your] actions."

In this regard, there is no provision of law that would preclude the City Clerk from sharing your request with City officials or transmitting copies of his responses to them. Situations frequently arise in which an agency's designated records access officer seeks the services of other agency officials, for those officials may have physical custody of the records sought, they may be familiar with the contents of the records and offer assistance concerning the extent to which the records should be disclosed, or attorneys may offer legal advice concerning the obligations imposed by law. In short, it is not uncommon for requests and the responses to them to be distributed to agency staff.

It is also noted that requests made under the Freedom of Information Law are generally accessible to the public 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. From my perspective, with rare exceptions, requests are accessible under the law.

In my view, the only instances in which requests 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" [see Freedom of Information Law, §§87(2)(b) and 89(2)]. For instance,

Ms. Julie L. Carney

February 18, 1999

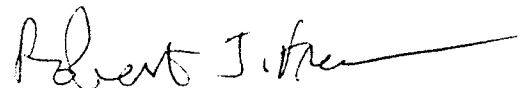
Page -2-

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.

Having reviewed your request, I do not believe that it includes what may be characterized as intimate or personal information or that disclosure would constitute an unwarranted invasion of privacy.

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

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and extends across the right side of the page.

Robert J. Freeman
Executive Director

RJF:tt

cc: James R. Koury



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

70JL-90-11315

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Alexander F. Treadwell

Executive Director

Robert J. Freeman

February 18, 1999

Mr. Larry G. Campbell
79-C-0029
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. Campbell:

I have received your letter of February 2 in which you sought assistance in relation to a request for records of the Erie County Department of Central Police Services.

The correspondence attached to your letter indicates that on June 30, you asked that coordinator at the Department of Police Services "identify any and all records, papers and forms, analyses reports, memoranda, correspondence, or documents regarding any and all analyses made by any 'Central Police Services person' and/or any person or persons for the CPS laboratory concerning the results of examinations, comparisons, or tests performed in connection with any physical evidence gathered in the above-referenced case and which was the subject of grand jury proceedings conducted on either the 1st/and or 15th days of July, 1976."

Although the receipt of your request was acknowledged in July, you have apparently received no further response. You have sought assistance in the matter.

First, in view of the delay in determining rights of access, 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..."

Mr. Larry G. Campbell

February 18, 1999

Page -2-

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.

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."

The extent to which the records sought involve matters "attending a grand jury proceeding" is unclear. However, insofar as that is the case, the Freedom of Information Law would not, in my opinion, apply. Any disclosure of those records would be based on a court order or perhaps a vehicle authorizing or requiring disclosure that is separate from the Freedom of Information Law.

Insofar as the Freedom of Information Law is pertinent and governs rights of access, two of the grounds for denial would appear to be relevant.

Section 87(2)(g) states that an agency may withhold records that:

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

- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;

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

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

Mr. Larry G. Campbell
February 18, 1999
Page -5-

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 than exemplary.

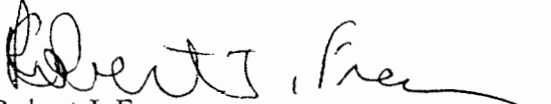
"Disclosure of the techniques enumerated in those pages would enable an operator to tailor his activities in such a way as to significantly diminish the likelihood of a successful prosecution. The information detailed on pages 481 and 482 of the manual, on the other hand, is merely a recitation of the 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.

As you requested, enclosed is the latest supplement to the annual report of the Committee on Open Government.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: John N. Cardarelli, Commissioner
June E. Jonmaire



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL NO - 11316

Committee Members

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Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

February 18, 1999

Mr. Howard Ostrander



Dear Mr. Ostrander:

I have received your letter of February 9 and your appeal in relation to your request to the Town of Guilford for a "separate accounting of Town of Guilford general and highway funds."

In this regard, first, it is emphasized that the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee is not empowered to determine appeals or compel an agency to grant or deny access to records. The provision concerning the right to appeal, §89(4)(a) of the Freedom of Information Law, states in relevant part that:

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

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 the Town does not maintain the information of your interest in the format in which you want it, the Town would not be obliged to prepare new records to accommodate you. In short, if there is no "separate accounting", the Town, in my view, would not be obliged to create new records reflective of a separate accounting on your behalf.

Mr. Howard Ostrander
February 18, 1999
Page -2-

Third, it appears that the information of your interest may be available in records routinely maintained 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."

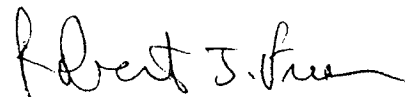
In addition, subdivision (1) of §119 of the Town Law states in part that:

"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:tt

cc: Hon. Jane Winchester
Town Board



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 11317

Committee Members

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Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

February 19, 1999

Mr. Willie Kears
93-A-8665
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. Kears:

I have received your letter of February 2 in which you sought guidance concerning your ability to obtain your "institutional visiting list".

In this regard, I offer the following comments.

First, the regulations promulgated by the Department of Correctional Services indicate that a request for records kept at a facility may be made to the facility superintendent or his designee.

Second, if a list is maintained that pertains only to your visitors, I believe that it would be accessible. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, if such a list exists, none of the grounds for denial would be applicable.

If, however, no separate visitors list is maintained with respect to each inmate, rights of access may be different. For instance, 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. If such records 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

Mr. Willie Kears
February 19, 1999
Page -2-

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:

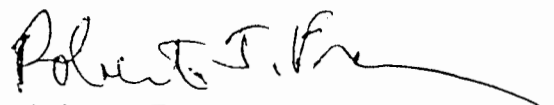
"respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal 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.

I am unaware of the means by which a visitors log, if it exists, is kept or compiled. If an inmate's name or other identifier can be used to locate records or portions of records that would identify the inmate's visitors, it would likely be easy to retrieve that information, and the request would reasonably describe the records. On the other hand, if there are chronological logs of visitors and each page would have to be reviewed in an effort to identify visitors of a particular inmate, I do not believe that agency staff would be required to engage in such an extensive search.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL AO - 11318

Committee Members

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Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

February 19, 1999

Mr. Frank E. Redl
Town of Poughkeepsie
One Overocker Road
Poughkeepsie, NY 12603

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

Dear Mr. Redl:

I have received your letter of February 4 in which you sought an advisory opinion.

You indicated that the Town of Poughkeepsie recently honored a request made under the Freedom of Information Law for payroll information, which it made available on a printout. However, the applicant, a newspaper, has asked that the information contained in the printout be made available on computer disk. You have contended that "one cannot request that the information be supplied to them in any specific form."

I respectfully disagree with your contention. In my view, the Freedom of Information Law, in terms of its intent and its judicial interpretation, has and should be construed to require agencies to produce accessible information in the format of the applicant's choice, so long as the agency is able to do so and the applicant pays the requisite fee.

Illustrative of that principle is a case in which an applicant sought a database in a particular format, and even though the agency had the ability to generate the information in that format, it refused to make the database available in the format requested and offered to make available a printout. In holding that the agency was required to make the data available in the format requested and upon payment of the actual cost of reproduction, the Court in Brownstone Publishers, Inc. v. New York City Department of Buildings unanimously held that:

"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 &

Mr. Frank E. Redl
February 19, 1999
Page -2-

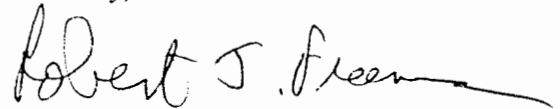
Pomerantz v. Records Access Officer, 65 N.Y.2d 294, 296-297, 491 N.Y.S.2d 289, 480 N.E.2d 1071). Under the circumstances presented herein, it is clear that both the statute and its underlying policy require that the DOB comply with Brownstone's reasonable request to have the information, presently maintained in computer language, transferred onto computer tapes" [166 Ad 2d, 294, 295 (1990)].

Further, in a more recent decision that cited Brownstone, it was held that: "[a]n agency which maintains in a computer format information sought by a F.O.I.L. request may be compelled to comply with the request to transfer information to computer disks or tape" (Samuel v. Mace, Supreme Court, Monroe County, December 11, 1992).

In short, assuming that the data sought is available under the Freedom of Information Law, that it can be made available in the format in which an applicant requests it, and that the applicant is willing to pay the requisite fee, I believe that an agency would be obliged to do so.

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-11319

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Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

February 19, 1999

Mr. John Solak

[REDACTED]

Dear Mr. Solak:

As you are aware, your letter of January 19 addressed to Assistant Attorney General Dennis McCabe 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 Open Meetings and Freedom of Information Laws.

You referred to a public hearing conducted in Broome County concerning pay raises during which the County Attorney presided. You wrote, however, that no elected officials were present, other than the County Clerk and the Sheriff, both of whom were members of the audience. You have requested a "follow up" on the matter.

In this regard, it is noted at the outset that there are distinctions between "meetings", which must be held in accordance with the Open Meetings Law, and hearings. A "meeting" is a convening of a majority of the membership of a public body, such as a county legislature, city council, town board, etc., for the purpose of discussion, deliberation, and potentially, the taking of action. A hearing, on the other hand, typically involves a situation in which members of the public are given the opportunity to speak and express their views on a given subject. A meeting can be held only with a majority of a public body present; there is no such requirement with respect to a hearing.

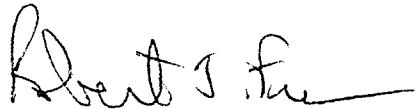
Since the issue involves a hearing, the Open Meetings Law would not have applied. Without additional information concerning the hearing and the statute under which it was held, I cannot offer additional guidance.

If you continue to wish to question whether the hearing was held in a manner consistent with law, it is suggested that you contact Mr. Harry Willis, an attorney with the Department of State who is an expert in the area of municipal law.

Mr. John Solak
February 19, 1999
Page -2-

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:tt



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 11320

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Robert L. King
Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

February 19, 1999

Mr. Corey Harrison
95-A-8647
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. Harrison:

I have received your letter of February 5 in which you questioned the propriety of a denial of access to a certain record maintained at your facility. Specifically, you sought a "memorandum detailing the reasons why [your] disciplinary hearing determination was modified."

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 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

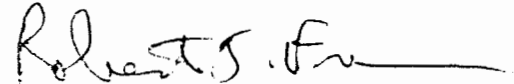
Mr. Corey Collins
February 19, 1999
Page -2-

or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those 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 memorandum consists of recommendations, as indicated in the denial of your request, I believe that the denial would have been proper. On the other hand, insofar as the memorandum is reflective of a final determination, it would, in my view, be accessible under §87(2)(g)(iii).

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and extends across the width of the text area.

Robert J. Freeman
Executive Director

RJF:tt

cc: Thomas R. Hicks



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11321

Committee Members

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Robert L. King
Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

February 22, 1999

Executive Director

Robert J. Freeman

Mr. Norman J. Charnock
95-B-0544
Collins Correctional Facility
P.O. Box 0340
Collins, NY 14034-0340

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

Dear Mr. Charnock:

I have received your letter of January 31. As I understand the matter, you requested a copy of your parole warrant relating to a new conviction and containing a "declaration of delinquency." The request was denied pursuant to §87(2)(e)(i) of the Freedom of Information Law and you have since appealed. You have questioned the propriety of the 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.

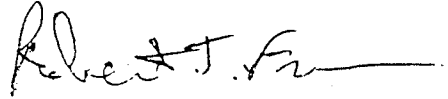
The provision to which you referred indicates that an agency may withhold records compiled for law enforcement purposes when disclosure would "interfere with law enforcement investigations or judicial proceedings." If I have interpreted the facts correctly, the exception cited in the denial would not serve to justify withholding the record in question. Typically a warrant is served upon the subject of the conviction or delinquency. That being so, a denial of a request for the record that should have been served upon you would, in my view, be unjustifiable. Further, I cannot envision how disclosure of the record at issue would interfere with either an investigation or a judicial proceeding.

Since you wrote that you appealed, it is assumed that the appeal was directed to Mr. Terrence X. Tracy, Counsel to the Division of Parole. If the appeal was not sent to Mr. Tracy, it is suggested that you do so.

Mr. Norman J. Charnock
February 22, 1999
Page -2-

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Terrence X. Tracy



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11322

Committee Members

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Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

February 22, 1999

Executive Director

Robert J. Freeman

Mr. John McKinney



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

Dear Mr. McKinney:

I have received your letter of February 5, as well as the correspondence attached to it. You described an incident that occurred in the City of Auburn and your efforts in obtaining records pertaining to the incident.

In this regard, I am unaware of the nature of records kept or prepared by the City of Auburn or its Police Department. However, the primary consideration in my view with respect to your inquiry is that the Freedom of Information Law pertains to existing records. Section 89(3) of that statute provides in part that an agency is not required to prepare a record that does not exist. Consequently, insofar as the City does not maintain records that contain the information in which you are interested or which are as expansive as you would want, it would not be obliged to prepare new records on your behalf. Similarly, because the Freedom of Information Law pertains to records, that statute does not require that agency officials answer questions. Certainly if a government official wants to answer a question or provide an explanation, that person may do so. Nevertheless, the responsibility under the Freedom of Information involves disclosure of existing records to the extent required by that statute; it does not require that agencies provide responses to questions or explanations of their actions.

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: Michael F. McKeon
Gary J. Giannotta



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11323

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Robert L. King
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Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

February 22, 1999

Executive Director

Robert J. Freeman

Mr. Jamal Sharif Fowler
91-A-5610
Cayuga Correctional Facility
Route 38A
P.O. Box 1150
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. Fowler:

I have received your letter of February 2. You have raised a series of questions concerning rights of access to records maintained by two hospitals, St. Luke's and Metropolitan, both of which are in New York City. You wrote that your intent is to obtain portions of records indicating the time that paramedics received an initial call to respond to a crime scene involving victims that you were accused of assaulting.

In this regard, I offer the following comments.

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

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

Based on the foregoing, the Freedom of Information Law generally applies to records maintained by governmental entities. St. Luke's Hospital is private and, therefore, would not be subject to the Freedom of Information Law. I believe that Metropolitan Hospital, however, is part of the New York City Health and Hospitals Corporation. If that is so, it would be part of an "agency" required to comply with the Freedom of Information Law.

Mr. Jamal Sharif Fowler
February 22, 1999
Page -2-

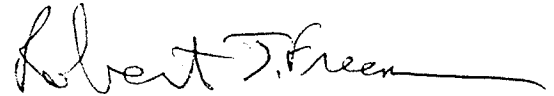
As it applies to agencies, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

If the record containing the information sought is a medical record, I do not believe that you would have the ability to obtain it under the Freedom of Information Law. The first ground for denial, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute." One such statute, §18 of the Public Health Law, removes medical records from the scope of public rights of access. If the document containing the information of your interest could not be characterized as a medical record, the portion indicating the time of receipt of a call would, in my view, be available; other aspects of that record identifiable to individuals receiving emergency or medical treatment could in my opinion be withheld on the ground that disclosure would constitute an unwarranted invasion of privacy pursuant to §§87(2)(b) and 89(2)(b) of the Freedom of Information Law.

Lastly, the address of the Metropolitan Hospital Center is 1901 First Avenue, New York, NY 10029.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and has a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11324

Committee Members

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Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

February 24, 1999

Executive Director

Robert J. Freeman

Mr. Dominic Bretti
80-C-0511
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. Bretti:

I have received your letter of February 9 and the materials attached to it. You have sought an opinion concerning your right to obtain the "investigatory file" of the New York State Organized Crime Task Force that was used in relation to your arrest and conviction.

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

Since I am unaware of the contents of the records in question or the effects of their disclosure, 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."

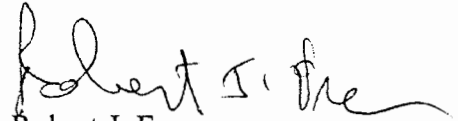
In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in sub- paragraphs (i) through (iv) of §87(2)(e).

Mr. Dominic Bretti
February 24, 1999
Page -3-

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,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and is positioned above the printed name and title.

Robert J. Freeman
Executive Director

RJF:jm

cc: David J. Mudd



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11325

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Executive Director

Robert J. Freeman

February 24, 1999

Ms. Gertrude M. Prater
Mr. Rudolph L. Eissing

[REDACTED]

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

Dear Ms. Prater and Mr. Eissing:

I have received your letter of February 10 and the correspondence attached to it. In brief, you complained that requests for records made to various officials of the Town of Greenville have not been answered.

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 person as "records access officer." The records access officer has the duty of coordinating an agency's response to requests. While I believe that the persons in receipt of your requests should either have responded in a manner consistent with the Freedom of Information Law or forwarded the requests to the appropriate person, it is suggested that, in the future, your requests for records be made to the designated records access officer. In most towns, the person so designated is the town clerk.

Second, irrespective of which Town officials received requests, I point out that the Freedom of Information Law provides direction concerning the time and manner in which an agency must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

Ms. Gertrude M. Prater
Mr. Rudolph L. Eissing
February 24, 1999
Page -2-

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

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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 one of your requests, you sought "a listing of the violations found" and "a listing of fines" imposed by the Code Enforcement Officer. Here I point out that the Freedom of Information Law pertains to existing records, and that §89(3) of the Law states in relevant part that an agency is not required to create a record in response to a request. If, for example, there are no "listings" of violations or fines, the Town, in my view, would not be obliged to prepare such records on your behalf.

It is likely that another issue involves the extent to which the requests "reasonably describe" the records sought as required by §89(3) of the Freedom of Information Law. I point out that it has been held by the Court of Appeals that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

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

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

Ms. Gertrude M. Prater
Mr. Rudolph L. Eissing
February 24, 1999
Page -3-

already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency']" (id. at 250).

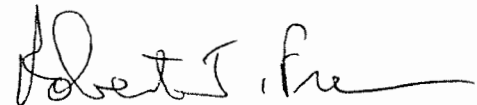
In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping system. In Konigsberg, it appears that the agency was able to locate the records on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

While I am unfamiliar with the recordkeeping systems of the Town, to extent that the records sought can be located with reasonable effort, I believe that the request would have met the requirement of reasonably describing the records. On the other hand, if the records are not maintained in a manner that permits their retrieval except by reviewing perhaps hundreds or even thousands of records individually in an effort to locate those falling within the scope of the request, to that extent, the request would not in my opinion meet the standard of reasonably describing the records. Further, in the context of one request, the request for all records "relating to the Baraba's" at a certain address, a real question involves, very simply, where Town officials might begin to look for records. It is possible that records falling within the scope of the request may be maintained in several locations by a variety of units within Town, and that those units maintain their records by means of different filing and retrieval methods. If an office maintains all of its records regarding violations, since the beginning of its existence, in a single file, it may be a simple task to locate the records. If, however, records are not maintained by subject, but rather are kept chronologically, locating the records might involve a search, in essence, for the needle in the haystack. Based on the holding by the State's highest court, an agency is not required to engage in that kind of effort. Similarly, records relating a certain address might involve code enforcement, police or fire calls, water or sewer problems, assessment, zoning, junked cars, garage sales, deaths or any number of subjects.

It is suggested that it may be worthwhile to resubmit requests that include sufficient detail to enable Town officials to locate and identify the records of your interest.

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 Board
Hon. Chris Martens, Supervisor



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11326

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Joseph J. Seymour
Alexander F. Treadwell

February 24, 1999

Executive Director

Robert J. Freeman

Mr. Jack 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 February 8 and the materials attached to it.

According to your letter, the Board of Education of the Port Jervis City School District received an anonymous donation of software, and you have asked whether the District is required to disclose the identity of the donor.

Assuming that a record is maintained by the District identifying the donor, such a record would fall within the coverage of the Freedom of Information Law. As a general matter, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. The only ground for denial of relevance in my opinion would be §87(2)(b), which permits an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." Further, §89(2)(b) includes a series of examples of unwarranted invasions of personal privacy.

From my perspective, if the donation was made by a natural person, the District could likely deny access to his or her identity. One of the examples of unwarranted invasions of personal privacy, §89(2)(b)(iv), pertains to:

"disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting it or maintaining it..."

Disclosure of the identity of the donor might result in personal or economic hardship to that person. Moreover, in my view, his or her identity would be irrelevant to the ordinary work of the District.

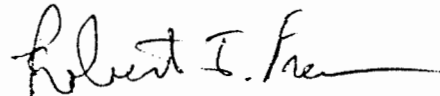
Mr. Jack McAndrew
February 24, 1999
Page -2-

Consequently, it would appear that identifying details pertaining to a natural person who made the donation could be withheld.

If the donation was made by a business or other similar organization, rather than a natural person, I believe that the identity of that entity would be accessible. In short, the exception pertaining to personal privacy is applicable only to records identifying natural persons; it would not apply to records relating to entities.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Patrick Hamill



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-A0-11327

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Alexander F. Treadwell

February 24, 1999

Executive Director

Robert J. Freeman

Mr. Terrence Sinkler
97-B-1493
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. Sinkler:

I have received your letter of January 30 and the materials attached to it. You have sought advice concerning your ability to obtain certain records from the Division of Parole.

According to your letter, the key prosecution witness in your case "is on parole for life." Although he apparently testified that he had been given immunity by the investigating officer and the prosecuting attorney, the police and the District Attorney have denied that any promises or considerations were given. Although the Division of Parole appears to have records concerning a deal or agreement with that person, it has denied access.

In this regard, I offer the following comments.

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

From my perspective, if indeed the Division of Parole maintains records indicating a deal or an agreement, for example, with the individual in question, it is likely that the denial of access would be proper. Section 87(2)(b) permits an agency to withhold records when disclosure would constitute "an unwarranted invasion of personal privacy." Section 87(2)(e)(iii) permits an agency to withhold records compiled for law enforcement purposes when disclosure would "identify a confidential source or disclose confidential information relating to a criminal investigation." Additionally, §87(2)(f), as you are aware, authorizes an agency to withhold records when disclosure would "endanger the life or safety of any person."

Mr. Terrence Sinkler
February 24, 1999
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If the record or records sought exists, each of the three exceptions cited above could serve as a justification for denial of access. While an agency has the burden of defending secrecy and demonstrating that records that have been withheld clearly fall within the scope of one or more of the grounds for denial [see §89(4)(b)], I note that in the case of the assertion of §87(2)(f), the standard developed by the courts is less stringent. In citing §87(2)(f), it has been found that:

"This provision of the statute permits nondisclosure of information if it would pose a danger to the life or safety of any person. We reject petitioner's assertion that respondents are required to prove that a danger to a person's life or safety will occur if the information is made public (see, *Matter of Nalo v. Sullivan*, 125 AD2d 311, 312, *lv denied* 69 NY2d 612). Rather, there need only be a possibility that such information would endanger the lives or safety of individuals...."[*Stronza v. Hoke*, 148 AD2d 900,901 (1989)].

The principle enunciated in Stronza has appeared in several other decisions [see Ruberti, Girvin & Ferlazzo v. NYS Division of the State Police, 641 NYS 2d 411, 218 AD2d 494 (1996), Connolly v. New York Guard, 572 NYS 2d 443, 175 AD 2d 372 (1991) and McDermott v. Lippman, Supreme Court, New York County, NYLJ, January 4, 1994.] Additionally, it was determined in American Broadcasting Companies, Inc. v. Siebert that when disclosure would "expose applicants and their families to danger to life or safety", §87(2)(f) may properly be asserted [442 NYS2d 855, 859 (1981)].

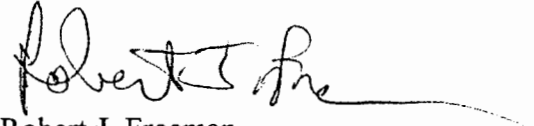
Second, on the basis of the correspondence, it appears that you are suggesting that since various records were submitted into evidence during your trial that the records in question must be available due to those prior disclosures. While it is true that records made available by means of public judicial proceedings must be disclosed under the Freedom of Information Law [see Moore v. Santucci, 543 NYS 2d 103, 151 Ad 2d 677 (1989)], it does not necessarily follow that records relating to testimony or other information publicly disclosed must be made available. Frequently records maintained by law enforcement agencies and prosecutors relating to information disclosed during public proceedings may fall within one or more of the grounds for denial appearing in the Freedom of Information Law.

Lastly, in your request of January 30 to the Division of Parole, you asked for "a list specifically identifying the dates of any and all parole violation hearings held against James Hackett, and the name and business address of the person or persons who recorded those proceedings." Here I point out that the Freedom of Information Law pertains to existing records and that §89(3) states in part that an agency is not required to create a record in response to a request. If no list containing the information sought has been prepared, the Division would not be obliged to create a new record containing that information on your behalf.

Mr. Terrence Sinkler
February 24, 1999
Page -3-

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Terrence X. Tracy
David Molik

FOIL-AO - 11328

From: Robert Freeman
To: Internet:felleman@esf.edu
Date: 2/24/99 8:15AM
Subject: Endangered species and Archaeological sites

Dear Professor Felleman:

I have received your email of February 19 concerning the treatment under the Freedom of Information Law of records indicating the locations of endangered species and archaeological sites.

In this regard, as you may be aware, the Freedom of Information Law provides as a general matter that all agency records are available, unless they fall within an exception to rights of access. The first ground for denial pertains to records that "are specifically exempted from disclosure by state or federal statute."

With respect to the locations of the habitats of endangered flora or fauna, the NYS Environmental Conservation Law, section 3-0301((2)(r) gives the Commissioner of the Department of Environmental Conservation the authority to withhold records indicating those locations "where the destruction of such habitat or the removal of such species therefrom would impair their ability to survive provided, however, that the commissioner may, in his descretion permit access to such inspection to persons engaged in legitimate scientific and academic research."

With regard to records indicating the locations of archaeological sites, there is no state statute dealing with the issue. However, section 427.8 of the regulations of the Office of Parks, Recreation and Historic Preservation provides restrictions on access. Further, a federal statute provides confidentiality under certain circumstances. See 16 USC section 470hh. Also potentially relevant is 16 USC section 470w-3 concerning the confidentiality of the location of sensitive historic resources. I obtained the citations to those federal statutes from the FOI office at the US Department of the Interior and can fax their contents to you if you need them.

I hope that I have been of assistance.



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIC-40-11329

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Alexander F. Treadwell

Executive Director

Robert J. Freeman

February 25, 1999

Mr. Kenneth P. Hatfield
97-B-1779 E-1/44
Bare Hill Correctional Facility
Caller Box 20 Cady Road
Malone, NY 12953-0020

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

Dear Mr. Hatfield:

I have received your letter of February 9 in which you sought guidance concerning the refusal of several entities in Niagara County to respond to your requests for records.

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.

Mr. Kenneth P. Hatfield
February 25, 1999
Page -2-

As the Freedom of Information Law applies to agencies, that statute 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..."

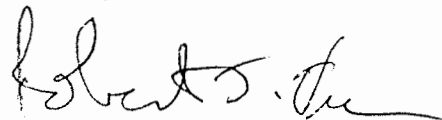
If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively 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-AD-11330

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Executive Director

Robert J. Freeman

February 25, 1999

Mr. Eric Page
95-A-1200
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. Page:

I have received your letter of February 9 in which you sought the "intervention" of this office in relation to a request for records directed to the Office of the Schenectady County District Attorney.

In this regard, it is noted at the outset that the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. The Committee is not empowered to "intervene" in the legal sense. Nevertheless, in an effort to enhance your understanding of the matter, I offer the following comments.

First, as I interpret the correspondence, your request for records was rejected because the records sought were made available to your attorney. 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

Mr. Eric Page
February 25, 1999
Page -2-

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).

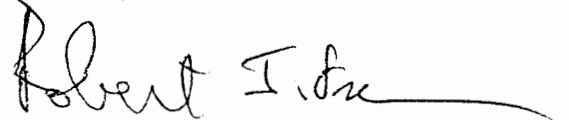
In view of the foregoing, it is suggested that you contact your attorney to determine whether he or she continues to possess the record. If the attorney no longer maintains the record, he or she should prepare an affidavit so stating that can be submitted to the office of the district attorney.

Second, you referred to the decision rendered in Pennington v. McMahon [234 AD2d 624 (1998)] as a means of contending that the District Attorney must maintain an index of the records kept in the file of your case. That decision related in part to an inventory of items found in a vehicle; it does not suggest, in my opinion, that an agency must maintain or prepare an index identifying each and every record contained within a file. If no such index exists, the Office of the District Attorney would not be required to prepare such a record on your behalf. If an index has been prepared, I believe that it would be available to the extent required by the Freedom of Information Law.

Similarly, since you referred to §87(3)(c) of the Freedom of Information Law, that provision requires an agency to maintain a reasonably detailed list, by subject matter, of the kinds of records that it maintains. The subject matter list is not required to consist of index of each and every record maintained by an agency; rather, it is a categorization of the kinds of records maintained by an agency. Further, the statute does not require the maintenance of a subject matter list in relation to individual cases.

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: Robert M. Carney, District Attorney



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL AO 11331

Committee Members

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Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

February 25, 1999

Executive Director

Robert J. Freeman

Mr. Jamal Sharif Fowler
91-A-5610
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. Fowler:

I have received your letter of February 8 and have reviewed your request for records of the New York City Police Department.

In this regard, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Since I am unaware of the contents of the records in which you are interested or the effects of their disclosure, I cannot offer specific guidance. Nevertheless, the following paragraphs will review the provisions that may be significant in determining rights of access to the records in question.

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)]. 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.

Mr. Jamal Sharif Fowler
February 25, 1999
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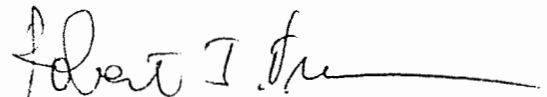
Lastly, in a decision concerning a request for records maintained by the office of a district attorney that would ordinarily be exempted from disclosure under the Freedom of Information Law, it was held that "once the statements have been used in open court, they have lost their cloak of confidentiality 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



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

7011-A0-11332

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February 25, 1999

Executive Director

Robert J. Freeman

Mr. Stewart S. Lilker
c/o Donart
302 Guy Lombardo Avenue
Freeport, NY 11520

Dear Mr. Lilker:

I have received your letter of February 10 and the materials attached to it. You have asked whether the Village of Freeport has forwarded records to this office in accordance with §89(4)(a) of the Freedom of Information Law.

The cited provision states in relevant part that:

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

Based on a search of our files regarding appeals involving the time period to which you referred, this office has not received copies of appeals or determinations thereon from the Village of Freeport.

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-Ad-11333

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February 26, 1999

Executive Director

Robert J. Freeman

Gustave J. DeTraglia, Jr., Esq.
Attorney and Counselor at Law
1425 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.

Dear Mr. DeTraglia:

As you are aware, I have received your letter of February 11. In your capacity as attorney for the Town of New Hartford, you raised a series of issue relating to a request for records received by the Town from a law firm. While you expressed the view that certain aspects of the records should be disclosed, you contended that "the name of the law firm and their address and phone number should be redacted for a combination of privacy and confidentiality principles." You added that the town is the client of the law firm.

In addition to the issue of the disclosure of the name and address of the law firm, you indicated that the Town Clerk contacted me concerning the matter without your knowledge and that she did not raise the issue of attorney-client privilege. Further, you asked whether the Town can "raise issues of harassment and abuse of the law" when requests "seem to have no legitimate purpose other than curiosity and/or political motivations."

In this regard, I offer the following comments.

First, I believe that the Town Clerk is the records access officer designated in accordance with the regulations promulgated by the Committee on Open Government (21 NYCRR §1401.2). In that capacity, she has the duty of coordinating the Town's responses to requests for records. Although she may consult with you prior to granting or denying access to records or contacting me, there is no obligation to do so pursuant to the Freedom of Information Law or the regulations promulgated thereunder.

Second, although I do not recall the particular conversation between the clerk and myself, it is clear in my opinion that the identity of the law firm, unlike the legal advice rendered to a client, would fall within the scope of the attorney-client privilege.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 indeed records fall within the coverage of the attorney-client privilege, I believe that they would be "specifically exempted from disclosure pursuant to state...statute" in accordance with §87(2)(a). Nevertheless, a judicial decision involving the assertion of the privilege under the Freedom of Information Law indicates that a disclosure of the name, address and telephone number of a law firm providing legal services to a municipality would not be privileged.

That decision, Orange County Publications, Inc. v. County of Orange [637 NYS 2d 596 (1995)], involved access to billing statements submitted to a municipality by a law firm. 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.)"

Based on the foregoing, those portions of a record identifying a law firm by name, address and telephone number would not, in my view, constitute a privileged communication.

With respect to privacy, §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." From my perspective, it is clear that the privacy exception is applicable to natural persons, not to entities, such as law firms. Moreover, 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). 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 information in question would be accessible.

Lastly, I know of no decision that deals with the use of the Freedom of Information Law for purposes of curiosity or political advantage in a manner that could be characterized as harassing or abusive. In my opinion, while requests made based on political motivation may be viewed as abusive from a government official's point of view, it may be considered as an assertion of rights or an attempt to ensure accountability from the point of view of others. When records are accessible under the Freedom of Information Law, it has been held that they should be made equally available to any

Gustave J. DeTraglia, Jr., Esq.
February 26, 1999
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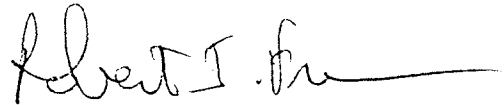
person, regardless of one's status, interest or the intended use of the records [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Moreover, the Court of Appeals has held that:

"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 curiosity or political gain, 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.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Gail Young, Town Clerk



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11334

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February 26, 1999

Ms. Edna Paskoff

[REDACTED]

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

Dear Ms. Paskoff:

I have received your letter of February 16. You wrote that you serve as a member of the Board of Trustees of the Elmont Public Library. Having requested oaths of office pertaining to Library Trustees from the Director of the Library, you were informed that other than your oath of office, the records were not maintained by the Library or any other agency. Following other attempts, the Director phoned to indicate "that she had been 'mistaken' when she reported that there was only one oath of office on file" and said that two other written oaths had been filed.

You wrote that you "doubt the veracity of the Director's statement to [you] regarding the existence of the other written oaths at the time [you] requested them." As such, you asked "[w]hat, if anything, is [your] recourse, now that [you] have found out that [you] have been denied access to records which [you were] entitle to inspect." Conversely, you asked what your recourse might be "if records that exist are proven to be false."

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)].

Ms. Edna Paskoff
February 26, 1999
Page -2-

In addition, while I am not suggesting that it would apply, I note that §89(8) of the Freedom of Information Law pertains to "unlawful prevention of public access to records" and that §240.65 of the Penal Law, which states that:

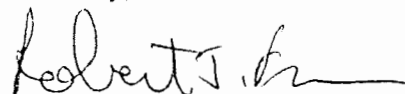
"A person is guilty of unlawful prevention of public access to records when, with intent to prevent the public inspection of a record pursuant to article six of the public officers law, he willfully conceals or destroys any such record."

From my perspective, the preceding may be applicable in two circumstances: first, when an agency employee receives a request for a record and indicates that the agency does not maintain the record even though he or she knows that the agency does maintain the record; or second, when an agency employee destroys a record following a request for that record in order to prevent public disclosure of the record.

Your remaining question does not deal directly with the Freedom of Information Law. Pertinent may be other provisions of law, such as those in the Penal Law dealing with the filing of a false instrument.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Library Director



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-A - 11335

Committee Members

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Executive Director

Robert J. Freeman

February 26, 1999

Ms. Mona Graves
88-G-0305
P.O. Box 1000
Bedfordhills, 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 February 9. According to your letter, following a request for records made to the Office of the Queens County District Attorney, you were informed that the records are lost. You questioned whether losing the records is a frequent occurrence and whether there may be another source of the records that you are seeking.

In this regard, I am unaware of the number of requests that are made in comparison to the number of situations in which the records cannot be found. I would conjecture that the loss of records is some what rare.

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)].

Ms. Mona Graves
February 26, 1999
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While I am unfamiliar with the specific nature of the records sought, frequently copies are maintained by a police department or a court. In the context of your inquiry, if you believe that the records may be maintained by the New York City Police Department, a request may be made to the Records Access Officer, Room 110C, One Police Plaza, New York, New York 10038. Although the courts are not subject to the Freedom of Information Law, court records are generally available under other statutes (see e.g., Judiciary Law, §255). If you believe that the records may be maintained by the court, a request may be made to the court clerk, citing an applicable provision of law as the basis for the request.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and extends across the width of the page.

Robert J. Freeman
Executive Director

RJF:tt



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL AO - 11336

Committee Members

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

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Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

February 26, 1999

Executive Director

Robert J. Freeman

Ms. Ralene Adler

[REDACTED]
[REDACTED]

Dear Ms. Adler:

I have received your letter of January 31, which reached this office on February 18. You have questioned the use of records identifying users of the Great Neck Library in its election procedures.

In this regard, it does not appear that the Freedom of Information Law is pertinent or controlling. Rather, I believe that statutory direction is provided by §4509 of the Civil Practice Law and Rules, which states that:

“Library records, which contain names or other personally identifying details regarding the users of public, free association, school, college and university libraries and library systems of this state, including but not limited to records related to the circulation of library materials, computer database searches, interlibrary loan transactions, reference queries, requests for photocopies of library materials, title reserve requests, or the use of audio-visual materials, films or records, shall be confidential and shall not be disclosed except that such records may be disclosed to the extent necessary for the proper operation of such library and shall be disclosed upon request or consent of the user or pursuant to subpoena, court order or where otherwise required by statute.”

As I understand the foregoing, the Library is prohibited from disclosing records that contain personally identifying details regarding its users. If its election procedures are inconsistent with the requirements of §4509, they should, in my view, be altered to comply with law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 11337

Committee Members

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Executive Director

Robert J. Freeman

February 26, 1999

Mr. Carlos Yepes Rodas
95-A-5856
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. Rodas:

I have received your letter of February 9 in which you sought "input or advice" concerning a request for records of the New York City Police Department. One aspect of the request involves records relating to your indictment in 1994. Another involves records "referring to or relating to any investigation conducted by law enforcement personnel into alleged conspiracies [of any kind] of defendant's from 1990 before or until trial."

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

With regard to other elements of the request, a key issue in my opinion 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

Mr. Carlos Yepes Rodas

February 26, 1999

Page -6-

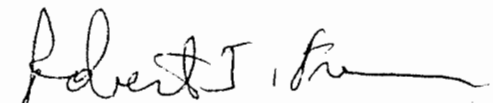
Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file 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. Further, in the context of the request, a real question involves, very simply, where Department officials might begin to look for records. It is possible that records falling within the scope of the request may be maintained in several locations by a variety of units within Department, and that those units maintain their records by means of different filing and retrieval methods. If an office maintains all of its records in a single file, it may be a simple task to locate the records. If, however, records are maintained in a different 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.

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 - 11338

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February 26, 1999

Executive Director

Robert J. Freeman

Mr. Michael Jones
85-A-1962
Wallkill Correctional Facility
Box G
Wallkill, NY 12589-0286

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

Dear Mr. Jones:

I have received your letter of February 15. You referred to an opinion addressed to you on February 3 and your ensuing "revised request" in which you sought "a listing of all violent felony offenders that have appeared each month, at Wallkill Correctional Facility, between the years of January, 1995 to December of 1998 and have been placed on hold-status--effectively denying parole."

In this regard, I reiterate the point offered in the earlier opinion: the Freedom of Information Law pertains to existing records, and §89(3) of that statute indicates that an agency is not required to prepare a record in response to a request.

If the facility to which your request was made maintains a "listing" containing the information sought, it would be obliged to disclose its contents to the extent required by the Freedom of Information Law. If no such listing exists, there would be no obligations to create such a list on your behalf.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Mark Shepard
FOIL Officer, Wallkill Correctional Facility



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11339

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Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

February 26, 1999

Ms. Dolly Pratt
Concerned Homeowners
Association
P.O. Box 080144
Brooklyn, NY 11208-0144

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

Dear Ms. Pratt:

As you are aware, your letter of February 2 addressed to the Attorney General has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State, is authorized to provide advice concerning the Freedom of Information Law. In brief, you complained that your requests for records sent to Region 2 of the Department of Environmental Conservation have been ignored.

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

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

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

Ms. Dolly Pratt
February 26, 1999
Page -2-

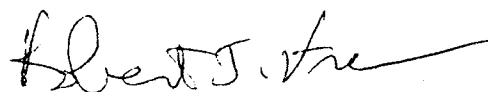
"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial,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

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

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Records Access Officer, Region 2
Ruth Earl



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIA-AO / 11340

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Alexander F. Treadwell

February 26, 1999

Executive Director

Robert J. Freeman

Mr. Steve L. Fornal

[REDACTED]
[REDACTED]

Dear Mr. Fornal:

I have received your letter of February 11. You referred to the opinion addressed to you on January 29 and indicated that your comment concerning free speech "was not about speaking out at public meetings. But, rather, the protected right for one to whisper in their friend's ear during a public meeting." You have asked whether the ability to whisper in one's ear is a "protected right."

From my perspective, the issue does not involve the Open Meetings Law but rather the authority of a public body to govern its proceedings by means of the rules that it adopts. I note that it has been held that rules involving conduct at meetings must be reasonable [see e.g., People v. Ystueta, 99 Misc. 2d 1105, 418 NYS 2d 508 (1979), Mitchell v. Board of Education of the Garden City Union Free School District, 113 AD2d 924 91985), and Peloquin v. Arsenault, 616 NYS2d 716 (1994)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL - NO - 11341

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February 26, 1999

Executive Director

Robert J. Freeman

Ms. Brenda Shepard

[REDACTED]

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

Dear Ms. Shepard:

I have received your letter of February 17. You have questioned the propriety of "restrictions" on your ability to gain access to records of the Barker Central School District.

Having reviewed the "restrictions" set forth in a letter addressed to you by the District's attorney, I do not believe that they are inconsistent with the Freedom of Information Law or the procedural regulations promulgated by the Committee on Open Government (21 NYCRR part 1401).

I note, however, that the attorney indicated that you could review the records only for a period of one hour during a particular day. In this regard, §1401.4 of the Committee's regulations, entitled "Hours for public inspection", states that:

"(a) Each agency shall accept requests for public access to records and produce records during all hours they are regularly open for business."

Relevant to your inquiry and the foregoing is a decision rendered by the Appellate Division. Among the issues was the validity of a similar limitation regarding the time permitted to inspect records established by a village pursuant to regulation. The Court held that the village was required to enable the public to inspect records during its regular business hours, stating that:

"...to the extent that Regulation 6 has been interpreted as permitting the Village Clerk to limit the hours during which public documents can be inspected to a period of time less than the business hours of the Clerk's office, it is violative of the Freedom of Information Law..."
[Murtha v. Leonard, 620 NYS 2d 101 (1994), 210 AD 2d 411].

Ms. Brenda Shepard

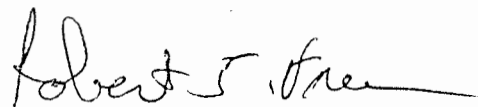
February 26, 1999

Page -2-

Lastly, having reviewed your request as published in a news article, I point out 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. Further, §89(3) states in part that agency need not create a record in response to a request. 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 the future, rather than seeking information by asking questions, it is suggested that you request existing records. For instance, instead of asking what the rate of pay might be for a person or a law firm, I recommend that you request records indicating the rate of pay. In several instances, you requested "lists" or "totals." In short, if no list or total is maintained, the District would not be obliged to prepare new records on your behalf.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman". The signature is fluid and cursive, with a long horizontal stroke at the end.

Robert J. Freeman
Executive Director

RJF:jm

cc: Judith P. Staples, Ed.D.
Jerome D. Schad



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

Oml. 20-3001
FOIL 20-11342

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February 26, 1999

Ms. Joan Eustace-Reeverts

[REDACTED]

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

Dear Ms. Eustace-Reeverts:

I have received your letter of February 16 in which you raised a series of questions concerning the disclosure of information by Erie Community College.

The initial area of inquiry involves your efforts in obtaining notes of interviews pertaining to you. In this regard, 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)].

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

Relevant with respect to access to the notes is §87 (2)(g), which states that an agency may withhold records that:

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

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

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

In short, insofar as the notes consist of factual information, I believe that they must be disclosed; insofar as they include the interviewer's opinions or recommendations, I believe they may be withheld.

A second area of inquiry pertains to the contents of minutes of meetings of the Executive Committee of the Board of Trustees. In this regard, §106(1) of the Open Meetings Law provides direction concerning the contents of minutes of open meetings and states that:

"Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon."

In a decision that may be pertinent to the matter, Mitzner v. Goshen Central School District Board of Education [Supreme Court, Orange County, April 15, 1993], the case involved a series of complaints that were reviewed by the School Board president, and the minutes of the Board meeting merely stated that "the Board hereby ratifies the action of the President in signing and issuing eight Determinations in regard to complaints received from Mr. Bernard Mitzner." The court held that "these bare-bones resolutions do not qualify as a record or summary of the final determination as required" by §106 of the Open Meetings Law. As such, the court found that the failure to indicate the nature of the determination of the complaints was inadequate. In the context of your inquiry, I believe that, in order to comply with the Open Meetings Law and to be consistent with the thrust of the holding in Mitzner, minutes must indicate in some manner the precise nature of the Board's action.

With respect to minutes of executive sessions, the remainder of §106 of the Open Meetings Law provides 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."

I point out that, as a general rule, a public body may take action during a properly convened executive session [see Open Meetings Law, §105(1)]. If action is taken during an executive session, minutes reflective of the action, the date and the vote must be recorded in minutes pursuant to §106(2) of the Law. If no action is taken, there is no requirement that minutes of the executive session be prepared.

It is noted that minutes of executive sessions need not include information that may be withheld under the Freedom of Information Law. From my perspective, even when a public body makes a final determination during an executive session, that determination will, in most instances, be public. For example, although a discussion to hire or fire a particular employee could clearly be discussed during an executive session [see Open Meetings Law, §105(1)(f), a determination to hire or fire that person would be recorded in minutes and would be available to the public under the Freedom of Information Law. On other hand, if a public body votes to initiate a disciplinary proceeding against a public employee, minutes reflective of its action would not have include reference to or identify the person, for the Freedom of Information Law authorizes an agency to withhold records to the extent that disclosure would result in an unwarranted personal privacy [see Freedom of Information Law, §87(2)(b)].

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)], 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).

Lastly, you expressed an understanding that :

"if an employee is going to be discussed in 'executive session' that the employee must be given 48 hours advance notice, and the employee has the right to move it to an 'open session' and that the decision is strictly up to the employee not the employer, and the employee has a right to counsel."

I believe that your understanding is inaccurate. There is nothing in the open Meetings Law that requires that an employee be given notice that he or she will be discussed during an executive

Ms. Joan Eustace-Reeverts

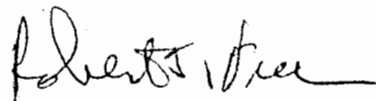
February 26, 1999

Page -5-

session. Further, the subject of the discussion has no control over whether the discussion is held in public or in private based on the provision of the Open Meetings Law.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman". The signature is fluid and cursive, with a long horizontal stroke at the end.

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Trustees
Darley Willis



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3000
FOIL-AO-11343

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February 26, 1999

Executive Director

Robert J. Freeman

Ms. Georgia Svolos
Coalition for Creative Solutions
N1 Kissam Road
Peekskill, NY 10566

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

Dear Ms. Svolos:

I have received your letter of February 12 in which you sought an advisory opinion concerning what you characterized as "certain abuses of open government" in the City of Peekskill.

You referred initially to a situation in which an individual "was denied access to the City Council's working meeting, and when he pressed his right to attend, the meeting went into executive session." In this regard, there is no legal distinction between a "working meeting" and a formal or official meeting. By way of background, it is noted that the definition of "meeting" has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

I point out that the decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that so-called "work sessions" and similar gatherings held for the purpose of discussion, but without an intent to take action, fell outside the scope of the Open Meetings Law. In discussing the issue, the Appellate Division, whose determination was unanimously affirmed by the Court of Appeals, stated that:

"We believe that the Legislature intended to include more than the mere formal act of voting or the formal execution of an official

document. Every step of the decision-making process, including the decision itself, is a necessary preliminary to formal action. Formal acts have always been matters of public record and the public has always been made aware of how its officials have voted on an issue. There would be no need for this law if this was all the Legislature intended. Obviously, every thought, as well as every affirmative act of a public official as it relates to and is within the scope of one's official duties is a matter of public concern. It is the entire decision-making process that the Legislature intended to affect by the enactment of this statute" (60 AD 2d 409, 415).

The court also dealt with the characterization of meetings as "informal," stating that:

"The word 'formal' is defined merely as 'following or according with established form, custom, or rule' (Webster's Third New Int. Dictionary). We believe that it was inserted to safeguard the rights of members of a public body to engage in ordinary social transactions, but not to permit the use of this safeguard as a vehicle by which it precludes the application of the law to gatherings which have as their true purpose the discussion of the business of a public body" (*id.*).

Based upon the direction given by the courts, if a majority of a public body gathers to discuss public business, any such gathering, in my opinion, would ordinarily constitute a "meeting" subject to the Open Meetings Law that must be preceded by notice given in accordance with §104 of the Law.

Further, a public body cannot conduct an executive session to discuss the subject of its choice; §105(1) of the Open Meetings Law specifies and limits the subjects that may properly be considered during an executive session.

Next, you referred to situations in which you sought to attend a "scheduled work session meeting" but "found that it had been held at an earlier time." Since a "working meeting" is subject to the Open Meetings Law, it must be preceded by notice. Section 104 of that statute provides that:

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

2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.

3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

Stated differently, if a meeting is scheduled at least a week in advance, notice of the time and place must be given to the news media and to the public by means of posting in one or more designated public locations, not less than seventy-two hours prior to the meeting. If a meeting is scheduled less than a week in advance, again, notice of the time and place must be given to the news media and posted in the same manner as described above, "to the extent practicable", at a reasonable time prior to the meeting. Although, the Open Meetings Law does not make reference to "unscheduled", "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.

I note the judicial interpretation of the Open Meetings Law suggests that the propriety of scheduling a meeting less than a week in advance is dependent upon the actual need to do so. As stated in Previdi v. Hirsch:

"Whether abbreviated notice is 'practicable' or 'reasonable' in a given case depends on the necessity for same. Here, respondents virtually concede a lack of urgency: They deny petitioner's characterization of the session as an 'emergency' and maintain nothing of substance was transacted at the meeting except to discuss the status of litigation and to authorize, pro forma, their insurance carrier's involvement in negotiations. It is manifest then that the executive session could easily have been scheduled for another date with only minimum delay. In that event respondents could even have provided the more extensive notice required by POL §104(1). Only respondent's choice in scheduling prevented this result.

"Moreover, given the short notice provided by respondents, it should have been apparent that the posting of a single notice in the School District offices would hardly serve to apprise the public that an executive session was being called...

"In White v. Battaglia, 79 A.D. 2d 880, 881, 434 N.Y.S.2d 637, lv. to app. den. 53 N.Y.2d 603, 439 N.Y.S.2d 1027, 421 N.E.2d 854, the Court condemned an almost identical method of notice as one at bar:

"Fay Powell, then president of the board, began contacting board members at 4:00 p.m. on June 27 to ask them to attend a meeting at 7:30 that evening at the central office, which was not the usual meeting date or place. The only notice given to the public was one typewritten announcement posted on the central office bulletin board...Special Term could find on this record that appellants violated the...Public Officers Law...in that notice was not given 'to the extent

practicable, to the news media' nor was it 'conspicuously posted in one or more designated public locations' at a reasonable time 'prior thereto' (emphasis added)" [524 NYS 2d 643, 645 (1988)].

Based upon the foregoing, absent an emergency or urgency, the Court in Previdi suggested that it would be unreasonable to conduct meetings on short notice, unless there is some necessity to do so.

You indicated that you have also experienced difficulty in obtaining records, particularly crime statistics and those relating to the renovation of a named facility. Specifically, you wrote that:

"We have been trying for three months to obtain via the filing of an FOI, the original application from the Peekskill Housing Authority for money from HUD for installation of surveillance cameras. We have been sent from the Housing Authority to City Hall and from City Hall back to the Housing Authority with detours to the Police Department, with no visible result."

In my view, both the City and the Authority are required to comply with the Freedom of Information Law, and each has an obligation to respond to requests for records in their custody. I point out by way of background that the Freedom of Information Law is applicable to agency records and that §86(3) of the Law defines the term "agency" to include:

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

The Kiley Center is operated by the City of Peekskill Civic Center Authority, which, according to §2073 of the Public Authorities Law, is a public benefit corporation. Since a public benefit corporation is an "agency" subject to the Freedom of Information Law, it would be required to comply with that statute.

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..."

Ms. Georgia Svolos
February 26, 1999
Page -5-

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

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

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

Lastly, you complained concerning "the continual refusal on the part of City government to place items on its agenda that [you] have asked them to consider..." In short, I know of no law that would require the City to place items on its agenda or to consider issues pursuant to your request that it do so.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: City Council, City of Peekskill
Board of Directors, Peekskill Civic Authority



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI L. AO - 11344

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Alexander F. Treadwell

February 26, 1999

Executive Director

Robert J. Freeman

Mr. Charles Wright
80-A-2724
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. Wright:

I have received your letter of February 14. You have questioned the status of the Legal Aid Society under the Freedom of Information Law.

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

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

Therefore, in general, the Freedom of Information Law is applicable to entities of state and local government.

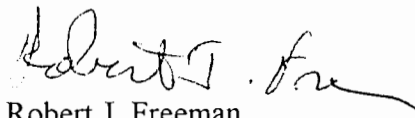
It is my understanding that there are a variety of entities within New York that use the name "Legal Aid Society". Some are a part of the federal Legal Services Corporation, some may be private not-for profit corporations, and some may be parts of units of local government. While legal aid societies which are agencies of local government may be subject to the Freedom of Information Law, most are not "agencies" as that term is defined in the Freedom of Information Law and, as such, are not subject to that statute.

Mr. Charles Wright
February 26, 1999
Page -2-

If you are referring to the Legal Aid Society in New York City, I am not fully familiar with its status. However, I believe that it is a corporate entity separate and distinct from government, and that it is not an "agency" subject to the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman".

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI(A) - 11345

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Executive Director

February 26, 1999

Robert J. Freeman

Hon. Robert Cunningham
Supervisor
Town of Deerpark
Drawer A
Huguenot, NY 12746

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

Dear Supervisor Cunningham:

I have received your letter of February 17 and the correspondence attached to it, a letter addressed to you by the Orange County Commissioner of Personnel. The Town Board has informed you that the letter is "confidential" and should not be released.

The first paragraph of the letter states as follows:

"It has been discovered that Mr. Romanino Colandrea fails to meet the minimally required qualifications for service in the title of Police Chief (A). As such, he must vacate the position for which was nominated by the Town of Deerpark, and must do so forthwith."

The basis for the conclusion involves a recitation in the next paragraph consisting largely of a review of positions previously held by Mr. Colandrea with other municipalities and the periods of time in which those positions were held.

From my perspective, the letter in question is accessible to the public under the Freedom of Information Law. In this regard I offer the following comments.

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

Pertinent to the matter is §87 (2)(g). While that provision potentially serves as a basis for a denial of access, due to its structure, it often requires disclosure. Specifically, the cited provision enables an agency to withhold records that:

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

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

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

The first paragraph in my view clearly indicates that the letter serves as a final determination that would be available under §87 (2)(g)(iii). The second paragraph indicating positions held and dates of employment consists of factual information available under §87 (2)(g)(i).

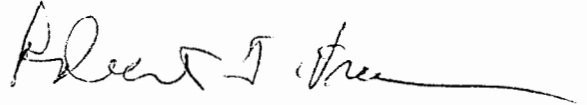
Also pertinent is which authorizes agencies to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." While the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding 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)].

A determination involving the employment or termination of employment be a governmental entity would be relevant to that person's duties, as well as those of the municipality. Additionally, the fact of one's public employment, that person's title, salary and dates of attendance are, based on the language of the Freedom of Information Law and its judicial interpretation, accessible to the public [see Freedom of Information Law, §87(3)(b); also see Capital Newspapers, *supra*].

Hon. Robert Cunningham
February 26, 1999
Page -3-

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:tt.



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI-10-11346

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Alexander F. Treadwell

Executive Director

March 1, 1999

Robert J. Freeman

Mr. Waki Milling
95-A-1840
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. Milling:

I have received your undated letter, which reached this office on February 19. You have asked how you might obtain statistics from the Division of Parole.

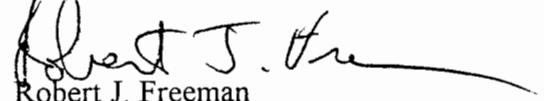
In this regard, a request for records made under the Freedom of Information Law should be addressed to the "records access officer" at the agency that maintains the records of your interest. The records access officer has the duty of coordinating an agency's response to requests. To seek records from the Division of Parole, a request may be directed to David Molik, Records Access Officer, NYS Division of Parole, 97 Central Avenue, Albany, NY 12206.

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 new record in response to a request. Therefore, if the Division of Parole has not created statistics involving the information of your interest, it would not be required to prepare or tabulate new statistical information on your behalf in order to satisfy your request. I have no personal knowledge concerning the nature of any statistics that have been prepared by the Division of Parole concerning inmates released since 1994. It is suggested a request pertain to statistics prepared since 1994 involving the areas of your interest.

Mr. Waki Milling
March 1, 1999
Page -2-

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:tt
cc: David Molik



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIA No 11347

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Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

March 1, 1999

Mr. Steve Evans
96-A-2799
Coxsackie Correctional Facility
P.O. Box 999
Coxsackie, NY 12051-0999

Dear Mr. Evans:

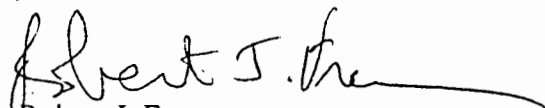
I have received your letter of February 18 in which you appealed a denial of your request for records, which was appealed to Susan Petito, the Records Access Appeals Officer for the New York City Police Department.

In this regard, if an agency has denied an appeal pursuant to §89(4)(a) of the Freedom of Information Law, there is no additional appeal. I note, too, that the Committee on Open Government is authorized to provide advice concerning that statute; the Committee is not empowered to determine appeals or otherwise compel an agency to grant or deny access to records.

When an agency denies an appeal in writing in accordance with §89(4)(a), the applicant may seek judicial review of the denial within four months by initiating a proceeding under Article 78 of the Civil Practice Law and Rules. Such a proceeding may also be initiated if the agency fails to determine the appeal within ten business days of its receipt of the appeal as required by law [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:tt

cc: Susan Petito



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI-AO-11348

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

March 1, 1999

Ms. Halyna Barannik
Director
West Hurley Public Library
42 Clover Street
West Hurley, NY 12491

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

Dear Ms. Barannik:

I have received your letter of February 19 in which you sought my views concerning a situation that has arisen in relation to the West Hurley Public Library.

According to your letter, a member of the Library Board of Trustees "removed 85 public surveys from the library when the library was closed and refused to return them when [you] twice recalled them 6 weeks later, claiming that he needed them for a committee on long-range planning." Although he prepared an analysis of the surveys, he continues to retain the original surveys.

From my perspective, the Trustee has no right to maintain the surveys, for they are the property of the Library. In this regard, I offer the following comments.

First, a public library that is a governmental agency is clearly subject to 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."

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 records would not have come into the possession of the Trustee, but for his position as Trustee. That being so, it is my opinion that records in question are subject the Freedom of Information Law. Even though they may be in the physical possession of the Trustee, they are not

Ms. Halyna Barannik

March 1, 1999

Page -3-

his personal property; on the contrary, I believe that they are the property of the Library and in the legal custody of the Library and that they must be returned. Moreover, if a member of the public requests the surveys under the Freedom of Information Law, without having possession of those records, the Library would be incapable of complying with law.

Similarly, the "Local Government Records Law", Article 57-A of the Arts and Cultural Affairs Law, deals with the management, custody, retention and disposal of records by local governments. For purposes of those provisions, §57.17(4) of the Arts and Cultural Affairs Law defines "record" to mean:

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

As in the case of the Freedom of Information Law, I believe that the materials at issue would constitute "records".

Further, §57.25 of the Arts and Cultural Affairs Law states in relevant part that:

"1. It shall be the responsibility of every local officer to maintain records to adequately document the transaction of public business and the services and programs for which such officer is responsible; to retain and have custody of such records for so long as the records are needed for the conduct of the business of the office; to adequately protect such records; to cooperate with the local government's records management officer on programs for the orderly and efficient management of records including identification and management of inactive records and identification and preservation of records of enduring value; to dispose of records in accordance with legal requirements; and to pass on to his successor records needed for the continuing conduct of business of the office..."

Based on the foregoing, I believe that you, in your capacity as Library Director, have a legal obligation to maintain the custody and integrity of the surveys. That being so, and in order to enable you to perform your legal responsibilities, I believe that the surveys must be returned by the Trustee to the Library.

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

Ms. Halyna Barannik

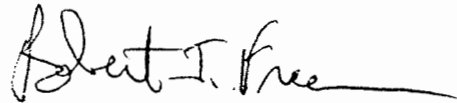
March 1, 1999

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As I understand the matter, the survey responses include "vociferous" comments by taxpayers concerning a particular issue. In my view, while the substance of the surveys would be accessible, any portion of their contents that would identify those who responded could be deleted pursuant to §87(2)(b), which states that an agency may withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy."

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

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in dark ink and has a long, sweeping horizontal line extending to the right.

Robert J. Freeman
Executive Director

RJF:tt



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11349

Committee Members

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Alexander F. Treadwell

March 1, 1999

Executive Director

Robert J. Freeman

Mr. Robert A. Brown
98-B-0395
Wyoming Correctional Facility
P.O. Box 501
Attica, NY 14011-0501

Dear Mr. Brown:

I have received your letter of February 23, in which you appealed a denial of access to certain court records.

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 entity to grant or deny access to records.

Further, 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:

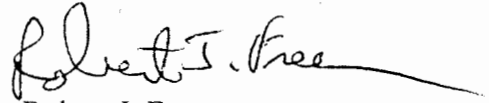
"the courts of the state, including any municipal or district court, whether or not of record."

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.

Mr. Robert A. Brown
March 1, 1999
Page -2-

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

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and has a long, sweeping horizontal line extending to the right.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 11350

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Alexander F. Treadwell

Executive Director

Robert J. Freeman

March 2, 1999

Mr. Michael Henderson
98-R-6323
Gouverneur Correctional Facility
P.O. Box 480
Gouverneur, NY 13642-0370

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

Dear Mr. Henderson:

I have received your letter of February 14 in which you asked for assistance in obtaining records under the Freedom of Information Law from Abbott House, which apparently is a foster care agency.

In this regard, it is likely that Abbott House is not subject to the Freedom of Information Law. That statute pertains to agency records, and §86(3) defines the term "agency" to mean:

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

Based on the foregoing, the Freedom of Information Law generally applies to records maintained by entities of state and local government. I would conjecture that Abbott House is not a governmental entity.

Even if it is an agency, the Freedom of Information Law would not govern access to its records, and a different statute generally requires that the kinds of records in which you are interested be kept confidential. Specifically, §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:

Mr. Michael Henderson

March 2, 1999

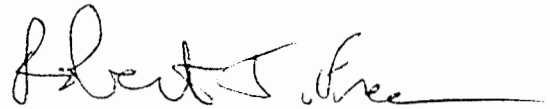
Page -2-

"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 (which is now part of the Office of Children and Family Services).

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

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:tt



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11351

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- Robert L. King
- Gary Lewi
- Warren Mitofsky
- Wade S. Norwood
- David A. Schulz
- Joseph J. Seymour
- Alexander F. Treadwell

Executive Director

Robert J. Freeman

March 2, 1999

Mr. Bruce T. Reiter

[Redacted]

Dear Mr. Reiter:

Your letter of February 16 addressed to the Secretary of State has been forwarded to the Committee on Open Government. As you are aware, the Committee, a unit of the Department of State, is authorized to provide guidance concerning public access to government information, primarily under the state's Freedom of Information Law. Your letter pertains to a refusal of your request to request to inspect records of Senior Citizens of Green Island, Inc.

As explained to you in previous correspondence, the entity in question is not governmental in nature and, therefore, is not an "agency" required to comply with the Freedom of Information Law. When an entity seeks to incorporate, it is required to file certain papers with the Department of State. However, after a certificate of incorporation is conferred, and as inferred in the response by the Department of February 17, there are no additional filing requirements with the Department. Further, there is no general law, state or federal, that provides public rights of access to the records of not-for-profit corporations or similar entities.

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

FOI/AO-11352

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Alexander F. Treadwell

Executive Director

Robert J. Freeman

March 2, 1999

Mr. Delroy Lewin
98-A-1434/Drawer B
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. Lewin:

I have received your undated letter, which reached this office on February 23. You have sought assistance in obtaining records from the Office of the Bronx County District Attorney. According to your letter, following a request made under the Freedom of Information Law, you were informed that you must not communicate with that office directly, and that any communications must be accomplished through your counsel.

Although I am not aware of the context in which that response might have been prepared, I offer the following general comments.

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

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Without knowledge of the nature of the records of your interest, I cannot offer specific guidance concerning your rights of access.

Mr. Delroy Lewin

March 2, 1999

Page -2-

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:

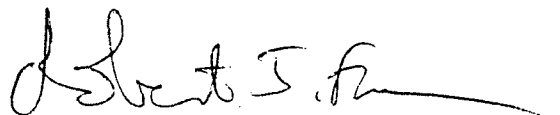
"FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on government decision-making, its ambit is not confined to records actually used in the decision-making process. (Matter of Westchester Rockland 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. 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, in my opinion irrelevant. In short, I know of no reason why you should not be able to communicate directly with the Office of the District Attorney for the purpose of seeking records under the Freedom of Information Law.

As requested, enclosed is a copy of "Your Right to Know", which describes the Freedom of Information Law.

I hope 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
COMMITTEE ON OPEN GOVERNMENT

FODL-AO-11353

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

March 2, 1999

Executive Director

Robert J. Freeman

Mr. Ricky Porter, Sr.
97-A-6228
Clinton Correctional Facility Annex
Box 2002
Dannemora, NY 12929

Dear Mr. Porter:

I have received your letter of February 24, in which you appealed a denial of access to certain court records.

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 entity to grant or deny access to records.

Further, 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.

Mr. Ricky Porter, Sr.
March 2, 1999
Page -2-

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

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman", followed by a long horizontal flourish.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-NO-11354

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March 2, 1999

Executive Director

Robert J. Freeman

Mr. Richard Moran
95-a-1606
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. Moran:

I have received your letter dated February 8, which reached this office on February 23. You referred to a "predicament" relating to your efforts in obtaining records from the Office of the Dutchess County District Attorney.

Although your appeal includes substantial detail to encourage the Office of the District Attorney to disclose the records sought, there is no indication in the correspondence of the specific nature of the records that you requested. Therefore, I cannot offer specific guidance. Nevertheless, I offer the following comments.

First, since it appears that you received no response to a request, I point out that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests and appeals. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges

Mr. Richard Moran

March 2, 1999

Page -2-

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

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

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

Potentially relevant is a decision by the Court of Appeals that you cited 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.

Mr. Richard Moran

March 2, 1999

Page -3-

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:

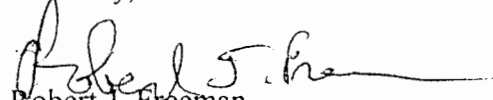
- i. interfere with law enforcement investigations or judicial proceedings;
- ii. deprive a person of a right to a fair trial or impartial adjudication;
- iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
- iv. reveal criminal investigative 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 I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:tt

cc: Freedom of Information Appeals Officer



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11355

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Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

March 2, 1999

Executive Director

Robert J. Freeman

Ms. Martha L. Weale

[REDACTED]
[REDACTED]

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

Dear Ms. Weale:

As you are aware, your letter of January 22 addressed to the Rochester regional office of the Attorney General was forwarded to the Office of the State Comptroller, which in turn forwarded your letter to the Committee on Open Government. As you may recall, the Committee, a unit of the Department of State, is authorized to provide opinions concerning the Freedom of Information Law.

You referred to your request "to inspect the Gross Wages only portion of the 1998 W-2 forms for Village employees/officials" that was denied by the Village of Addison. You asked whether gross wage information pertaining to public officers and employees must be disclosed. In this regard, I offer the following comments.

First, 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 this instance, I do not believe that you would have the right to inspect W-2 forms, for they include information that you have no right to see. However, in conjunction with the ensuing analysis, the portions of the forms containing names and gross wages must be disclosed. The Village could in that circumstance seek payment of the requisite fee for photocopies, which would be made available after the deletion of certain details (see Van Ness v. Center for Animal Care and Control and the New York City Department of Health, Supreme Court, New York County, January 28, 1999).

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

Ms. Martha L. Weale

March 2, 1999

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Pertinent to the matter 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:

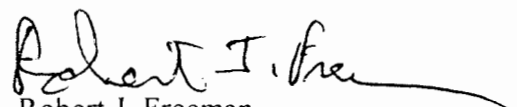
"...represent important fiscal as well as operational information. The identity of the employees and their salaries are vital statistics kept in the proper recordation of departmental functioning and are the primary sources of protection against employment favoritism. They are subject therefore to inspection" 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.

Based upon the direction provided by the Freedom of Information Law and the courts, 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:tt

cc: Clerk/Treasurer, Village of Addison



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11356

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Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

March 2, 1999

Mr. S.C. Lassiter



Dear Mr. Lassiter:

As you are aware, your letter of February 15 addressed to the Attorney General has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State, is authorized to provide advice and opinions concerning the state's Freedom of Information Law.

By way of background, an event involving yourself and other patients and members of staff at the Harlem Hospital Center occurred in November of 1975, and you requested from the State Department of Health records indicating "the names of all employees of the house keeping, medical, security and clerical staff that worked in the Emergency Room of the said hospital on the evening shift...during the month and year aforementioned." Your request was apparently made on December 16, 1997, and its receipt was acknowledged on December 11, 1998 by Gene D. Therriault, the Department's Records Access Officer. At that time, he indicated that a determination concerning your request would be made in thirty to sixty days. As of the date of your letter to the Attorney General, you had received no further response.

In this regard, I offer the following comments.

First, having contacted the Department of Health in an effort to determine the status of your request, I was informed that a response was sent to you recently indicating that it does not maintain the records of your interest. It is noted that the Freedom of Information Law pertains to existing records maintained by an agency, and that the Law imposes no obligation on an agency to create or acquire records on behalf of an applicant.

Second, the Harlem Hospital Center is part of the New York City Health and Hospitals Corporation. Therefore, the records maintained by the Corporation and the facilities within its jurisdiction are subject to the Freedom of Information Law. It is questionable in my view whether either the Corporation or the Hospital Center would continue to maintain attendance records for a particular month in 1975. If the records of your interest no longer exist, the Freedom of Information Law would not be applicable.

Mr. S.C. Lassiter

March 2, 1999

Page -2-

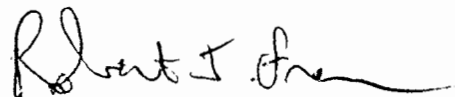
Third, to ascertain whether the records in question do exist, it is suggested that a request be directed to the records access officer at the Health and Hospitals Corporation. The records access officer, according to the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), has the duty of coordinating an agency's response to requests for records.

Assuming that the records continue to be maintained by the Corporation or the Hospital Center and that they can be located with reasonable effort, I believe that they 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. The fact of one's public employment is a matter of public record and is included in payroll records prepared pursuant to §87(3)(b) of the Freedom of Information Law. Further, it has been held that attendance and leave records pertaining to public employees are accessible [see Capital Newspapers v. Burns, 109 AD 2d 92, aff'd 67 NY 2d 562 (1986)].

In sum, the State Department of Health does not maintain the records sought, and if neither the Health and Hospitals Corporation nor the Harlem Hospital Center any longer maintain the records, the Freedom of Information Law would be inapplicable. If, however, the records remain in the possession of the Corporation or the Hospital Center and can be found based on the terms of your request, they would, in my opinion, be accessible under the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Gene D. Therriault



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIA-90-11357

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Alexander F. Treadwell

March 3, 1999

Executive Director

Robert J. Freeman

Mr. Frank Pravda

[REDACTED]

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

Dear Mr. Pravda:

As you are aware, your correspondence of February 20 addressed to the Attorney General has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State, is authorized to provide advice and guidance concerning the Freedom of Information Law.

You contended that Saratoga County and the City of Saratoga Springs have not responded to your requests in a manner consistent with the Freedom of Information Law, and you "demanded" that the Attorney General enforce that statute. In this regard, I offer the following comments.

First, there is no state agency that has the authority to enforce the Freedom of Information Law or compel an agency to grant or deny access to records. If a person believes that an agency has failed to comply with that statute, he or she may seek judicial review by initiating a proceeding under Article 78 of the Civil Practice Law and Rules.

Second, based on a review of the correspondence attached to your letter, it appears that both the County and the City have complied with law. In short, the City indicated that it maintained no record concerning the event to which you referred. 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 is not required to create a record in response to a request. With respect to the County, the Public Access Officer offered to disclose the records relating to the event upon payment of the requisite fee.

The remaining issue involves the portion of requests made to both the County and City for any records pertaining to three individuals named Pravda, "or any other Pravda." As suggested by the County's Public Information Officer, the issue here involves the extent to which the request "reasonably describes" the records sought as required by §89(3) of the Freedom of Information Law.

Mr. Frank Pravda

March 3, 1999

Page -2-

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).

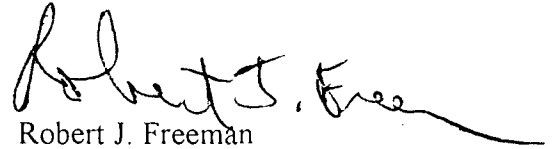
In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping system. In Konigsberg, it appears that the agency was able to locate the records on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

While I am unfamiliar with the recordkeeping systems of the County and the City, 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. Further, in the context of the request, a real question involves, very simply, where agency officials might begin to look for records. It is possible that records falling within the scope of the request may be maintained in several locations by a variety of units within an agency, and that those units maintain their records by means of different filing and retrieval methods. If an office maintains all of its records regarding an individual, since the beginning of its existence, in a single file, it may be a simple task to locate the records. If, however, records are not maintained by name, but rather are kept chronologically, by means of an address, a subject area, etc., 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.

Mr. Frank Pravda
March 3, 1999
Page -3-

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

Sincerely,

A handwritten signature in black ink that reads "Robert J. Freeman". The signature is written in a cursive style with a long, sweeping tail on the "n".

Robert J. Freeman
Executive Director

RJF:jm

cc: Barbara J. Plummer
Peter A. Tulin



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-KO-11358

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

March 3, 1999

Ms. Linda Kelly

[REDACTED]

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

Dear Ms. Kelly:

I have received your letter of February 21. You wrote that you are attempting to obtain information concerning your "employment folder" and "several investigations [you] requested [your] employer to do." In conjunction with the foregoing you requested information pertaining to the Freedom of Information Law and asked for the addresses of agencies that might maintain the information of your interest.

In this regard, it emphasized that the Freedom of Information Law applies to agency records, and that §89(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 definition quoted above, the Freedom of Information Law pertains to records maintained by entities of state and local government; it does not apply to private organizations or businesses. Therefore, if your employer is a unit of government, the Freedom of Information Law would be applicable; if it is not, that statute would not be pertinent.

Assuming that your employer is a government agency, I point out that each agency is required to designate one or more persons as "records access officer" (21 NYCRR Part 1401). The records access officer has the duty of coordinating the 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 Law requires that an applicant "reasonably describe" the records sought. Consequently, a request should include sufficient detail to enable agency staff to locate and identify the records.

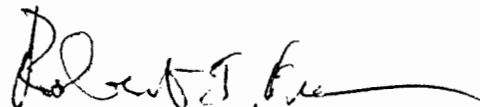
Ms. Linda Kelly
March 3, 1999
Page -2-

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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, as requested, are copies of the Freedom of the Freedom of Information Law and "Your Right to Know", an explanatory brochure that may be useful to you.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:tt
Enc.



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AD- 11359

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Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

March 4, 1999

Executive Director

Robert J. Freeman

Hon. Michael L. Brown
Alderman
City of Albany Common Council
319 Sheridan Avenue
Albany, NY 12206

The staff of the Committee 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 Alderman Brown:

I have received your letter of February 23 in which you asked that I "perform an expedited review of actions taken by the ...Comptroller" of the City of Albany in relation to your request for records made under the Freedom of Information Law.

According to the materials attached to your letter, on January 20 you requested "any and all information about late fees and charges which have been submitted to the City of Albany by vendors who provide the city with goods and services" for the period from January 1, 1998 to the present. You specified that you were seeking "actual copies of any and all invoices or bills submitted to the city between January 1, 1998 and the present date which contain any late payment charges or fees."

In response to the request, you were informed that you could review the records "during two specific hours each week", but more importantly in your view, the City has apparently authorized you to inspect "thousands of billing records...and refusing to separate the specific documents that were requested from a mountainous file of information that was never asked for..."

In an effort to learn more of the situation, I contacted the Comptroller. In brief, I was informed that the records in which you are interested are filed by vendor name and that there is no way of locating records indicating late fees or charges, except by reviewing some twenty-five thousand invoices manually, one by one. If that is so, City officials or staff would not have been required, based on a decision by the State's highest court, to review the records individually for the purpose of separating or retrieving the records of your interest.

The issue involves the requirement imposed by §89(3) of the Freedom of Information Law that an applicant must "reasonably describe" the records sought. In considering that standard, the State's highest court has found that requested records need not be "specifically designated", that to meet the standard, the terms of a request must be adequate to enable the agency to locate the records, and that an agency must "establish that 'the descriptions were insufficient for purposes of locating and identifying the documents sought'...before denying a FOIL request for reasons of overbreadth" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

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

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

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

In the context of your request, as I understand the situation, the City has no means of retrieving the records sought other than reviewing thousands of records, page by page. If that is so, the City, according to Konigsberg, would not be required to engage in that degree of effort to locate or separate the records sought on behalf of an applicant.

If you choose to review the records in order to locate those of your interest, I do not believe that the City can restrict the time of inspection to two hours per week. 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

Hon. Michael L. Brown

March 4, 1999

Page -3-

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."

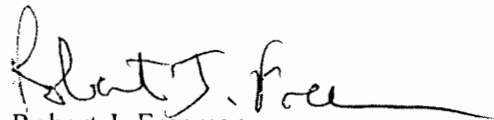
Relevant to your inquiry and the foregoing is a decision rendered by the Appellate Division. Among the issues was the validity of a similar limitation regarding the time permitted to inspect records established by a village pursuant to regulation. The Court held that the village was required to enable the public to inspect records during its regular business hours, stating that:

"...to the extent that Regulation 6 has been interpreted as permitting the Village Clerk to limit the hours during which public documents can be inspected to a period of time less than the business hours of the Clerk's office, it is violative of the Freedom of Information Law..."
[Murtha v. Leonard, 620 NYS 2d 101 (1994), 210 AD 2d 411].

Based on the foregoing, unless the records are in use by City employees in the performance of their duties, you should have the right to review the records during regular business hours.

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. Nancy Burton
Nancy S. Anderson



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL AO - 11360

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Alexander F. Treadwell

Executive Director

March 4, 1999

Robert J. Freeman

Mr. John Washington
95-A-2525
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. Washington:

I have received your letter dated March 1. You referred to a "predicament" relating to your efforts in obtaining records from the Office of the Albany County District Attorney.

Although your appeal includes substantial detail to encourage the Office of the District Attorney to disclose the records sought, there is no indication in the correspondence of the specific nature of the records that you requested. Therefore, I cannot offer specific guidance. Nevertheless, I offer the following comments.

First, since it appears that you received no response to a request, I point out that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests and appeals. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges

Mr. John Washington

March 4, 1999

Page -2-

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

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

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

Potentially relevant is a decision by the Court of Appeals that you cited 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.

Mr. John Washington
March 4, 1999
Page -3-

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:

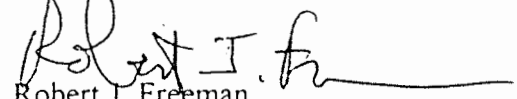
- i. interfere with law enforcement investigations or judicial proceedings;
- ii. deprive a person of a right to a fair trial or impartial adjudication;
- iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
- iv. reveal criminal investigative 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 I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:tt
cc: Freedom of Information Appeals Officer



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOTL AD - 113601

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

March 5, 1999

Mr. Kenneth R. Dash Sr.



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

Dear Mr. Dash:

I have received your letter of February 3, which reached this office on February 24. Please note that the Committee's address has changed.

In your letter, you wrote: "here we are the crossroads where the County Attorney has failed to answer a Freedom of Information request." Attached is your letter to the County Attorney indicating that you wrote to him the previous week "inquiring whether the County is self insured against shortage and overage in the collection of revenue by cashiers."

Although you did not transmit a copy of your letter seeking the information, it is emphasized that the title of the Freedom of Information Law is somewhat misleading, for it is not a vehicle that requires agency officials to provide information by answering questions; rather, it is a statute that requires the disclosure of records in accordance with its provisions. It is also noted that the Freedom of Information Law pertains to existing records, and that §89(3) of the Law states in part that an agency is not required to create a record in response to a request for information. Therefore, if there is no record that contains the information sought, the Freedom of Information Law would not apply.

In the future, instead of seeking information by raising questions, it is suggested that you request existing records.

On the basis of the foregoing, it is unclear whether you sought an answer to a question or requested records under the Freedom of Information Law or, therefore, whether the County Attorney "failed" to comply with law.

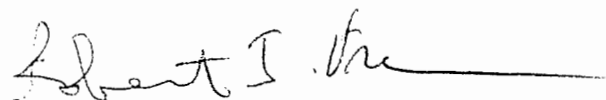
Mr. Kenneth R. Dash Sr.

March 5, 1999

Page -2-

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

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman", followed by a long horizontal line extending to the right.

Robert J. Freeman
Executive Director

RJF:tt

cc: Owen Walsh



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL 90-11362

Committee Members

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

March 5, 1999

Executive Director

Robert J. Freeman

Gustave J. DeTraglia, Jr., Esq.
Attorney and Counselor at Law
1425 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.

Dear Mr. DeTraglia:

I have received your letter of February 22 in which you sought guidance concerning the Freedom of Information Law.

The matter involves requests for records in possession of the New Hartford Town Supervisor pertaining to Consumer Square/Benderson Corporation, which, according to your letter, "is the name of a project that is pending to be developed." You added that the "file is dozens, if not hundreds of pages thick and [you] feel that the FOIL is over broad."

From my perspective, the issue involves the extent to which the requests met the standard of "reasonably describing" the records 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)].

Konigsberg involved a situation in which an inmate at a state correctional facility essentially requested all records that could be found by means of his name or identification number. Based upon the request, the facility was able to locate approximately 2,300 pages of records. When staff asked which among those records were the subject of his request, the inmate indicated that he wanted all of them. Although the agency contended that the request did not reasonably describe the records sought, the Court of Appeals disagreed and found that the agency could not reject the request due to its breadth.

Notwithstanding the foregoing, the Court found that:

Gustave J. DeTraglia, Jr.
March 5, 1999
Page -2-

"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, 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 the extent that the records sought can be located with reasonable effort, I believe that the requests would meet the requirement of reasonably describing the records. Therefore, if, for example, the hundreds of pages falling within the scope of the request are kept in a single file drawer or even in a series of locations where they can be retrieved based upon the description provided in the requests, the applicants for the records, in my opinion, would have met the requirement that they reasonably describe the records.

On the other hand, if the records are not maintained in a manner that permits their retrieval except by reviewing hundreds or perhaps thousands of records individually in an effort to locate those falling within the scope of the request, to that extent, the request would not in my opinion meet the standard of reasonably describing the records. It is possible that records falling within the scope of the request may be maintained in several locations by a variety of units within Town, and that those units maintain their records by means of different filing and retrieval methods. If, for example, records are not maintained by subject, but rather are kept chronologically, locating the records might involve a search, in essence, for the needle in the haystack. Based on the holding by the State's highest court, an agency is not required to engage in that kind of effort.

I hope that 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-3003
FOIL-AO-11363

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Alexander F. Treadwell

March 8, 1999

Executive Director

Robert J. Freeman

Mr. James M. Dee
[REDACTED]
[REDACTED]

The staff of the Committee 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. Dee:

I have received your letter of February 23 in which you sought an advisory opinion concerning the Open Meetings and Freedom of Information Laws.

According to your letter, at a recent meeting held to elect officers, the Board of the Tonawanda Housing Authority voted by secret ballot. You wrote that the public was not given the opportunity to review the ballots, and that "[n]o record exists as to how individual members voted."

In this regard, as you may be aware, I was contacted by phone concerning the issue that you have presented, and I believe that the matter has been resolved. However, for purposes of clarity, I offer the following comments.

First, the Tonawanda Housing Authority was created pursuant to §412 of the Public Housing Law and, as a public authority constituting "a body corporate and politic", I believe that it is an "agency" and a "public body" for purposes of the Freedom of Information and Open Meetings Laws [see respectively, Public Officers Law, §§86(3) and 102(2)].

With regard to the members' votes, I direct your attention initially 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..."

Mr. James M. Dee

March 8, 1999

Page -2-

Based upon the foregoing, when a final vote is taken by an "agency", 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:

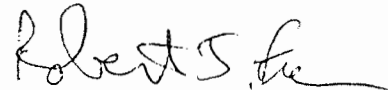
"it is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go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

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

Based on a discussion with Ms. Meadows, the Board's attorney, the matter has been rectified, and I believe that a record of votes likely now appears in minutes of the meeting.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Directors, Tonawanda Housing Authority
S. Meadows, Esq.



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AD - 11364

Committee Members

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Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

March 8, 1999

Executive Director

Robert J. Freeman

Mr. Kevin Smith
87-A-9373
Green Haven Correctional Facility
Drawer B
Stormville, NY 12582-0010

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

Dear Mr. Smith:

I have received your letter of February 22 in which you described a series of delays in your attempts in obtaining records from the Office of the Kings County District Attorney. You added that you are in the process of initiating an Article 78 proceeding.

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

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

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

Mr. Kevin Smith
March 8, 1999
Page -2-

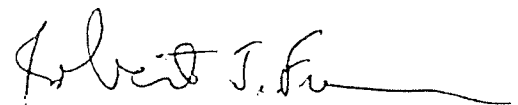
"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial,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

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

cc: Records Access Officer
Appeals Officer



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-A0-11365

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

March 8, 1999

Executive Director

Robert J. Freeman

Mr. Ignacio Ayala
95-A-8644
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. Ayala:

I have received your letter of February 22 in which you sought assistance concerning your efforts in obtaining court records.

In this regard, it is emphasized that the statute within the advisory jurisdiction of the Committee on Open Government, 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

Mr. Ignacio Ayala

March 8, 1999

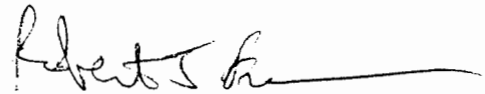
Page -2-

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 any 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 I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMC-RO-3006
FOIL DO-11366

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Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

March 9, 1999

Ms. Elizabeth S. Manion
Director
Marlboro Free Library
P.O. Box 780
Marlboro, NY 12542

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

Dear Ms. Manion:

I have received your letter of February 25 and the article attached to it. You indicated that you are "confused" for you "always believed that any discussion was considered confidential if discussed in Executive Session. (e.g., salary negotiations/personnel issues)."

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. 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)].

In general, I am unaware of any statute that would prohibit a member of a library board of trustees from disclosing the kinds of information to which you referred. Further, even when information might have been obtained during an executive session properly held or from records marked "confidential", I note that the term "confidential" in my view has a narrow and precise technical meaning. For records or information to be validly characterized as confidential, I believe that such a claim must be based upon a statute that specifically confers or requires confidentiality.

Ms. Elizabeth S. Manion

March 9, 1999

Page - 2 -

For instance, if a discussion by a library board concerns a record pertaining to a particular user of the library, the discussion would have to occur in private and the record would have to be withheld insofar as public discussion or disclosure would identify that person. As you may be aware, §4509 of the Civil Practice Law and Rules prohibits a library from disclosing records identifiable to users of its services. In the context of the Open Meetings Law, a discussion concerning a user of the library would constitute a matter made confidential by federal law and would be exempted from the coverage of that statute [see Open Meetings Law, §108(3)]. In the context of the Freedom of Information Law, a record identifiable to a user would be specifically exempted from disclosure by statute in accordance with §87(2)(a). In both contexts, I believe that a library board of trustees and its employees would be prohibited from disclosing because a statute requires confidentiality. Again, however, no statute of which I am aware would confer or require confidentiality with respect to the matters described in your letter.

In a case in which the issue was whether discussions occurring during an executive session held by a school board could be considered "privileged", it was held that "there is no statutory provision that describes the matter dealt with at such a session as confidential or which in any way restricts the participants from disclosing what took place" (Runyon v. Board of Education, West Hempstead Union Free School District No. 27, Supreme Court, Nassau County, January 29, 1987).

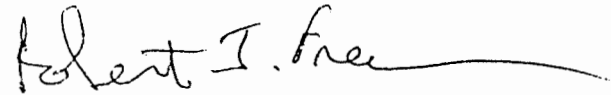
While there may be no prohibition against disclosure of the information acquired during executive sessions or records that could be withheld, the foregoing is not intended to suggest such disclosures would be uniformly appropriate or ethical. Obviously, the purpose of an executive session is to enable members of public bodies to deliberate, to speak freely and to develop strategies in situations in which some degree of secrecy is permitted. Similarly, the grounds for withholding records under the Freedom of Information Law relate in most instances to the ability to prevent some sort of harm. In both cases, inappropriate disclosures could work against the interests of a public body as a whole and the public generally. Further, a unilateral disclosure by a member of a public body might serve to defeat or circumvent the principles under which those bodies are intended to operate.

Historically, I believe that public bodies were created to order to reach collective determinations, determinations that better reflect various points of view within a community than a single decision maker could reach alone. Members of boards should not in my opinion be unanimous in every instance; on the contrary, they should represent disparate points of view which, when conveyed as part of a deliberative process, lead to fair and representative decision making. Nevertheless, notwithstanding distinctions in points of view, the decision or consensus by the majority of a public body should in my opinion be recognized and honored by those members who may dissent. Disclosure made contrary to or in the absence of consent by the majority could result in unwarranted invasions of personal privacy, impairment of collective bargaining negotiations or even interference with criminal or other investigations. In those kinds of situations, even though there may be no statute that prohibits disclosure, release of information could be damaging to individuals and the functioning of government.

Ms. Elizabeth S. Manion
March 9, 1999
Page - 3 -

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

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and has a long, sweeping horizontal line extending to the right.

Robert J. Freeman
Executive Director

RJF:tt



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11307

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Warren Mitofsky
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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

March 10, 1999

Mr. Hasaun Grigger
95-A-6086
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. Grigger:

I have received your letter of February 24 in which you sought assistance concerning your efforts in obtaining court records.

In this regard, it is emphasized that the statute within the advisory jurisdiction of the Committee on Open Government, 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

Mr. Hasaun Grigger

March 10, 1999

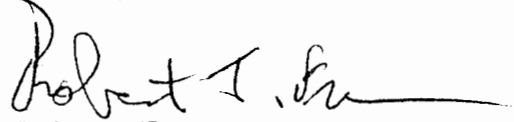
Page - 2 -

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 any 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 I have been of assistance.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman", followed by a horizontal line extending to the right.

Robert J. Freeman
Executive Director

RJF:tt



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL AO - 11368

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Robert L. King
Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

March 15, 1999

Mr. Craig S. Rose
95-A-7042
Wyoming Correctional Facility
P.O. Box 501
Attica, NY 14011-0501

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

Dear Mr. Rose:

I have received your letter of February 28. According to your letter, you requested "parole violation papers" prepared in 1995 and a "pre-parole summary" prepared in 1994. The request was denied because you "do not appear before the Parole Board until 4/2000."

From my perspective, the time of your appearance before the Parole Board is irrelevant to your right to gain access to the records in question. In this regard, 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)].

Based on the foregoing, unless there is a basis for withholding records in accordance with the ground for denial appearing in §87(2) of the Freedom of Information Law, agency must records must be made available, irrespective of one's status, interest or intended of the records.

Mr. Craig S. Rose

March 15, 1999

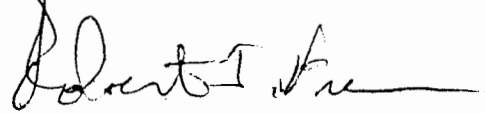
Page 2-

While I am unfamiliar with the contents of the records sought, 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.

It is suggested that you renew your request and direct it to the Division of Parole's records access officer. That person has the duty of coordinating the agency's response to requests for records. The address of the Division of Parole is 97 Central Avenue, Albany, NY 12206.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

File-AO-11369

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Alexander F. Treadwell

March 15, 1999

Executive Director

Robert J. Freeman

Mr. George W. van der Ploeg



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

Dear Mr. van der Ploeg:

I have received your letter of February 26, as well as the materials related to it. You have complained with respect to the treatment of requests for records of the Katonah-Lewisboro School 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

Mr. George W. van der Ploeg

March 15, 1999

Page 2-

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

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

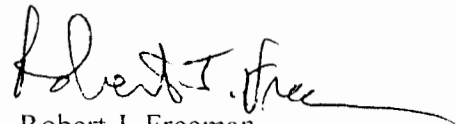
Second, it is emphasized that the Freedom of Information Law pertains to existing records, and that §89(3) of the Law states in part that an agency is not required to create a record in response to a request. For instance, if there is no record indicating the "current number of students from Michelle Estates" living on certain streets, or if there is no summary of compensation paid to a construction manager "broken down between Basic Services, Additional Services and Reimbursable Services", the District would not be required to prepare new records containing the information sought.

It is suggested that you contact the District's records access officer to discuss the request and the manner in which the District maintains records. While there may be no breakdowns prepared in accordance with the parameters that you described, there may be other or similar records that include the information in which you are interested. I note that under the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), each agency must designate one or more persons as records access officer, and that person has the duty of coordinating an agency's response to requests for records.

Lastly, as it pertains to existing records, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, the kinds of records that you requested, insofar as they exist, would be available, for none of the grounds for denial would be applicable.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Dr. Karen McCarthy



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11370

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

March 15, 1999

Executive Director

Robert J. Freeman

Mr. David Gregory
96-R-4602
Gouverneur Correctional Facility
P.O. Box 480
Gouverneur, NY 13642-0370

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

Dear Mr. Gregory:

I have received your letter of February 24. You asked whether "even though [you are] destitute and have no funds in [your] inmate account", you "have the right under (FOIL) to receive the records" that you requested from your facility.

In this regard, as a general matter, under §87(1)(b)(iii) of the Freedom of Information Law, when a record is available, it may be inspected free of charge. However, if the applicant for the record seeks a copy, that provision authorizes an agency to charge up to twenty-five cents per photocopy. 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 I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FCY (Ad) -11371

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Alexander F. Treadwell

March 15, 1999

Executive Director

Robert J. Freeman

Mr. Pablo Lopez
98-A-3831
Coxsackie Correctional Facility
P.O. Box 999
Coxsackie, NY 12051-0999

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

Dear Mr. Lopez:

I have received your letter of February 28. You wrote that you attempted to obtain your birth certificate from the New York City Department of Health, but that you were informed that you could not do so because your mother's last name is unknown to you. As such, you asked how you may obtain your mother's last name through the Freedom of Information Law.

From my perspective, you would likely need additional information pertaining to your mother to obtain her last name. In this regard, I point out that §89(3) of the Freedom of Information Law requires that an applicant must "reasonably describe" the records sought. Therefore, a request should include sufficient detail (i.e., names, identification numbers, dates, addresses, etc.) to enable the staff of an agency to locate and identify the records.

Additionally, a request made under the Freedom of Information Law should be sent to the agency that maintains the records of interest to the applicant. Unless there is an indication of which agency possesses records containing the information that you are seeking, it may be impossible to submit an appropriate request on the basis of the Freedom of Information Law.

I hope that I have been of assistance and regret that I could not offer more effective guidance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI-AO-11372

Committee Members

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David A. Schulz
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Alexander F. Treadwell

Executive Director

Robert J. Freeman

March 15, 1999

Ms. Julie West



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

Dear Ms. West:

I have received your letter of March 1 in which you questioned a certain practice of the Town Clerk of the Town of Henderson.

According to your letter, having asked to review the file on a proposed zoning change, you were informed that must indicate "exactly what document [you] wanted to see from the file." From my perspective, the requirement imposed by the Clerk is inconsistent with the language of the Freedom of Information Law and its judicial interpretation.

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.

Based upon that standard, 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)].

Konigsberg involved a situation in which an inmate at a state correctional facility essentially requested all records that could be found by means of his name or identification number. Based upon the request, the facility was able to locate approximately 2,300 pages of records. When staff asked which among those records were the subject of his request, the inmate indicated that he wanted all of them. Although the agency contended that the request did not reasonably describe the records

Ms. Julie West
March 15, 1999
Page - 2 -

sought, the Court of Appeals disagreed and found that the agency could not reject the request due to its breadth.

Notwithstanding the foregoing, the Court found 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, 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 Town, to the extent that the records sought can be located with reasonable effort, I believe that the requests would meet the requirement of reasonably describing the records. Therefore, if, for example, all of the records concerning the proposed zoning change are kept in a particular file, or in a series of locations where they can be retrieved based upon the description provided in your request, in my opinion, you would have met the requirement that the request reasonably describe the records.

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

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Charlotte Raymond



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-KO-11373

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Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

March 15, 1999

Executive Director

Robert J. Freeman

Mr. Joseph M. Dobson

[REDACTED]

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

Dear Mr. Dobson:

I have received your letter of February 26 concerning a denial of access to records indicating the "monies spent on lawyers for lawsuit against Crucible Specialty Metals Company" apparently by the Town of Geddes for the years 1990 through 1995.

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to existing records. Therefore, if, for example, the Town no longer maintains records of payments to attorneys made prior to a certain date because it has disposed of the records, the Freedom of Information Law would not apply. In a related vein, §89(3) of that statute states that an agency is not required to create a record in response to a request. Therefore, if records concerning payments to attorneys are general and do not indicate monies paid in relation to a particular lawsuit, the Town would not be obliged to prepare new records on your behalf pertaining to monies paid involving that suit.

Second, 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, 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:

Mr. Joseph M. Dobson

March 15, 1999

Page -2-

"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 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.

Third, insofar as the records sought continue to exist and can be found with reasonable effort, I believe that the information in which you are interested should be disclosed. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

In my opinion, bills, vouchers, contracts, receipts and similar records reflective of payments made or expenses incurred by an agency or payments made to an agency's staff or agents are generally available, for none of the grounds for denial would be applicable in most instances.

With specific respect to payments to attorneys, I point out that, while the communications between an attorney and client are often privileged, it has been established in case law that records of the monies paid and received by an attorney or a law firm for services rendered to a client are not privileged [see e.g., People v. Cook, 372 NYS 2d 10 (1975)]. If, however, portions of time sheets, bills or related records contain information that is confidential under the attorney-client privilege, those portions could in my view be withheld under §87(2)(a) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof that are "specifically exempted from disclosure by state or federal statute" (see Civil Practice Law and Rules, §4503). Therefore, while some identifying details or descriptions of services rendered found in the records sought might

Mr. Joseph M. Dobson

March 15, 1999

Page -3-

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.

In a decision dealing with similar records, Knapp v. Board of Education, Canisteo Central School District (Supreme Court, Steuben County, November 23, 1990), the case involved an applicant ("petitioner") who sought billing statements for legal services provided to the Board ("respondents") by a law firm. Since the statements made available included "only the time period covered and the total amount owed for services and disbursements", petitioner contended that "she is entitled to that billing information which would detail the fee, the type of matter for which the legal services were rendered and the names of the parties to any current litigation". In its discussion of the issue, the court found that:

"The difficulty of defining the limits of the attorney client privilege has been recognized by the New York State Court of Appeals. (Matter of Priest v. Hennessy, 51 NY2d 62, 68.) Nevertheless, the Court has ruled that this privilege is not limitless and generally does not extend to the fee arrangements between an attorney and client. (Matter of Priest v. Hennessy, supra.) As a communication regarding a fee has no direct relevance to the legal advice actually given, the fee arrangement is not privileged. (Matter of Priest v. Hennessy, supra. at 69.)

"There appear to be no New York cases which specifically address how much of a fee arrangement must be revealed beyond the name of the client, the amount billed and the terms of the agreement. However, the United States Court of Appeals, in interpreting federal law, has found that questions pertaining to the date and general nature of legal services performed were not violative of client confidentiality. (Cotton v. United States, 306 F.2d 633.) In that Court's analysis such information did not involve the substance of the matters was not privileged...

"...Respondents have not justified their refusal to obliterate any and all information which would reveal the date, general nature of service rendered and time spent. While the Court can understand that in a few limited instances the substance of a legal communication might be revealed in a billing statement, Respondents have failed to come forward with proof that such information is contained in each and every document so as to justify a blanket denial of disclosure. Conclusory characterizations are insufficient to support a claim of privilege. (Church of Scientology v. State of New York, 46 NY 2d 906, 908.)...Therefore, Petitioner's request for disclosure of the fee, type of matter and names of parties to pending litigation on each billing statement must be granted."

Mr. Joseph M. Dobson

March 15, 1999

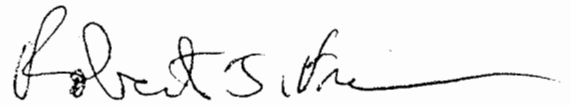
Page -4-

In my view, disclosure of information analogous to that described in Knapp would be required [see also Orange County Publications v. County of Orange, 637 NYS2d 596 (1995)].

Lastly, the function of an advisory opinion is to educate and persuade, and you may use the opinion as you see fit. In addition, a copy will be sent to the Town Supervisor.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Manuel Martinez, Supervisor



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AD-11374

Committee Members

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Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

March 15, 1999

Ms. Andrea Vecchio

[REDACTED]

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

Dear Ms. Vecchio:

I have received your letter of March 4 in which you requested an advisory opinion concerning the East Islip School District and "a delay in [y]our request for the teacher's salary list [you] have obtained at this time of the year for past several years without any problem." You indicated that you requested "W-2 and contract salaries for all teachers and administrators".

In this regard, I offer the following comments.

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

Second, with certain exceptions, the Freedom of Information Law 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..."

Ms. Andrea Vecchio
March 15, 1999
Page - 2 -

(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 "maintained" on a continual basis.

With respect to rights of access, of primary relevance is §87(2)(b), which permits an agency to withhold record or portions of records when disclosure would result in "an unwarranted invasion of personal privacy." However, payroll information has been found by the courts to be available [see e.g., Miller v. Village of Freeport, 379 NYS 2d 517, 51 AD 2d 765, (1976); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NYS 2d 954 (1978)]. In addition, this Committee has advised and the courts have upheld the notion that records that are relevant to the performance of the official duties of public employees are generally available, for disclosure in such instances would result in a permissible as opposed to an unwarranted invasion of personal privacy [Gannett, supra; Capital Newspapers v. Burns, 109 AD 2d 292, aff'd 67 NY 2d 562 (1986); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980; Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); and Montes v. State, 406 NYS 664 (Court of Claims 1978)]. As stated prior to the enactment of the Freedom of Information Law, payroll records:

"...represent important fiscal as well as operational information. The identity of the employees and their salaries are vital statistics kept in the proper recordation of departmental functioning and are the primary sources of protection against employment 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.

Based upon the direction provided by the Freedom of Information Law and the courts, other records reflective of payments made to public employees are available. For instance, insofar as W-2 forms of public employees indicate gross wages, they must be disclosed. In conjunction with the previous commentary concerning the ability to protect against unwarranted invasions of personal privacy, I believe that portions of W-2 forms could be withheld, such as social security numbers, home addresses and net pay, for those items are largely irrelevant to the performance of one's duties. However, for reasons discussed earlier, those portions indicating public officers' or employees' names and gross wages must in my view be disclosed. That conclusion has been reached judicially, and the court cited an advisory opinion rendered by this office in so holding (Day v. Town of Milton, Supreme Court, Saratoga County, April 27, 1992).

Lastly, I believe that the payroll list should be made available without delay, and in addition, 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:

Ms. Andrea Vecchio

March 15, 1999

Page - 3 -

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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 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 record or report is clearly public and can be found easily, as in the case of the payroll list required to be "maintained" pursuant to §87 (3)(b), 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).

Ms. Andrea Vecchio

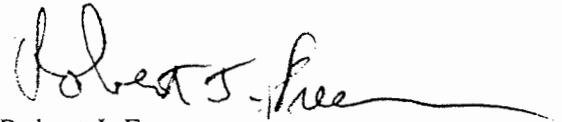
March 15, 1999

Page - 4 -

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,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and has a long, sweeping horizontal line extending to the right.

Robert J. Freeman
Executive Director

RJF:tt



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-DO-11375

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Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

March 16, 1999

Mr. Jacques Webb
88-B-1289
Groveland Correctional Facility
P.O. Box 104
Sonyea, NY 14556-0001

Dear Mr. Webb:

I have received your letter of March 10. It appears that you have requested various records from this office pertaining to your case.

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 entity of government to grant or deny access to records. In short, I cannot provide the records that you requested because this office does not possess them.

Some of the documents of your interest would apparently be maintained by the office of a district attorney, and others by 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."

Mr. Jacques Webb

March 16, 1999

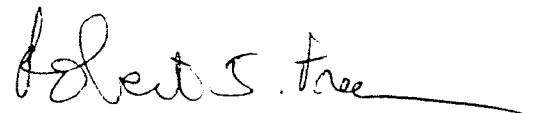
Page - 2 -

Based on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law (see e.g., Judiciary Law, §255) may grant broad public access to those records. It is suggested that any request for court records be made to the clerk of the appropriate court, citing an applicable provision of law as the basis for the request.

The office of a district attorney or a police department, for example, would clearly constitute an "agency" required to comply with the Freedom of Information Law. I note that the regulations promulgated by the Committee on Open Government require that each agency designate one or more persons as "records access officer" (see 21 NYCRR Part 1401). The records access officer has the duty of coordinating an agency's response to requests for records. As such, if certain of the records in which you are interested are maintained by the office of a district attorney, a request should be made to that agency's records access officer.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman", with a long horizontal line extending to the right.

Robert J. Freeman
Executive Director

RJF:tt



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11376

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

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Alan Jay Gerson
Walter Grunfeld
Robert L. King
Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

March 16, 1999

Executive Director

Robert J. Freeman

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 March 1. You have asked whether you can use the Freedom of Information Law to gain access to "one's personal parole records from the local office parolees are assigned." You indicated that you made such a request, but that it has not been answered.

In this regard, 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 for records, and requests should ordinarily be made to that person.

While I believe that the person in receipt of your request should either have forwarded your request to the records access officer or responded directly to you in a manner consistent with the Freedom of Information Law, it is suggested that you resubmit your request to the records access officer, Mr. David Molik, Division of Parole, 97 Central Avenue, Albany, NY 12206.

For your information, the person designated by the Division of Parole to determine appeals is Mr. Terrence X. 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-11377

Committee Members

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March 16, 1999

Executive Director

Robert J. Freeman

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 February 28 in which you requested an advisory opinion concerning rights of access to records "which would show or tend to show the number of absences of a particular DOCS' teacher" 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. Although two of the grounds for denial relate to attendance records involving the use of leave time, based upon the language of the Law and its judicial interpretation, I believe that such records are generally available.

In addition to the provisions dealing with the protection of privacy, also significant to an analysis of rights of access is §87(2)(g), which permits an agency to withhold records that:

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

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

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

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

Also relevant is §87(2)(b), which permits an agency to withhold record or portions of records when disclosure would result in "an unwarranted invasion of personal privacy." The Committee has advised and the courts have upheld the notion that records that are relevant to the performance of the official duties of public employees are generally available, for disclosure in such instances would result in a permissible as opposed to an unwarranted invasion of personal privacy [Gannett, supra; Capital Newspapers v. Burns, 109 AD 2d 292, aff'd 67 NY 2d 562 (1986) ; Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980; Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975) ; and Montes v. State, 406 NYS 664 (Court of Claims 1978)].

In a decision affirmed by the State's highest court dealing with attendance records, specifically those indicating the days and dates of sick leave claimed by a particular employee, it was found, in essence, that disclosure would result in a permissible rather than an unwarranted invasion of personal privacy. In that case, the Appellate Division found that:

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

Insofar as attendance records or time sheets include reference to reasons for an absence, it has been advised that an explanation of why sick time might have been used, i.e., a description of an

Mr. Wallace S. Nolen

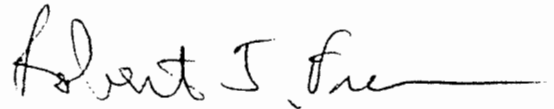
March 16, 1999

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

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Superintendent
Leslie Becher



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11738

Committee Members

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October 13, 1999

Executive Director

Robert J. Freeman

Mr. Merton Simpson



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

Dear Mr. Simpson:

I have received your letter of August 19 and the materials attached to it.

Among the materials is a record apparently prepared by the Department of Civil Service entitled "Eligible List Scores Distribution by Race and Sex" in relation to a "battery exam." You have asked whether similar records "would have to be produced by Civil Service for all the Battery Exams and simulations of exams [you] have requested through previous FOIL's if they have the capability." In response to an appeal, you were informed that "eligible list scores distribution by race and sex are not available because the Battery Tests do not produce an eligible list" and that "an eligible list scores distribution report which had been released to you should not have been created."

From my perspective, the issue involves whether the Department has the ability to generate the records of your interest based on its existing computer programs. In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to existing records. Section 89(3) of that statute states in relevant part that an agency is not required to create a record in response to a request.

Second, §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,

Mr. Merton Simpson

October 13, 1999

Page -2-

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 soon after the enactment of the current version 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, Szikszy v. Buelow, 436 NYS 2d 558 (1981)].

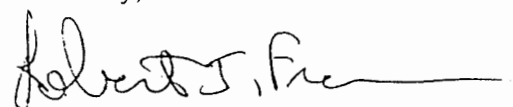
When information is maintained electronically, it has been advised that if the information sought is available under the Freedom of Information Law and may be retrieved by means of existing computer programs, an agency is required to disclose the information. In that kind of situation, the agency in 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)].

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. Assuming that the information of your interest can be generated by means of the Department's existing computer programs, I believe that it would be available. In short, insofar as intra-agency materials consist of "statistical or factual tabulations or data", they must be disclosed pursuant to section 87(2)(g)(i), unless a different ground for denial applies. In my view, none of the grounds for denial would be applicable or pertinent.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Patricia Hite



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-40-11379

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Executive Director

March 16, 1999

Robert J. Freeman

Mr. George Dinstber



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

Dear Mr. Dinstber:

I have received your letter dated February 4 that was transmitted to this office with related materials on March 3. You have questioned the ability of the Suffolk County Police Department to withhold records pertaining to a complaint that you made against a police officer.

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

The first ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §50-a of the Civil Rights Law. In brief, that statute provides that personnel records of police and correction officers that are used to evaluate performance toward continued employment or promotion are confidential. The Court of Appeals, the State's highest court, in reviewing the legislative history leading to its enactment, has held that §50-a 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

Mr. George Dinstber
P.O. Box 1005
Smithtown, NY 11787

disclosure by the Police Department in a non-litigation context under Public Officers section 87(2)(a)" [Capital Newspapers v. Burns, 67 NY 2d 562, 569 (1986)].

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

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

From my perspective, based on the contents of the materials that you forwarded, it appears that the records in question would be exempt from disclosure under §50-a of the Civil Rights Law and, therefore, §87(2)(a) of the Freedom of Information Law. I note, however, that records otherwise deniable may be ordered disclosed by a court insofar as they are relevant and material to an action or proceeding. Specifically, subdivisions (2) and (3) of §50-a state 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 a 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 finding the court shall make those parts of the record found to be relevant and material available to the persons so requesting."

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: Derrick J. Robinson



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

F01L-A0-11380

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Alexander F. Treadwell

March 17, 1999

Executive Director

Robert J. Freeman

Mr. Joseph W. Spinney
Marist College MSC 11972
290 North Road
Poughkeepsie, NY 12601

Dear Mr. Spinney:

I have received your undated letter, which reached this office on March 12. As you asked in the letter, I attempted to reach you by phone without success.

You have requested records from this office concerning "first degree homicide crimes committed in the town of Valley Cottage...from 1974 to 1999." 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 custody and control of records generally.

To seek records, a request should be made to the agency or agencies that you believe maintain the records of your interest. I note that the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) require that each agency designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests, and requests ordinarily should be made to that person.

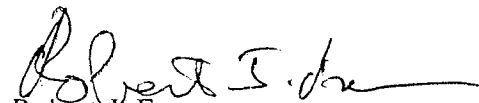
I am unaware of whether Valley Cottage has its own police department or whether police coverage is provided by the county or the state police. It is suggested that any request be made to the law enforcement agency that has jurisdiction with respect to Valley Cottage. It is also noted that §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, a request should include sufficient detail to enable agency officials to locate and identify the records.

Lastly, unless I am mistaken, I do not believe that there would have been any crime committed in New York that could be characterized as "first degree homicide" from 1974 until the recent reinstatement of the death penalty.

Mr. Joseph W. Spinney
March 17, 1999
Page -2-

I hope that I have been of assistance. ---

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman". The signature is written in black ink and is positioned above the printed name and title.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 11381

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March 17, 1999

Executive Director

Robert J. Freeman

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 March 8, as well as the materials attached to it. You have sought assistance in relation to your efforts in obtaining a variety of records from the Katonah-Lewisboro School District.

In brief, it is your belief that your children's medical problems have arisen due to construction and renovation work performed at the school that they were attending, and your requests involve your efforts in attempting to ascertain whether that may be so. Based upon the correspondence, 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, your status as a litigant or potential litigant has no impact upon your rights under the Freedom of Information Law or the District's duty to disclose under that statute. As stated by the state's highest court, the Court of Appeals, in a case involving a request made under the Freedom of Information Law by a person involved in litigation against an agency: "Access to records of a government agency under the Freedom of Information Law (FOIL) (Public Officers Law, Article 6) is not affected by the fact that there is pending or potential litigation between the person making the request and the agency" [Farbman v. NYC Health and Hospitals Corporation, 62 NY 2d 75, 78 (1984)]. Similarly, in an earlier decision, the Court of Appeals determined that "the standing of one who seeks access to records under the Freedom of Information Law is as a member of the public, and is neither enhanced...nor restricted...because he is also a litigant or potential litigant" [Matter of John P. v. Whalen, 54 NY 2d 89, 99 (1980)]. The Court in Farbman, supra, discussed the 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].

Ms. Ann Nathan

March 17, 1999

Page -3-

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

Third, it is noted 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. I am unaware of the means by which the District maintains its records. Nevertheless, insofar as the records sought exist, they would be subject to rights of access. In a related vein, a potential 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 recordkeeping systems of the District, 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 a request, to that extent, the request would not in my opinion meet the standard of reasonably describing the records.

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

Relevant to the matter insofar as your requests relate to students is the initial ground for denial, §87(2)(a), which pertains to records that are "specifically exempted from disclosure by state or federal statute." In this instance, insofar as disclosure of the records in question would or could identify a student or students, 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 for records indicating 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 student's illnesses or absences, 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.

Records indicating sick leave claimed by teachers or other District staff would generally be available. Although two of the grounds for denial relate to attendance records involving the use of leave time, based upon the language of the Law and its judicial interpretation, I believe that such records are generally available.

In addition to the provisions dealing with the protection of privacy, also significant to an analysis of rights of access is §87(2)(g), which permits an agency to withhold records that:

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

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

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

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

Also relevant is §87(2)(b), which permits an agency to withhold record or portions of records when disclosure would result in "an unwarranted invasion of personal privacy." The Committee has advised and the courts have upheld the notion that records that are relevant to the performance of the official duties of public employees are generally available, for disclosure in such instances would result in a permissible as opposed to an unwarranted invasion of personal privacy [Gannett, supra; Capital Newspapers v. Burns, 109 AD 2d 292, aff'd 67 NY 2d 562 (1986) ; Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980; Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975) ; and Montes v. State, 406 NYS 664 (Court of Claims 1978)].

In a decision affirmed by the State's highest court dealing with attendance records, specifically those indicating the days and dates of sick leave claimed by a particular employee, it was found, in essence, that disclosure would result in a permissible rather than an unwarranted invasion of personal privacy. In that case, the Appellate Division found that:

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

Insofar as attendance records or time sheets include reference to reasons for an absence, it has been advised that an explanation of why sick time might have been used, i.e., a description of an illness or medical problem found in records, could be withheld or deleted from a record otherwise available, for disclosure of so personal a detail of a person's life would likely constitute an unwarranted invasion of personal privacy and would not be relevant to the performance of an employee's duties. Similarly, since a workers' compensation claim relates to a medical problem or injury, I believe that any records relating to such claims may be withheld. 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 leave, 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.

Other records that you requested, such as "comparative studies" and asbestos test results, would appear to constitute intra-agency materials. Again, insofar as those materials consist of statistical or factual information, they must be disclosed, unless a different basis for denial can be asserted. Pertinent in my view is a decision rendered by the Court of Appeals in which the Court focused on what constitutes "factual data", stating that:

"...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132, 490

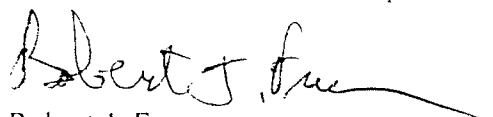
Ms. Ann Nathan
March 17, 1999
Page -7-

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)].

Lastly, one aspect of your request concerns a subpoena served upon the District by a federal court relating to the construction at the elementary school. If indeed the subpoena has been served, in my view, there would be nothing privileged or confidential about it, and it is unlikely 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: Board of Education
Dr. Karen McCarthy
Peter A. Walker



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

APPL. NO. 252
FOI NO. 11382

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Executive Director

Robert J. Freeman

March 22, 1999

Mr. George Miller

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

Dear Mr. Miller:

I have received your letter of March 3 in which you sought an opinion concerning a denial of access to records by the Orange County Department of Personnel. Since you did not indicate the nature of the records sought, I cannot provide clear guidance. However, on the basis of the letter denying your request, I offer the following comments.

First, with respect to certain aspects of your request, the response indicates that you sought information rather than records, and that the records were not reasonably described. Again, while I am unfamiliar with your request, I point out that the Freedom of Information Law pertains to existing records, and that §89(3) states in part that an agency is not required to create a record in response to a request. Therefore, insofar as you sought information, rather than records, and the information sought does not exist in the form of a record, the County would not be obliged to prepare new records on your behalf.

Section 89(3) also provides that an applicant must "reasonably describe" the records sought. Consequently, a request should contain sufficient detail to enable an agency to locate and identify the records. It is noted that the state's highest court, the Court of Appeals, has held that whether or the extent to which a request reasonably describes requested records may be dependent on the nature of an agency's filing or recordkeeping systems [*Konigsberg v. Coughlin*, 68 NY2d 245 (1986)]. By means of example, if an individual wants records identifying persons in the phone book whose last name is "Miller", those items can be easily located, for listings appear alphabetically, by last name, and a request of that nature would reasonably describe the records. On the other hand, if a request is made for the entries of persons whose first name is "George", locating those entries would require a review of each and every entry. Because the entries appear on the basis of last names rather than first names, such a request would not meet the standard of reasonably describing the records.

Mr. George Miller

March 22, 1999

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

Since the records appear to relate to a police officer, the first ground for denial, §87(2)(a), may be relevant. That provision pertains to records that "are specifically exempted from disclosure by state or federal statute", and 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 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)].

The response also refers to §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;

Mr. George Miller

March 22, 1999

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

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

Finally, reference is made to unwarranted invasions of personal privacy in relation to §89(2) of the Freedom of Information Law and §96 of the Personal Privacy Protection Law. Here I note that the Personal Privacy Protection Law is applicable only to state agencies. For purposes of that statute, §92(1) defines the term "agency" to mean:

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

Based on the foregoing, the Personal Privacy Protection Law excludes from its coverage "any unit of local government", such as a 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.

Notwithstanding the foregoing, the cited provision of the Freedom of Information Law authorizes an agency to deny access to records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." Since your request appears to involve records pertaining to a public employee, I point out that the courts have provided substantial direction regarding the privacy of public officers and 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);

Mr. George Miller

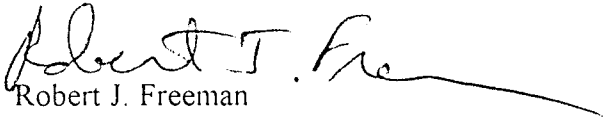
March 22, 1999

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Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]--Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy (see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977).

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

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

cc: Catherine O'Grady
Richard B. Golden



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DEPARTMENT OF STATE
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FOI-AO-11383

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Alexander F. Treadwell

Executive Director

Robert J. Freeman

March 22, 1999

Mr. Dominic Bretti
80-C-0511
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. Bretti:

I have received your letter of March 3 in which you wrote that you are "getting shuffled around" in relation to your request for records, and you asked where and to whom you may appeal a denial of access.

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

Mr. Dominic Brett

March 22, 1999

Page 2-

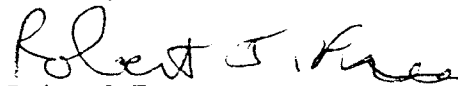
who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

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



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Executive Director

Robert J. Freeman

March 22, 1999

Mr. Rafael Robles
88-A-8275
Great Meadows 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 letter of March 8 in which you sought assistance concerning your ability to gain access to certain records. You asked whether you can obtain police reports prepared in 1987 involving an event unrelated to yourself, as well as those pertaining an injury sustained by a police officer in the line of duty.

In this regard, I offer the following comments.

First, it is emphasized that the Freedom of Information Law pertains to existing records [see §89(3)]. I am unaware of whether records or reports prepared in 1987 continue to exist. If they have been destroyed, the Freedom of Information Law would not apply.

Second, insofar as the police reports in which you are interested continue to be maintained, I note as a general matter that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Since I am unaware of the contents of 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", also known as "DD5's", prepared by police officers in which it was held that a denial of access based on their characterization as intra-agency materials would be inappropriate.

The provision at issue, §87(2)(g) of the Freedom of Information Law, enables an agency to withhold records that:

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

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

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

In its analysis of the matter, the decision states that:

"...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute 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)]). 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 victim, a suspect, 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).

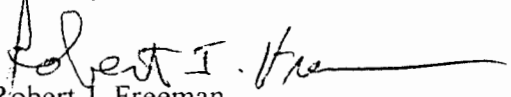
Another possible ground for denial is §87(2)(f), which permits withholding to the extent that disclosure "would endanger the life or safety of any person". The capacity to withhold on that basis is dependent upon the facts and circumstances concerning an event.

With respect to records concerning an injury sustained by a police officer, as indicated earlier, §87(2)(b) authorizes an agency to withhold records to the extent that disclosure would result in an unwarranted invasion of personal privacy. In addition, §89(2)(b) provides a series of examples of unwarranted invasions of personal privacy, two of which relate to medical information. From my perspective, insofar as records include medical information or descriptions concerning the medical nature of an injury, treatment and the like, they may be withheld on the ground that disclosure would constitute an unwarranted invasion of privacy.

Mr. Rafael Robles
March 22, 1999
Page - 5 -

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

FOIA-10-11385

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Alexander F. Treadwell

Executive Director

Robert J. Freeman

March 22, 1999

Mr. Jerry Brixner



The staff of the Committee on Open 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 been asked by Assemblywoman John to offer guidance concerning your request for her advice in relation to your unsuccessful efforts in obtaining records from the Chili Town Supervisor. In your letter to the Assemblywoman, you asked: "To what ends would it be for me to initiate a law suit if Supervisor Kelly continues to ignore my December 15 request." You also referred to a provision in the Freedom of Information Law that authorizes a court to award attorney's fees certain limited circumstances in a suit brought under that statute.

While the meaning of your question is not entirely clear, 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:

Mr. Jerry Brixner

March 22, 1999

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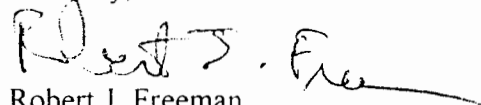
"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial,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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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 Assemblywoman John has co-sponsored legislation that would provide a court with broader authority to award attorney's fees when a member of the public substantially prevails in a proceeding brought under the Freedom of Information Law to gain access to records (see attached, A. 1111). The legislation is based on a recommendation offered to the Governor and the State Legislature by the Committee on Open Government in several of its annual reports.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Susan John
Hon. William C. Kelly



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL AO
FOIL AO - 11386

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Executive Director

Robert J. Freeman

March 22, 1999

Ms. Pauline Aldridge
Special Projects
R.A.M.S.
8789 San Jose Blvd., Suite 104
Jacksonville, Florida 32217

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

Dear Ms. Aldridge:

I have received your letter of March 10 in which you questioned the propriety of a denial of access to a list of names and addresses of substance abuse counselors by the Office of Alcoholism and Substance Abuse Services (OASAS).

Having spoken with Richard Chady, the Public Information Officer for OASAS, the list of substance abuse counselors maintained by that agency includes the home addresses of those individuals. For that reason, I believe that 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.

Also pertinent under the circumstances is the Personal Privacy Protection Law, which deals in part with the disclosure of records or personal information by state agencies concerning data subjects. A "data subject" is "any natural person about whom personal information has been collected by an agency" [Personal Privacy Protection Law, §92(3)]. "Personal information" is defined to mean "any information concerning a data subject which, because of name, number, symbol, mark or other identifier, can be used to identify that data subject" [§92(7)]. For purposes of 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)].

Ms. Pauline Aldridge

March 22, 1999

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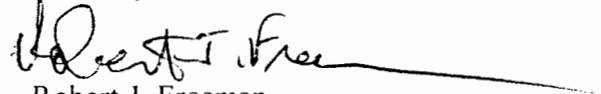
With respect to disclosure, §96(1) of the Personal Privacy Protection Law states that "No agency may disclose any record or personal information", except in conjunction with a series of exceptions that follow. One of those exceptions involves a situation in which a record is "subject to article six of 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.

In situations in which lists identify licensees or public employees by their business addresses, the lists are accessible. The inclusion of the business address relates to the performance of one's professional or governmental duties, and there is nothing "personal" about that item. However, the Freedom of Information Law specifies that home addresses pertaining to public employees need not be disclosed [see §89(7)]. Further, it has been held that the home addresses of others, persons who are not public employees, may be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy [see American Broadcasting Companies, Inc. v. Siebert, 442 NYS 2d 855 (1981), Empire Realty Corp. v. NYS Division of the Lottery, 657 NYS 2d 504, 230 AD 2d 270 (1997), Joint Industry Board of Electrical Industry v. Nolan, 159 AD 2d 241 (1990)].

It is noted that Mr. Chady indicated that a list of providers would be made available on request, and that such a list would potentially reach a larger audience for your purposes than a list of substance abuse counselors.

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

cc: Richard Chady



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DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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Executive Director

March 23, 1999

Robert J. Freeman

Ms. Jean A. Black
Certified Public Accountant
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 letter of March 9 in which you sought assistance in obtaining payroll records from the Hilton Central School District. According to your letter, you have encountered a series of delays in your attempts to gain access to the 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.

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

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

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

"Each agency shall maintain..."

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

As such, a payroll record that identifies all officers or employees by name, public office address, title and salary must be "maintained" on a continual basis.

With respect to rights of access, of primary relevance is §87(2)(b), which permits an agency to withhold record or portions of records when disclosure would result in "an unwarranted invasion of personal privacy." However, payroll information has been found by the courts to be available [see e.g., Miller v. Village of Freeport, 379 NYS 2d 517, 51 AD 2d 765, (1976); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NYS 2d 954 (1978)]. In addition, this Committee has advised and the courts have upheld the notion that records that are relevant to the performance of the official duties of public employees are generally available, for disclosure in such instances would result in a permissible as opposed to an unwarranted invasion of personal privacy [Gannett, supra; Capital Newspapers v. Burns, 109 AD 2d 292, aff'd 67 NY 2d 562 (1986); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980; Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); and Montes v. State, 406 NYS 664 (Court of Claims 1978)]. As stated prior to the enactment of the Freedom of Information Law, payroll records:

"...represent important fiscal as well as operational information. The identity of the employees and their salaries are vital statistics kept in the proper recordation of departmental functioning and are the primary sources of protection against employment 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, I believe that the payroll list should be made available without delay, and in addition, 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..."

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

Ms. Jean A. Black

March 23, 1999

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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:

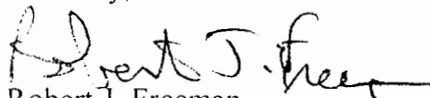
"...the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objectives cannot hope to be attained unless 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 record or report is clearly public and can be found easily, as in the case of the payroll list required to be "maintained" pursuant to §87 (3)(b), there would appear to be no rational basis for delaying disclosure. In a case in which it was found that an agency's "actions demonstrate an utter disregard for compliance set by FOIL", it was held that "[t]he records finally produced were not so voluminous as to justify any extension of time, much less an extension beyond that allowed by statute, or no response to appeals at all" (Inner City Press/Community on the Move, Inc. v. New York City Department of Housing Preservation and Development, Supreme Court, New York County, November 9, 1993).

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

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Christopher A. Bogden, Ed.D.

Steven V. Ayers



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11388

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March 23, 1999

Executive Director

Robert J. Freeman

Mr. Joel D. Davis
#26907-037
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Fort Dix, NJ 08640

The staff of the Committee on Open 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 February 4, which reached this office on March 11. Please note the change in the Committee's address.

According to your letter and the correspondence attached to it, you requested a variety of records regarding an alleged arson that occurred in the Town of Woodbury in 1980. Although the Town of Woodbury Police Department acknowledged the receipt of your request, which was made on January 17, 1996, when called by an attorney, you wrote that no written response has ever been received. You have sought assistance in the matter.

In this regard, I offer the following comments.

First, your request cites provisions of federal law, specifically, the federal Freedom of Information and Privacy Acts. Those provisions pertain only to records maintained by federal agencies. The statute that governs rights of access to records maintained by entities of state and local government in New York is this state's Freedom of Information Law.

Second, in view of the lapse of time since the submission of your request, more than three years, I would conjecture that the request may have been lost or that the failure to respond is based on an oversight. Consequently, it is suggested that you resubmit your request in accordance with the state Freedom of Information Law.

Third, it is emphasized that the Freedom of Information Law pertains to existing records [see §89(3)]. Since the event that is the subject of your request occurred nearly twenty years ago, it is questionable whether all of the records relating to the matter continue to exist. Insofar as the records have been disposed of or destroyed, the Freedom of Information Law would not apply.

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

Mr. Joel D. Davis

March 23, 1999

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In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in sub- paragraphs (i) through (iv) of §87(2)(e).

Another possible ground for denial is §87(2)(f), which permits withholding to the extent that disclosure "would endanger the life or safety of any person". The capacity to withhold on that basis is dependent upon the facts and circumstances concerning an event.

Next, since you referred in your request to a "Vaughn Index", I point out that there is nothing in 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, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

Mr. Joel D. Davis
March 23, 1999
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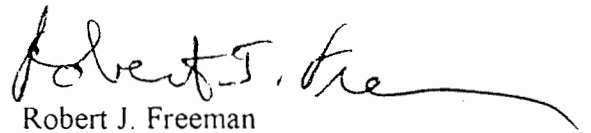
If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

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



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

Oml-AO-3010
FOIL-AO-11389

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Robert J. Freeman

March 24, 1999

Mr. Anthony G. Szkutak

[REDACTED]

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

Dear Mr. Szkutak:

I have received copies your correspondence with the Town of Hampton and would like to offer the following comments for the purpose of clarification.

First, since you referred to executive sessions held to discuss "potential litigation", I note that the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

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

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 by 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 Hampton."

Second, you wrote that the "personnel" exception for entry into executive session "pertains only to employees of the municipality and not to appointed or elected officials." In short, based on the language of the Open Meetings Law, I disagree. That provision, §105(1)(f), permits a public body to conduct an executive session to discuss:

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

The language quoted above is not restricted to employees and may be applied in appropriate circumstances to deal with others. For example, while members of planning boards or zoning boards of appeals are not employees, the Town Board could validly enter into executive sessions to discuss the strengths and weaknesses of specific individuals under consideration for service on those boards. Further, there may be instances in which the issue relates to a business entity and the Board considers the financial history of particular corporation before determining to contract or do business with that

Mr. Anthony Szkutak

March 24, 1999

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firm. In those and other situations, §105 (1)(f) could be cited to discuss matters that do not relate to employees.

It has been advised that a motion describing the subject to be discussed as "personnel" is inadequate, and that the motion should be based upon the specific language of §105(1)(f). For instance, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in my opinion have to identify the person or persons who may be the subject of a discussion. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

It is noted that the Appellate Division confirmed the advice rendered by this office. In discussing §105(1)(f) in relation to a matter involving the establishment and functions of a position, the Court stated that:

"...the public body must identify the subject matter to be discussed (See, Public Officers Law § 105 [1]), and it is apparent that this must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette Co. v Town Bd., Town of Cobleskill, 111 Misc 2d 303, 304-305). Additionally, the topics discussed during the executive session must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsburgh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, *supra*, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, *lv dismissed* 68 NY 2d 807).

"Applying these principles to the matter before us, it is apparent that the Board's stated purpose for entering into executive session, to wit, the discussion of a 'personnel issue', does not satisfy the requirements of Public Officers Law § 105 (1) (f). The statute itself requires, with respect to personnel matters, that the discussion involve the 'employment history of a particular person' (*id.* [emphasis supplied]). Although this does not mandate that the individual in question be identified by name, it does require that any motion to enter into executive session describe with some detail the nature of the proposed discussion (see, State Comm on Open Govt Adv Opn dated Apr. 6, 1993), and we reject respondents' assertion that the Board's reference to a 'personnel issue' is the functional equivalent of identifying 'a

Mr. Anthony Szkutak

March 24, 1999

Page - 4 -

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.

Third, in one item of correspondence, you asked that the Town's Freedom of Information Law Appeals Officer "provide by reference the section of the 'OML' that excludes the public from contesting the accuracy of the minutes prior to the minutes being accepted." There is no such provision of law, but I point out there is similarly no provision of law that gives the public the right to contest the contents of minutes. In fact, while I believe that minutes must be accurate, there is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved.

I note, too, that the Open Meetings Law provides what might be characterized as minimum requirements concerning the contents of minutes. Section 106 of that statute states that:

"1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.

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

3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

Based on the foregoing, it is clear that minutes need not consist of verbatim account of statements made at a meeting or that they include reference to all who might have spoken.

Mr. Anthony Szkutak

March 24, 1999

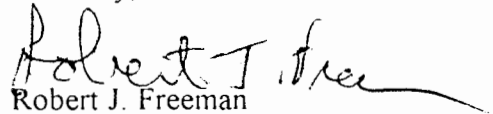
Page - 5 -

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, in a letter to the Town's Appeals Officer, you sought descriptions and explanations of certain actions or activities of the Town Board. In this regard, 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. In the context of your request, if the minutes include the information required by §106 of the Open Meetings Law, I do not believe that the Town would be obligated to prepare new records containing descriptions or explanations of its actions.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board

Peter L. Genier, Appeals Officer



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-A0 - 11390

Committee Members

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>

Mary O. Donohue
Alan Jay Gerson
Walter Grunfeld
Robert L. King
Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

March 25, 1999

Executive Director

Robert J. Freeman

Mr. Barry James Stone, Sr.

[REDACTED]
[REDACTED]

Dear Mr. Stone:

I have received the materials that you deposited with the Committee on Open Government. The nature of the services that you seek from this office is unclear. Nevertheless, I offer the following comments.

The package includes correspondence with several agencies from which you are apparently seeking records. However, in most instances, there is no clear indication of which records you are seeking. In this regard, it is emphasized that §89(3) of the Freedom of Information Law requires that an applicant must "reasonably describe" the records sought. Therefore, when making a request, you should include sufficient detail to enable agency staff to locate and identify the records of your interest. From my perspective, in most instances, your requests are so vague or broad that they do not meet the standard 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-11391

Committee Members

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Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

March 25, 1999

Executive Director

Robert J. Freeman

Mr. Perry Owen
Ms. Venetia Owen



Dear Mr. and Ms. Owen:

As you are aware, your letter of March 8 addressed to the Attorney General has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State, is authorized to provide advice and opinions concerning the Freedom of Information Law.

In brief, you complained that you are frustrated in your efforts in obtaining information from the Office of Mental Retardation and Developmental Disabilities (OMRDD) pertaining to "consumers at the Sunmount, Tupper Lake, CIT unit." In order to elicit the information, you prepared a form to be completed with respect to each consumer.

In this regard, in an effort to learn more of the status of your request, I contacted Eileen Zibell, OMRDD's records access officer. She informed me yesterday, Thursday, March 25, that she would likely send a response to you either today or during the beginning of next week. She indicated that OMRDD would provide some of the information sought.

I emphasize that the title of the Freedom of Information Law may be somewhat misleading, for it is not a statute that deals with information *per se*; rather, it is a vehicle that pertains to existing records. Further, §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 for information. In the context of your correspondence, OMRDD is not, in my opinion, required to complete the form that you supplied or prepare new records in order to satisfy your request for information. It is my understanding, however, that OMRDD will supply existing records in its possession that are responsive 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:jm
cc: Eileen Zibell



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AP-11392

Committee Members

41 State Street, Albany, New York 12231

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Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

March 26, 1999

Executive Director

Robert J. Freeman

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 March 9.

Based on my response to you regarding denials of requests by the Office of the Queens County District Attorney, you questioned whether this office had inadvertently overlooked equivalent records that might have been sent to this office between May and September. Having searched the records again, there was no oversight; you received all of the records that fell within the scope of your request. In addition, since your initial request involved records transmitted to this office through December, staff also searched for any that might have been filed since that time; there are none.

You asked where you would complain about "illegal practices" relating to the Freedom of Information Law. In short, anyone can transmit a complaint concerning the Freedom of Information Law to this office. The major function of the Committee on Open Government involves providing advice and guidance concerning public access to government information, primarily under the Freedom of Information Law. I note, however, that the Committee has no authority to enforce the Freedom of Information Law or compel an agency to grant or deny access to records. Enforcement of the Law can be sought through the initiation of a judicial proceeding.

Lastly, you asked whether a "records management/retention protocol" must be disclosed under the Freedom of Information Law. In my opinion, such a record 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. Pertinent is §87(2)(g), which permits an agency to withhold records that:

Mr. Alvaro A. Sanchez

March 26, 1999

Page -2-

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

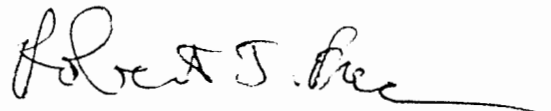
- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations; or
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

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

From my perspective, the kind of record that you described would serve as an agency's policy and, therefore, would be available under §87(2)(g)(iii).

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Joseph Carmello



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOYL 120-11393

Committee Members

41 State Street, Albany, New York 12231

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Walter Grunfeld
Robert L. King
Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

March 26, 1999

Ms. Teri Weaver
Staff Writer
Syracuse Newspapers
315 Fayette Street
Manlius, NY 13104

The staff of the Committee on Open 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 March 16 in which you sought an opinion concerning "the DeWitt Police Department withholding names of defendants who are 16, 17, 18 and 19 and who are charged with misdemeanor crimes."

From my perspective, until a court takes action to seal the records containing the names of those defendants pursuant to §720.15 of the Criminal Procedure Law, the names 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.

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 "apparently eligible youths" might at some point fall within a statutory exemption from disclosure, that point is reached, in my view, only when or after a court orders that the records be sealed.

As suggested above, pertinent to the issue in my view is §720.15 of the Criminal Procedure Law, which provides that:

Ms. Teri Weaver

March 26, 1999

Page - 2 -

"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.

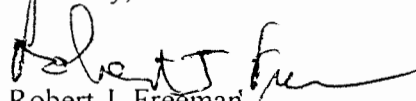
3. The provisions of subdivisions one and two of this section requiring or authorizing the accusatory instrument filed against a youth to be sealed, and the arraignment and all proceedings in the action be conducted in private shall not apply in connection with a pending charge of committing any felony 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", irrespective of whether that person is charged with a misdemeanor or a felony.

Lastly, although arrest records are not specifically mentioned in the current Freedom of Information Law, the original Law granted access to "police blotters and booking records" [see original Law, §88(1)(f)]. In my opinion, even though reference to those records is not made in the current statute, I believe that such records continue to be available, for the present law was clearly intended to broaden rather than restrict rights of access. Moreover, it was held by the state's highest court, the Court of Appeals, several years ago that, unless sealed under §160.50 of the Criminal Procedure Law, or, in this context, under §720.15 of the Criminal Procedure Law, records of the arresting agency identifying those arrested must be disclosed [see Johnson Newspapers v. Stinkamp, 61 NY 2d 958 (1984)].

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Deputy Chief William D. Ferguson



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AD - 11394

Committee Members

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>

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Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

March 26, 1999

Executive Director

Robert J. Freeman

Mr. Jorge Rivera
141-98-27978
1818 Hazen Street
East Elmhurst, NY 11370

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

Dear Mr. Rivera:

I have received your letter of March 12 in which you sought assistance in obtaining certain records. Although you submitted requests to Riker's Island and an office of the Division of Parole in Brooklyn, you had not received any response. The records requested involve "a list of phone calls" that you made to the Division of Parole on a certain date.

In this regard, I offer the following comments.

First, 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 has the duty of coordinating an agency's response to requests, and requests should generally be made to that person. While I believe that those in receipt of your requests should have answered in a manner consistent with the Freedom of Information Law or forwarded the requests to the appropriate persons, it is suggested that you resubmit your requests, directing them to the records access officers at the agencies in question.

For your information, since Riker's Island is operated by the New York City Department of Correction, a request may be sent to Mr. Thomas Antenen, Records Access Officer, New York City Department of Correction, 60 Hudson Street, 6th Floor, New York, NY 10013. The records access officer for New York State Division of Parole is David Molik, whose office is located at 97 Central Avenue, Albany, NY 12206.

Next, 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:

Mr. Jorge Rivera
March 26, 1999
Page -2-

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

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

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

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

Third, I am unaware of the nature of the records that might be kept by an agency regarding phone calls. Here I note that §89(3) of the Freedom of Information Law requires that an applicant must "reasonably describe" the records sought. In many instances, whether a request reasonably describes records may be dependent upon the nature of an agency's filing or recordkeeping system. If the items of your interest can be located with reasonable effort based on the terms of your request, the request would in my opinion meet the standard imposed by the law. On the other hand, however, if agency staff would be required to engage in a search of hundreds or thousands of records in an effort to locate the items of your interest, the request in my opinion would not meet that standard.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm
cc: Thomas Antenen
David Molik



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11395

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>

Committee Members

Mary O. Donohue
Alan Jay Gerson
Walter Grunfeld
Robert L. King
Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

March 26, 1999

Mr. Bennett Weiss



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

Dear Mr. Weiss:

I have received your letter of March 16 and the materials relating to it. You have sought guidance concerning the time taken by the Newburgh Enlarged City School District to respond to a request for records.

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

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

If neither a response to a request nor an 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."

Mr. Bennett Weiss

March 26, 1999

Page - 2 -

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

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:

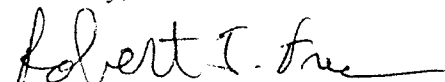
"...the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objectives cannot hope to be attained unless 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, 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 acknowledgment, 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.

Mr. Bennett Weiss
March 26, 1999
Page - 3 -

I hope that I have been of assistance. --

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and has a long, sweeping horizontal line extending to the right.

Robert J. Freeman
Executive Director

RJF:tt

cc: Philomena T. Pezzano

FOIL-AO - 11396

From: Robert Freeman
To: DOS1:congov@[usa.net],
Date: 3/29/99 5:12PM
Subject: SEEKING INFO FROM A PRO -Reply

Dear Mr. Rosenberg:

In brief, I believe that government agencies subject to the Freedom of Information Law are required to respond to requests for records. However, in this instance, the information of your interest appears to be confidential.

The first ground for denial in the Freedom of Information Law pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is the federal Family Educational Rights and Privacy Act (FERPA). FERPA pertains to records identifiable to students who attend any educational institution that participates in a federal funding or loan program. Therefore, it includes virtually every public educational institution and many private institutions within its coverage.

In short, FERPA prohibits those institutions from disclosing personally identifiable information pertaining to students without the consent of parents of students under the age of eighteen or the students themselves when they have reached that age.

Consequently, as I understand your inquiry, while a CUNY institution would be required to respond, it would have the authority to deny access to the information sought.

To obtain more information on the subject, we have a website that includes the text of opinions prepared by this office. The address is:

www.dos.state.ny.us/coog/coogwww/html

You will see reference to advisory opinions issued under the Freedom of Information Law. From there, click on to "F" and scroll down to "FERPA"; also click on to "T" and scroll to "Time Limits for Response."

If you need additional information, please feel free to contact me



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL No. 11397

Committee Members

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>

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Robert L. King
Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

March 30, 1999

Executive Director

Robert J. Freeman

Mr. Harry A. Lathrop



Dear Mr. Lathrop:

I have received your correspondence concerning a request for records directed to the Village of Marcellus. You asked whether the Village had transmitted materials to this office as required by §89(4)(a) of the Freedom of Information Law.

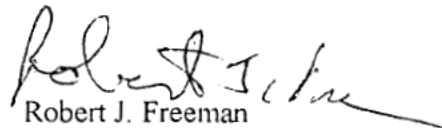
In this regard, having searched our files based upon the new information that you provided, it appears that the Village did not transmit the materials as required by law. As you are likely aware, §89(4)(a) states that:

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

In an effort to enhance compliance with 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

Hon. Frederic B. Eisenberg, Mayor



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11398

Committee Members

41 State Street, Albany, New York 12231

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Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

March 30, 1999

Executive Director

Robert J. Freeman

E-Mail

TO: Josh Rosenberg - Hello There <congov@usa.net>

FROM: Robert Freeman

Dear Mr. Rosenberg:

I have received your latest e-mail in which you questioned what action might be taken if an agency ignores appeals following denials of access.

In this regard, §89(4)(a) states that:

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

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

I point out that the authority of the Committee on Open Government is solely advisory; the Committee is not empowered to compel an agency to grant or deny access to records or otherwise comply with law. When the agency involved in a controversy is identified, copies of advisory opinions are sent to agency officials in an effort to educate, persuade and enhance compliance with law.

I hope that I have been of assistance.

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-10-11399

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Alexander F. Treadwell

March 30, 1999

Executive Director

Robert J. Freeman

Mr. Bruce Estes
Managing Editor
The Ithaca Journal
123 W. State Street
Ithaca, NY 14850

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

Dear Mr. Estes:

I have received your letter of March 16. You wrote that the new Tompkins County Sheriff "decided that the sheriff's blotter was a 'management document' and would not be accessible to [y]our reporters." You added that the blotter, which has been made available in the past, "contains brief notations on arrests, the nature of the offense, the location of the arrest, the name of the arrested person and the name of the arresting officer."

From my perspective, the records in question must be made available in great measure, if not in their entirety. In this regard, I offer the following comments.

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

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

Based on the foregoing, irrespective of the manner in which a document is characterized or whether it is maintained on paper or electronically, I believe that it would constitute a "record" subject to rights of access conferred by the Freedom of Information Law.

Mr. Bruce Estes
March 30, 1999
Page -2-

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

I point out that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of one or more of the grounds for denial that follow. Based on the quoted language, I believe that there may be situations in which a single record might be both available or deniable in part. Further, the same language, in my opinion, imposes an obligation on an agency to review records sought in their entirety to determine which portions, if any, may justifiably be withheld. As such, even though some aspects of a police blotter or other record might properly be denied, the remainder might nonetheless be available and would have to be disclosed.

Third, 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 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.*).

As you may be aware, the phrase "police blotter" is not specifically defined in any statute. It is my understanding that it is a term that has been used, more than anything else, based upon custom and usage. Further, the contents of what might be characterized as a police blotter may vary from one police department to another and often police departments use different terms for records or reports analogous to police blotters. In Sheehan v. City of Binghamton [59 AD 2d 808 (1977)], it was determined that, based on custom and usage, a police blotter is a log or diary in which any event reported by or to a police department is recorded. The decision specified that a traditional police blotter contains no investigative information, but rather merely a summary of events or occurrences and that, therefore, it is accessible under the Freedom of Information Law. When a police blotter or other record is analogous to that described in Sheehan in terms of its contents, I believe that the public would have the right to review it.

If the police blotter includes additional information, i.e., names of suspects or investigative information, it is possible that those portions might properly be deleted. Pertinent in that situation would be §87(2)(e), which enables an agency to withhold records compiled for law enforcement purposes to the extent that disclosure would interfere with an investigation, for example. In that circumstance, portions of the records might be withheld, but the remainder would be available.

Lastly, although arrest records are not specifically mentioned in the current Freedom of Information Law, the original Law granted access to "police blotters and booking records" [see original Law, §88(1)(f)]. In my opinion, even though reference to those records is not made in the current statute, I believe that such records continue to be available, for the present law was clearly intended to broaden rather than restrict rights of access. Moreover, it has been held by the Court of Appeals that unless sealed under §160.50 of the Criminal Procedure Law, records of the arresting agency identifying those arrested must be disclosed [see Johnson Newspapers v. Stainkamp, 61 NY 2d 958 (1984)].

In sum, the determination by the Sheriff to withhold the blotter in its entirety is in my opinion inconsistent with law. For the reasons described above, I believe that the blotter is presumptively available and must be disclosed, except to the extent that portions of the records fall within a ground for denial specified in the Law.

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

Mr. Bruce Estes
March 30, 1999
Page -4-

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman". The signature is fluid and cursive, with a long horizontal stroke at the end.

Robert J. Freeman
Executive Director

RJF:jm

cc: Sheriff Peter Meskill



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AP-11400

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Alexander F. Treadwell

April 2, 1999

Executive Director

Robert J. Freeman

Mr. Jack McAndrew



The staff of the Committee on Open 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 March 15. You wrote that you are employed by the Port Jervis Public School District and that you have been involved in various proceedings with that agency. Having recently requested a transcript of a hearing in which you were a party, the request was denied on the ground that the District is "not in possession" of the record in question. It is your belief that that the transcript and similar or related records are kept by the District's attorneys.

If your contention is accurate, the materials at issue would, in my view, constitute District records subject to rights conferred by the Freedom of Information Law. In this regard, I offer the following comments.

It is emphasized that the Freedom of Information Law pertains to all agency records, such as those involving school districts, and that §86(4) of that statute defines the term "record" expansively to include:

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

Based upon the language quoted above, 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.

Mr. Jack McAndrew

April 2, 1999

Page -2-

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).

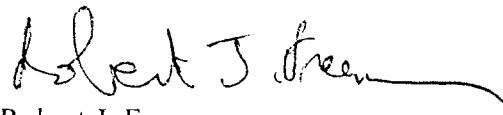
Additionally, in a decision rendered by the Court of Appeals, the state's highest court, it was found that materials received by a corporation providing services for a branch of the State University that were kept on behalf of the University constituted "records" falling within the coverage of the Freedom 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 District, I believe that the District is 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.

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

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Patrick Hamill, Superintendent
Robert B. Witherow, Records Access Officer



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11401

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April 2, 1999

Executive Director

Robert J. Freeman

Mr. Barry Sanders
94-A-8283 C-4-15
Clinton Correctional Facility
P.O. Box 2000
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. Sanders:

I have received your letter of March 15 and the materials attached to it. As I understand their contents, you have encountered a series of delays and denials of access to records that you have requested over the course of several years from the New York City Police Department and the State Department of Correctional Services.

Since I do not fully understand your commentary, I cannot offer specific guidance. However, I offer the following remarks.

First, the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee is not empowered to acquire records on behalf of an applicant or compel an agency to grant or deny access to records.

Second, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests 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..."

Mr. Barry Sanders

April 2, 1999

Page -2-

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

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

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

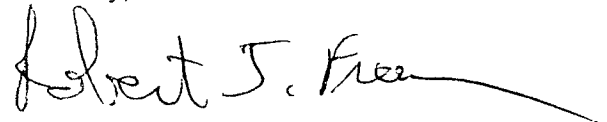
Third, in several instances concerning the appeal process, it appears that you are relying upon provisions contained in §89(5). Those provisions are not applicable; they deal only with situations in which commercial enterprises have sought confidentiality of records that they have submitted to state agencies.

Lastly, in the future, if you have a question concerning the Freedom of Information Law, it is suggested that you express it briefly and directly. If you do so, I might be able to offer more effective guidance.

As you requested, I am returning the materials that you sent to this office.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11402

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April 2, 1999

Executive Director

Robert J. Freeman

Ms. Penny Wells LaValle
Director
County of Suffolk Real Property
Tax Service Agency
300 Center Drive
Riverhead, NY 11901-3398

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

Dear Ms. LaValle:

I have received your transmittal of April 2 and the materials related to it. Among the correspondence is a letter addressed to me on December 28 in which you sought an advisory opinion concerning the Freedom of Information Law. As indicated by phone, and based upon a review of our log of incoming correspondence, that letter, for reasons unknown, did not reach this office. I hope that you will accept my apologies for the delay in response.

At issue is the fee that may be charged by Suffolk County for the disclosure of compact disks containing GIS information. The Counsel to the County Legislature referred to sections of the Suffolk County Code authorizing a flat "one time fee" for the duplication of a database, and a similar fee for a set of books. He suggested that "...the GIS CD-ROM fell within these pre-packaged database type items being provided to the public as distinguished from the photocopying of individual records." He added that:

"The common law principle against municipal profit making imposes a restriction on costs even for such packages in that the charge cannot exceed the County cost for providing the package or the item. In this case, given the tens of millions of dollars that were spent on prepared the GIS system, a modest fee did not seem to come even close to violating the common law principle."

Ms. Penny Wells LaValle

April 2, 1999

Page -2-

An Assistant County Attorney contended, however, that "the County is not permitted to charge for a data disk anymore than the cost of the materials to produce the disk."

From my perspective, the view of the Assistant County Attorney is essentially consistent with the Freedom of Information Law. In this regard, I offer the following comments.

First, as you may be aware, the Freedom of Information Law pertains to agency records and 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 nearly twenty 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, by way of background 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

Ms. Penny Wells LaValle

April 2, 1999

Page -3-

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 was confirmed judicially more than a decade ago that fees inconsistent with the Freedom of Information Law may be validly charged only when the authority to do so is conferred by a statute [see Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)]. The most recent decision on the matter involved a provision in the Suffolk County Code that established a fee of twenty dollars for photocopies of police reports [Gandin, Schotsky & Rappaport v. Suffolk County, 640 NYS2d 214, 226 AD2d 339 (1996)]. The Appellate Division unanimously determined that the provision in the County Code was invalid. In short, it was determined an enactment of a municipal body is not a statute, and the County was restricted to charging a fee of twenty-five cents per photocopy for the records at issue.


In my view, while a compact disk might be likened to a database, the fee that could be assessed for reproducing either must be based upon the actual cost of reproduction. If the County Code authorizes a "one time fee" for the duplication of a database, or if a similar fee is established relative to a compact disk, unless the fee is reflective of the actual cost of reproduction, I believe that it would be invalid.

Based upon the foregoing, a fee for reproducing electronic information generally would involve the cost of computer time, plus the cost of an information storage medium (i.e., a computer tape or compact disk) to which data is transferred. If the duplication of the data involves a transfer of data from one disk to another, computer time may be minimal, perhaps a matter of seconds. If that is so, the actual cost may involve only the cost of a disk.

Lastly, the suggestion by the Counsel to the County Legislature that actual cost involves money expended in developing an information system is in my view inaccurate. Based upon the terms of the Freedom of Information Law and its judicial interpretation, actual cost involves only reproduction of a record, not the monies expended in development of an information system or the purchase of hardware or software. I note, too, that although compliance with the Freedom of Information Law involves the use of public employees' time and other costs, the Court of Appeals has found that the Law is not intended to be given effect "on a cost-accounting basis", but rather that "Meeting the public's legitimate right of access to information concerning government is fulfillment of a governmental obligation, not the gift of, or waste of, public funds" [Doolan v. BOCES, 48 NY 2d 341, 347 (1979)].

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11403

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April 5, 1999

Executive Director

Robert J. Freeman

Mr. Charles Myrtetus
74-C-0316
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. Myrtetus:

I have received your letter of March 14. You wrote that you are attempting to obtain records indicating payment made to an attorney by the assigned counsel program. You indicated that the "Onondaga County Assigned Counsel Program of Onondaga County Bar Association" has refused to honor your request.

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; it would not apply to a private organization.

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

Mr. Charles Myrtetus

April 5, 1999

Page -2-

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 or private organization 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.

The Onondaga County Bar Association is not, in my opinion, an "agency" subject to the Freedom of Information Law. However, if the County maintains the records of your interest, those records would fall within the scope of that statute.

Further, if a bar association, for example, maintains records for a county, I believe that they would constitute county records. 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, 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 within 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,

Mr. Charles Myrtetus

April 5, 1999

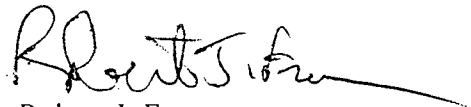
Page -3-

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. Rather than seeking the records from the Bar Association, it suggested that you direct a request to Onondaga County and its records access officer.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
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FOIL-AO-11404

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

April 5, 1999

Executive Director

Robert J. Freeman

Mr. Bernard Aunchman
96-A-1930
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. Aunchman:

I have received your letter of March 17 in which you sought assistance in obtaining records pertaining to your case from the City of Schenectady Police Department and the Office of the Schenectady County District Attorney.

In this regard, I offer the following comments.

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

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

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

Mr. Bernard Aunchman

April 5, 1999

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

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

Mr. Bernard Aunchman

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"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;

Mr. Bernard Aunchman

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iii. identify a 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:

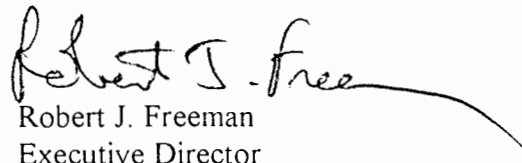
"...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of 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).

Mr. Bernard Aunchman
April 5, 1999
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I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:jm

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



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11405

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April 5, 1999

Executive Director

Robert J. Freeman

Ms. Ruth S. Szalasny

[REDACTED]
[REDACTED]

Dear Ms. Szalasny:

I have received your letter of March 17. You asked whether the subject matter list required to be maintained pursuant to the Freedom of Information Law is "the same thing as MU-1 RECORDS RETENTION AND DISPOSITION SCHEDULE."

In this regard, although the statutory requirements imposed by the Freedom of Information Law are separate from those relating to the retention and disposal of records, it has been advised that municipalities, by resolution, may adopt the retention schedule as their subject matter list. From my perspective, the retention schedules are more detailed than a subject matter list must be, and since they are quite complete in their references to records maintained by municipalities, they serve as a valid substitute for or equivalent of the subject matter 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

FOIL AO - 11406

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April 5, 1999

Executive Director

Robert J. Freeman

Ms. Krista Bradford

[REDACTED]

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

Dear Ms. Bradford:

I have received your correspondence of March 22, as well as the materials relating to it. You have sought guidance concerning a request made in July of 1998 for records relating to the selection of students for participation in the Anderson Program for gifted children in the New York City public schools.

The focus of your request involves gaining the ability, without personally identifying details, to know of the students who applied to the Program, which were accepted or rejected, the areas by zip code in which they reside, race, and IQ. All of that data is included in the materials submitted in the application process. In addition, you requested guidelines, criteria, policies, rules and similar documentation relating to the selection process, as well the qualifications of employees involved in that process. While you received some materials in response to your request, they minimally describe the program and the selection process; no documentation pertaining to students who applied was apparently provided; only brief information relating to employees who participated in the selection process was made available.

In this regard, I offer the following comments.

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

Relevant to the matter as it relates to records identifiable to students is the initial ground for denial, §87(2)(a), which pertains to records that are "specifically exempted from disclosure by state or federal statute." In this instance, insofar as disclosure of the records in question would or could identify a student or students, 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 that required disclosure following certain actions taken to ensure the privacy of students, 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, based upon FERPA, Kryston and the language of the Freedom of Information Law, I believe that the records concerning students, including zip codes of residence, race, IQ and other details, would be available, following the deletion of any information that would be personally identifiable to a student.

Ms. Krista Bradford

April 5, 1999

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Second, assuming that there are guidelines, policies, procedures and similar documentation concerning the selection process in addition to or more detailed than the materials that you received, I believe that they would be available. Pertinent is §87(2)(g). Although that provision potentially serves as a basis for denial, due to its structure, it frequently requires substantial disclosure. That provision enables an agency to withhold records that:

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

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

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

One of the contentions offered by 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)].

Ms. Krista Bradford

April 5, 1999

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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 agency maintains records falling within the scope of your request that consist of statistical or factual information, policy, procedures, rules or guidelines upon which it relies in implementing the selection process, they must be disclosed.

I note, too, 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, insofar as your request involves the qualifications of employees involved in the program, 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."

Ms. Krista Bradford

April 5, 1999

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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:

Ms. Krista Bradford

April 5, 1999

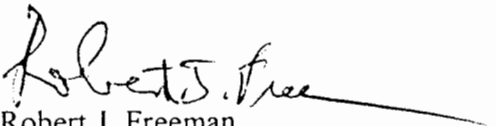
Page -6-

"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)]."

If resumes include reference to 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: Chancellor Rudy Crew

Patricia A. Romandetto, Community Superintendent

Cirino T. Lombard, Special Assistant to the Superintendent

Michael Valenti, Esq.



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 11407

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Alexander F. Treadwell

April 5, 1999

Executive Director

Robert J. Freeman

Mr. Tony C. Zappia



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

Dear Mr. Zappia:

I have received your letter of March 22 in which you sought "input" concerning a delay in response to a request for records of the New York Power Authority. Because the matter in which you are involved is "time sensitive", you asked whether you have "the right to insist upon immediate action".

From my perspective, there is no right to require "immediate action." However, I note that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

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

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

Mr. Tony C. Zappia

April 5, 1999

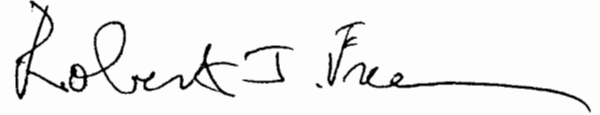
Page -2-

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

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

A handwritten signature in black ink that reads "Robert J. Freeman". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Anne Wagner-Findeisen



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-Ad - 11408

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April 5, 1999

Executive Director

Robert J. Freeman

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 note of March 18. You focused on a document referenced in a grievance decision and questioned whether that document would be available under the Freedom of Information Law.

In this regard, I would conjecture that the document in question is what has been characterized as a "Holt" letter. A Holt letter is in the nature of a warning rather than a determination indicating guilt or misconduct.

As I understand the Education Law as it pertains to tenured persons, a reprimand cannot be placed into a teacher's file unless the teacher has been charged and found to have engaged in misconduct in accordance with §3020-a of the Education Law. In contrast, a teacher may be evaluated at anytime relative to any performance of any nature, and a letter of evaluation may be placed in the teacher's file. This distinction was addressed by the Court of Appeals in Holt v. Board of Education of Webutuck Central School District (52 NY2d 625). As stated in Holt:

"The critical evaluations in issue fall within this permissible range of administrative evaluation. While the language of the administrators' letters may appear to some to be in the nature of a 'reprimand' within the literal meaning of that word, it falls far short of the sort of formal reprimand contemplated by the statute. Although the sharply critical content of the letters is unmistakable, the purpose of such communications - to call to the teacher's attention a relatively minor breach of school policy and to encourage compliance with that policy

Mr. Harvey M. Elentuck

April 5, 1999

Page -2-

in the future - is also clear. The purpose is to warn, and hopefully to instruct - not punish. Further, the documents in question are issued by a single administrator. While the inclusion of such letter in the teacher's permanent file may have some effect on his future advancement or potential employability elsewhere, it is by no means as damaging as a formal reprimand issued by the board of education as a result of a determination of misconduct made by an impartial hearing panel. Each letter represents one administrator's view, not a formal finding of misconduct.

In my opinion, notwithstanding its title or characterization, a document consisting of a "warning" or an administrator's opinion regarding a teacher's conduct, rather than a formal finding of misconduct, could be withheld pursuant to §87(2)(g) of the Freedom of Information Law. Such a document would not in my view represent a "final agency determination", which I believe would be accessible pursuant to §87(2)(g)(iii).

Your remaining comments deal with lesson observation reports. As indicated in previous correspondence, I will not address that issue again.

Sincerely,

A handwritten signature in black ink that reads "Robert J. Freeman". The signature is written in a cursive style and extends to the right with a long horizontal line.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11409

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

April 5, 1999

Executive Director

Robert J. Freeman

Hon. Charlotte Richmond
Town Clerk
Town of Henderson
P.O. Box 259
Henderson, NY 13650

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

Dear Ms. Richmond:

I have received your letter of March 18 in which you referred to an opinion rendered by this office on March 15 at the request of Ms. Julie West. The opinion focused on the requirement that an applicant must "reasonably describe" the records sought.

You enclosed a copy of Ms. West's request, and based upon a review of the materials that she requested, I agree that the item that you highlighted is inconsistent with the Freedom of Information Law. The request involves five items, the first four of which involve particular records, i.e., "standards", a proposed local law, a site plan and exhibits, and similarly described documents. The fifth involves "a copy of any document that supports the Town's position in the local law that states that Snowshoe Road in its present condition is adequate to handle the increase in traffic resulting from the Association Island Project."

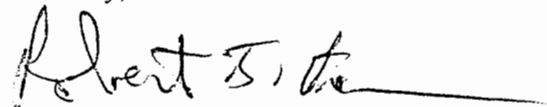
From my perspective, that aspect of the request involves the making of a judgment concerning the contents of records; it requires a reviewer of a record to opine concerning the content of records and to reach a conclusion that a particular record is for or against a particular proposed action. In my view, that is not a request for a record as envisioned by the Freedom of Information Law; on the contrary, it is a request that town staff read every record within a voluminous file in an effort to make judgments regarding their contents. I do not believe that the Town is required to partake in that kind of review to comply with the Freedom of Information Law.

In short, since item five of the request, unlike the remainder of the request, does not involve discrete documents, but rather reaching opinions concerning the contents of numerous documents, again, I do not believe that the Town would be obliged to engage in a review of that nature.

Hon. Charlotte Richmond
April 5, 1999
Page -2-

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

Sincerely,

A handwritten signature in black ink that reads "Robert J. Freeman". The signature is written in a cursive style and is followed by a horizontal line that extends to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Julie West



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11410

Committee Members

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Alexander F. Treadwell

April 6, 1999

Executive Director

Robert J. Freeman

Mr. Richard Becker



The staff of the Committee on Open 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 March 1, which reached this office on March 22. Although I could not decipher every aspect of your letter, it appears that you have asked what the State can do to enforce the Freedom of Information Law in Nassau County.

In this regard, there is no state agency that enforces that statute. While the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law, it is not empowered to compel an agency to grant or deny access to records.

I note that if a request for records 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:

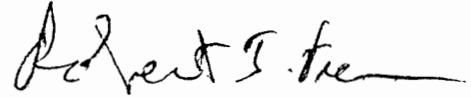
"any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal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

Further, if an appeal is denied, the applicant has the right to seek judicial review of the agency's determination by initiating a proceeding under Article 78 of the Civil Practice Law and Rules.

Mr. Richard Becker
April 6, 1999
Page -2-

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman". The signature is fluid and cursive, with a long horizontal stroke at the end.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11411

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David A. Schulz
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Alexander F. Treadwell

April 6, 1999

Executive Director

Robert J. Freeman

Mr. Benjamin Stephens, Jr.
83-B-0072
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. Stephens:

Your letter of March 16 addressed to Secretary of State Treadwell has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State upon which the Secretary serves, provides advice and opinions concerning the Freedom of Information Law. As indicated above, the staff of the Committee is authorized to respond on behalf of its members.

In brief, it is your contention that Anthony J. Annucci, Deputy Commissioner and Counsel at the Department of Correctional Services, "has not performed a fair and impartial review and determination" of appeals that you submitted in November and December of last year. In this regard, I offer the following comments.

First, there is no provision in the Freedom of Information Law that provides a right to a reconsideration of an appeal. If an appeal is denied, §89(4)(b) of that statute states that the person denied access has the right to seek judicial review of the agency's determination by initiating a proceeding under Article 78 of the Civil Practice Law and Rules. In short, I do not believe that Commissioner Annucci is obliged to reconsider your appeals.

Second, the initial appeal involved §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;

Mr. Benjamin Stephens, Jr.

April 6, 1999

Page -2-

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. Without knowledge of the specific contents of the records at issue, I could not conjecture as to rights of access.

The other appeal related to "employee misconduct complaints." As you may be aware, the first ground of denial in the Freedom of Information Law, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §50-a of the Civil Rights Law. In brief, that statute provides that personnel records of police and correction officers that are used to evaluate performance toward continued employment or promotion are confidential. The Court of Appeals, the State's highest court, in reviewing the legislative history leading to its enactment, has held that §50-a 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"

Mr. Benjamin Stephens, Jr.

April 6, 1999

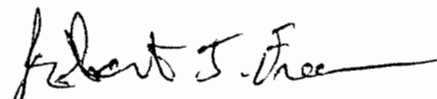
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[Prisoners' Legal Services v. NYS Department of Correctional Services, 73 NY 2d 26, 538 NYS 2d 190, 191 (1988)].

It appears that the records sought could justifiably have been withheld pursuant to §50-a of the Civil Rights Law and, therefore, §87(2)(a) of the Freedom of Information Law.

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

Sincerely,

A handwritten signature in black ink that reads "Robert J. Freeman". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Anthony J. Annucci



STATE OF NEW YORK
DEPARTMENT OF STATE
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FOIL-AO-11412

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Alexander F. Treadwell

April 6, 1999

Executive Director

Robert J. Freeman

Patricia A. Hennessey, Superintendent
Southold Union Free School District
P.O. Box 470
Southold, NY 11971

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

Dear Ms. Hennessey:

As you are aware, I have received your correspondence of March 22. You have sought my views concerning a policy proposed by a member of the Board of Education of the Southold School District.

The proposal is based on the principle that the Superintendent "has an obligation to keep the Board of Education informed about the progress and conditions of district schools", and that the Board may "require special reports from the Superintendent on special issues or to monitor the effectiveness with which the school system is being administered." In conjunction with the foregoing and the adoption of a "Standard Incident Report Form", the proposed policy states that:

"It will be mandatory for Every District Employee to generate a report upon witnessing or participating in an incident. It is also mandatory that the form be generated for every Detention, Suspension, Referral or Parent/Teacher Conference."

The report would be completed and forwarded to an immediate supervisor who could comment upon or add to its contents. Thereafter, the report with any such additions would be sent to the Superintendent, who would "then include in writing any action, recommendations, or observations taken on his/her part." Finally, the policy would require that the completed form "be sent to all Board of Education Members."

While I am willing to offer an opinion, since the matter does not deal directly with the statutes within the advisory jurisdiction of the Committee on Government, it is suggested that you also seek the views of the agency that oversees the pertinent statute, the Family Educational Rights and Privacy

Act ("FERPA", 20 USC §1232g). Specifically, within the United States Department of Education is the Family Policy Compliance Office, which is located at 400 Maryland Avenue, SW, Washington, DC 20202-4605 and can be reached by phone at (202)260-3887.

In brief, FERPA applies to all educational agencies or institutions that participate in grant programs administered by the United States Department of Education. As such, FERPA includes within its scope virtually all public and many private educational institutions.

The focal point of FERPA 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).

In view of the language quoted above, references to students' names, parents' names, or other aspects of records that would make a student's identity easily traceable must ordinarily be withheld in order to comply with federal law.

The circumstances in which prior consent to disclose information personally identifiable to a student is not required are detailed in §99.31 of the regulations. Pertinent to the matter is subdivision (1), which authorizes the release of such information when:

"The disclosure is to other school officials, including teachers, within the agency or institution whom the agency or institution has determined to have legitimate educational interests."

Based on the foregoing, in order to justify disclosure of information identifiable to a student, there must be a "legitimate educational interest" on the part of the recipient of the information.

From my perspective, there are some incidents, those of a serious or unusual nature, that might properly be reported to a supervisor, the Superintendent and to the Board of Education. For instance, if there is an act of violence, or if a student is found to have a weapon or drugs, such matters

Patricia A. Hennessey, Superintendent

April 6, 1999

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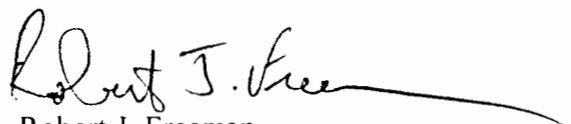
might appropriately be reported to all of those indicated in the proposal; each would have a duty relative to the conditions within a school and/or the effectiveness of the system's administration.

Nevertheless, there are other "incidents" which in my view are so minor or routine that the extensive disclosure required by the proposal would conflict with the basic intent of the FERPA: to protect the privacy of students by preventing all but necessary disclosures. If a student is given detention for chewing gum or being two minutes late to class, that kind of incident in my opinion would not merit being reported to the array of individuals indicated in the proposal. Similarly, reports would be required to be prepared and disseminated with respect events which are not defined. A "referral" would require the preparation and distribution of a report. The proposal, however, does not define the kind of referral intended to be reported. In the same vein, every parent/teacher conference would have reported on a form and distributed to those identified in the proposal. Is the intent to include even the most routine parent/teacher conference held with every parent of every child throughout elementary school as a reportable incident?

The kinds of events or "incidents" described above do not in my view involve the "legitimate educational interests" envisioned by the federal regulations. For that reason, I believe that the proposed policy is inappropriate and inconsistent with federal law. Again, however, it is suggested that you confer with a representative of the Family Policy Compliance Office for the purpose of obtaining the opinion of the agency that oversees FERPA.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11413

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Alexander F. Treadwell

April 7, 1999

Executive Director

Robert J. Freeman

Mr. Bornallah Wright
94-A-2919
P.O. Box 3600
Marcy, N Y 13403

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

Dear Mr. Wright:

I have received your letter of March 21. You raised a variety of issues in relation to one or more requests for records of the office of a district attorney.

First, you referred to a situation in which you were informed that a request involved a certain number of photocopies. Although you remitted the appropriate fee for that number of copies, there was one less than you paid for. In this regard, it is suggested that you contact the agency, explain the situation, and ask either for a refund in the proper amount or for a copy of the missing page.

In a related vein, you asked whether an agency can send you a "darkened" copy of a record. In my view, copies of records made available by agencies under the Freedom of Information Law must be legible. If the copy cannot be read, I suggest that you return it to the agency and request a readable copy. In that circumstance, I do not believe that the agency could justifiably charge a second photocopying fee.

Second, if an agency deletes material from a record, it is required to indicate that a portion of the record has been withheld, stating the reason and informing the applicant of the right to appeal (see regulations of the Committee on Open Government, 21 NYCRR Part 1401). I do not believe, however, that an agency is required to provide an explanation of its denial of access with the degree of specificity that you described.

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 separate statement 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

Mr. Bornallah Wright

April 7, 1999

Page -2-

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

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

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

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

Mr. Bornallah Wright

April 7, 1999

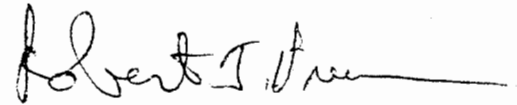
Page -3-

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

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

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11414

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April 7, 1999

Executive Director

Robert J. Freeman

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 March 18 in which you requested an advisory opinion concerning rights of access to "directives" prepared by the Department of Correctional Services. You have contended that a blanket denial of access to certain of the directives is inconsistent 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 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..."

Mr. Wallace S. Nolen

April 7, 1999

Page -2-

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or 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 Department policy. Therefore, I believe that they would be available, unless a different basis for denial could be asserted.

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

"are compiled for law enforcement purposes and which, if disclosed, would:

- i. interfere with law enforcement investigations of judicial proceedings...
- ii. deprive a person of a right to a fair trial or impartial adjudication;
- iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
- iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

Under the circumstances, most relevant is §87(2)(e)(iv). The leading decision concerning that provision is Fink v. Lefkowitz, which involved access to a manual prepared by a special prosecutor that investigated nursing homes, in which the Court of Appeals held that:

"The purpose of this exemption is obvious. Effective law enforcement demands that violators of the law not be apprised the nonroutine procedures by which an agency obtains its information (see Frankel v. Securities & Exch. Comm., 460 F2d 813, 817, cert den 409 US 889). However beneficial its thrust, the purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution.

"To be distinguished from agency records compiled for law enforcement purposes which illustrate investigative techniques, are those which articulate the agency's understanding of the rules and regulations it is empowered to enforce. Records drafted by the body

Mr. Wallace S. Nolen

April 7, 1999

Page -3-

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 of 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 than 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

Mr. Wallace S. Nolen
April 7, 1999
Page -4-

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).

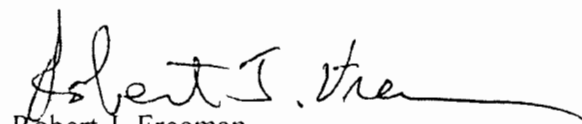
While I am unfamiliar with the records in question, it would appear that those portions which, if disclosed, would enable individuals to evade effective law enforcement or detection could likely be withheld. It is noted that in another decision which dealt with a request for certain regulations of the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

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

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

I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:jm

cc: Superintendent
Anthony J. Annucci



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11415

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April 7, 1999

Executive Director

Robert J. Freeman

Ms. Lindy Hatzmann



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

Dear Ms. Hatzmann:

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

In brief, you sought records from the City of Peekskill concerning the City's application for a grant awarded by the United States Department of Justice. You indicated that a condition required to gain the award involved holding a public hearing, which occurred on February 8. In an effort to be prepared for the hearing and to offer intelligent comments, you and others requested copies of the grant application. Despite those requests, you wrote that a copy of the application was made available for your inspection only after the hearing had been held. When you sought a copy, you encountered an additional delay in disclosure. A copy of the grant application was finally made available to you on March 10. However, your request for "copies of memos corresponding to that application and approval" were withheld pursuant to §87(2)(g) of the Freedom of Information Law.

You have sought my views on the matter. In this regard, I offer the following remarks.

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

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

Ms. Lindy Hatzmann

April 7, 1999

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

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

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

Ms. Lindy Hatzmann

April 7, 1999

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

Although §87(2)(g) of the Freedom of Information Law permits the withholding of inter-agency or intra-agency materials depending upon the contents of those materials, I do not believe that §87(2)(g) could be cited to withhold communications between the City of Peekskill and a federal agency. Section 86(3) of the Freedom of Information Law defines "agency" to include:

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

The language quoted above indicates that an "agency" is an entity of state or local government in New York. Since the definition of "agency" does not include a federal agency, §87(2)(g) could not be cited as a means of withholding communications with a federal entity. I note that there is case law involving the assertion of §87(2)(g) in relation to communications between agencies and entities other than New York state or municipal governments. In those instances, it was held that the assertion of §87(2)(g) was erroneous [see e.g., Community Board 7 of Borough of Manhattan v. Schaeffer, 570 NYS 2d 769; affirmed, 83 AD2d 422; reversed on other grounds, 84 NY2d 148 (1994); also Leeds v. Burns, 613 NYS 2d 46, 205 AD2d 540 (1994)].

Insofar as the memos or other documentation involve communications between the City and the federal government, §87(2)(g) would not, in my view, authorize a denial of access. Insofar as the request involves internal memoranda transmitted between or among City officials, as suggested

Ms. Lindy Hatzmann
April 7, 1999
Page -4-

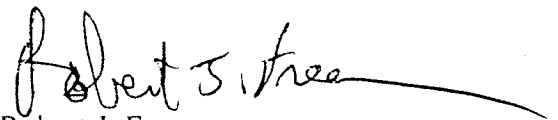
earlier, the contents of those materials would serve as the basis for determining rights of access. The cited provision permits an agency to withhold records that:

- "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.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Joseph A. Stargiotti



STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

FOIL-AD-11416

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Alexander F. Treadwell

April 9, 1999

Executive Director

Robert J. Freeman

Mr. Joe Chira
Rye Citizens Committee
11 Kirby Lane North
Rye, NY 10580

Dear Mr. Chira:

I have received your memorandum of March 29 concerning requests for records directed to the Village of Port Chester. You have asked whether the Village has sent documentation to the Committee on Open Government as required by the Freedom of Information Law.

Having searched our files concerning appeals, it does not appear that the Village has forwarded the documentation as required by law. I note that §89(4)(a), which pertains to the right to appeal a denial of access to records provides as follows:

"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."

Enclosed is a copy of an advisory opinion concerning delays in response to requests for records that may be useful to you.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
Enc.



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April 12, 1999

Executive Director

Robert J. Freeman

Mr. Vernon M. Allen



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

Dear Mr. Allen

I have received your letter of March 20. You indicated that you requested records a year ago under the Freedom of Information Law from the Village of Clayton. Although the Village has acknowledged that the information sought is a matter of public record, you wrote that you have not yet obtained the information. You questioned whether you have the right to have copies of records containing the information of your interest.

In this regard, I offer the following comments.

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

In most villages, the clerk is the records access officer. It is suggested that you phone the clerk to attempt to ascertain the status of your request. If you do not receive a satisfactory response, in view of the passage of time since the submission of your request, it is recommended that you resubmit a request to the records access officer.

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

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

Mr. Vernon M. Allen

April 12, 1999

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

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


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

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

Lastly, when records are accessible under the Freedom of Information Law, they must be made available for inspection and copying. Further, if an applicant wants photocopies, they must be made available upon payment of the appropriate fee, which generally cannot exceed twenty-five cents per photocopy.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees
Village Clerk



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FODL-AO 11418

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Alexander F. Treadwell

April 12, 1999

Executive Director

Robert J. Freeman

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 March 21 and the correspondence attached to it. Based on the decision rendered in Gould v. New York City Police Department [89 NY2d 267 (1996)], it is your belief that the Department must disclose certain records to you, particularly witness statements and DD5's.

While the decision rendered in Gould indicated that witness statements did not fall within the exception concerning "intra-agency materials", it was not determined that the records that you have requested must be disclosed in their entirety; rather, I believe that they are accessible or deniable, in whole or in part, based on their contents and the effects of disclosure.

In this regard, I offer the following comments.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Since I am unaware of the contents of all of the records in which you are interested, or the effects of their disclosure, I cannot offer specific guidance. Nevertheless, the following paragraphs will review the provisions that may be significant in determining rights of access to the records in question.

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 DD5's can be withheld in their entirety on the ground that they constitute intra-agency materials. Further, witness statements were found not to be the kind of communications that fell with §87(2)(g). 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, 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 be dependent upon the nature of statements by witnesses or the contents of those or 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.

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:

Mr. Damian C. Rossney

April 12, 1999

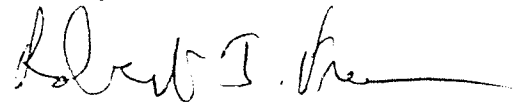
Page -5-

"...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,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

Oml-AO-3017
FOIL-AO-14419

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Alexander F. Treadwell

Executive Director

Robert J. Freeman

April 13, 1999

Ms. Stacy Kowaleski

[REDACTED]

Ms. Debra Koss

[REDACTED]

Ms. Lori Fox

[REDACTED]

Dear Ms. Kowaleski, Ms. Koss and Ms. Fox:

I have received your letter of March 19 in which you sought my opinion concerning a variety of practices of the Board of Education of the Akron School District and a subcommittee of the Board in relation to both the Freedom of Information Law and the Open Meetings Law.

The initial area of inquiry involves a meeting of the Board of Education held on January 20 in which a portion of the discussion related to the District's homework policy. The Board President said that the Board would consider the concerns expressed by parents and at the end of the meeting, at which time the Board entered into executive session without indicating a reason. A week later, the subcommittee of the Board also considered the homework policy. You wrote that there was no meeting of the Board in the time between the Board and subcommittee meetings and asked whether the School Board should "have charged the subcommittee to look at this homework policy during executive session."

You also referred to a survey distributed to parents, teachers and children concerning the homework policy and asked whether those surveys, which did not seek names of those who responded, are considered "school district records." Due to a discrepancy in the numbers of surveys reportedly returned to the District, you asked whether you can "ask to count them."

Reference was made to other meetings during which executive sessions were held with no disclosure of the reason. Further, you questioned the ability to discuss certain issues that were not specified in agendas. You added that at one of the meetings, the Superintendent "insisted" that he

Ms. Stacey Kowaleski
Ms. Debra Koss
Ms. Lori Fox
April 13, 1999
Page -2-

needed the names of those who attended, and you asked whether that kind of request is "customary and appropriate."

In this regard, I offer the following comments.

First, 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.

Second, 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.

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April 13, 1999
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To attempt to clarify the Law, the Committee recommended a series of amendments to the Open Meetings Law, several of which became effective on October 1, 1979. The recommendation made by the Committee regarding §105(1)(f) was enacted and states that a public body may enter into an executive session to discuss:

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

Due to the insertion of the term "particular" in §105(1)(f), I believe that a discussion of "personnel" may be considered in an executive session only when the subject involves a particular person or persons, and only when at least one of the topics listed in §105(1)(f) is considered.

In the context of the issues that you described, insofar as the discussions involved a particular person in relation to one or more of the subjects described in §105(1)(f), the executive sessions would have been justifiably held. On the other hand, to the extent that they involved consideration or review of matters of policy, or the functions of an office or certain positions, irrespective of who might hold those positions, I do not believe that there would have been a basis for discussion in executive session. Similarly, "scolding" a member of the Board would likely not have involved a matter that could properly have been considered in executive session. Even though those kinds of subjects might be reflective of "specific personnel" issues, unless they focused on a particular person in relation to the subjects listed in §105(1)(f), there would have been no basis for holding an executive session.

It has been advised that a motion describing the subject to be discussed as "personnel" or "specific personnel matters" is inadequate, and that the motion should be based upon the specific language of §105(1)(f). For instance, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in my opinion have to identify the person or persons who may be the subject of a discussion. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

It is noted that the Appellate Division 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).

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Additionally, the topics discussed during the executive session must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsburgh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, *supra*, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY 2d 807).

"Applying these principles to the matter before us, it is apparent that the Board's stated purpose for entering into executive session, to wit, the discussion of a 'personnel issue', does not satisfy the requirements of Public Officers Law § 105 (1) (f). The statute itself requires, with respect to personnel matters, that the discussion involve the 'employment history of a particular person' (*id.* [emphasis supplied]). Although this does not mandate that the individual in question be identified by name, it does require that any motion to enter into executive session describe with some detail the nature of the proposed discussion (see, State Comm on Open Govt Adv Opn dated Apr. 6, 1993), and we reject respondents' assertion that the Board's reference to a 'personnel issue' is the functional equivalent of identifying 'a particular person'" [Gordon v. Village of Monticello, 620 NY 2d 573, 575; 207 AD 2d 55 (1994)].

In short, the grounds for entry into executive session are limited. While it is unclear whether those topics were in fact discussed during executive sessions, insofar as the Board or its subcommittee considered the homework policy, directed the subcommittee to study the issue of homework policy or prepared or reviewed the survey, I do not believe that executive sessions would validly have been held.

Next, with respect to agendas, there is nothing in the Open Meetings Law or any other statute that pertains specifically to agendas. Unless a public body has established a rule to the contrary, there is no requirement that an agenda be followed. Similarly, there would be no prohibition against discussing issues that do not appear on an agenda.

You questioned why members of the Board of Education who are not members of the subcommittee but who attended the subcommittee's meeting could not attend an executive session. In this regard, §105(2) of the Open Meetings Law states that the only persons who have the right to attend an executive session are the members of the public body conducting an executive session. Since a subcommittee is a public body separate and distinct from the Board of Education [see definition of "public body", Open Meetings Law, §102(2)], the members of the Board who do not

Ms. Stacey Kowaleski
Ms. Debra Koss
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serve on the subcommittee would not have had the right to attend an executive session of the subcommittee. I point out that §105(2) also states that a public body may authorize others to attend. Therefore, while the subcommittee could have permitted the attendance of others, it would not have been required to do so. The foregoing is based, of course, on an executive session being validly held. For reasons discussed earlier, it is questionable whether the subcommittee appropriately held an executive session. If the matter did not fall within any of the grounds for entry into executive session, any person would have had the right to have been present.

Next, §103 of the Open Meetings Law states that meetings of public bodies are open to the general public. In my opinion, the right to attend a meeting can in no way be conditioned upon an individual's status, interest or residence. For that reason, I do not believe that a public body or a superintendent can require those attending a meeting to identify themselves or indicate their residence.

Lastly, based on the language of the Freedom of Information Law and its judicial interpretation, the surveys 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.).

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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).

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.

Of potential relevance 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).

Ms. Stacey Kowaleski
Ms. Debra Koss
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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 the survey did not include names, I would conjecture that most would not have contained information personally identifiable to a student. In those situations, I believe that the survey responses would be available in their entirety and could be inspected pursuant to the Freedom of Information Law by any person.

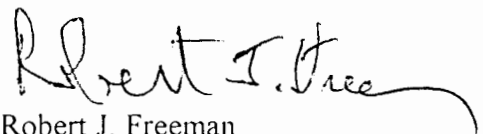
In the rare instances in which a survey response contains information that is personally identifiable to a student, the District, in my opinion, would be required to delete those portions, while disclosing the remainder. In that situation, since you would not have the right to inspect the survey responses, the District could charge a fee of up to twenty-five cents per photocopy, and photocopies could be made available after having deleted those portions identifiable to students.

I note 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. Therefore, if no total or figure has been tabulated by the District regarding the number of survey responses, it would not be required to prepare a total on your behalf. Nevertheless, in conjunction with the preceding commentary, I believe that you would have the ability to review each survey response in whole or in part and that you could, based upon such a review, prepare your own total.

In an effort to enhance compliance with and understanding of applicable law, copies of this opinion will be forwarded to School District officials.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Alan Derry
Marilyn Kasperek



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11420

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Alexander F. Treadwell

April 13, 1999

Executive Director

Robert J. Freeman

Ms. Joyce Shepard
Citizens' Action Committee for Change
18-55 Corporal Kennedy St., Suite L-2
Bayside, NY 11360

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

Dear Ms. Shepard:

As you are aware, I have received a variety of correspondence concerning your efforts in gaining access to records of the Office of the President of the Borough of Queens. You have sought guidance concerning delays in granting access to 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,

Ms. Joyce Shepard
April 14, 1999
Page -2-

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

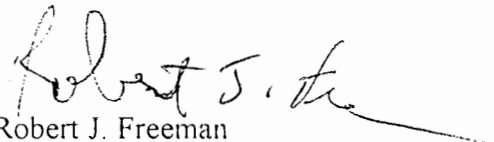
In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge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

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Michael Rogovin



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11421

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April 15, 1999

Executive Director

Robert J. Freeman

Ms. Elizabeth Peyraud

[REDACTED]

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

Dear Ms. Peyraud:

I have received your undated letter, which reached this office on March 29. You indicated that you are an employee of the Chappaqua Public Library, a school district library, and that the Library Director has refused to release salary information to you and others. You added that the Director believes that "he is well within his rights to do so and says that the Library Board of Directors fully supports him in his refusal." You have asked that I describe the operation of the Freedom of Information Law concerning the issue to the Director and the Board of Trustees.

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, a school district public library is clearly a governmental entity constituting an "agency" required to comply with the Freedom of Information Law.

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

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 of your interest, the names, titles and salaries of employees, is factual in nature and, therefore, accessible under §87(2)(g)(i), unless a different exception may be asserted. For reasons to be discussed later, no such exception exists.

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

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

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

"Each agency shall maintain...

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

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

Ms. Elizabeth Peyraud
April 15, 1999
Page -3-

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:

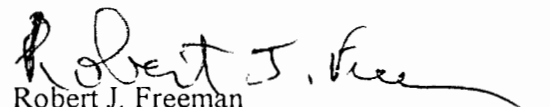
"...represent important fiscal as well as operational information. The identity of the employees and their salaries are vital statistics kept in the proper recordation of departmental functioning and are the primary sources of protection against employment favoritism. They are subject therefore to inspection"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

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

As you requested, copies of this response will be forwarded to those identified in your correspondence.

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

Sincerely,


Robert J. Freeman
Executive Director

RJF:jm

cc: Herbert W. Gstalder
Joan Schlanger
Lenore Pott
Sandra Flank
Edward Klagsbrun
Mark Hasskarl



STATE OF NEW YORK
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FOIL-AO-11422

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April 19, 1999

Executive Director

Robert J. Freeman

Mrs. Florence G. Goodwin

[REDACTED]

The staff of the Committee on 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. Goodwin:

I have received your letter of March 25 and the materials attached to it. You have sought guidance in relation to your efforts in obtaining information from the Town of Chili.

Based on a review of your request, it appears that you misunderstand the Freedom of Information Law, and I note that the title of that statute may be somewhat misleading. In short, 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 the Freedom of Information Law may require an agency to disclose records, it does not require that an agency provide information or answers in response to questions.

In the future, rather than seeking answers to questions as in the case of your request of January 13, it is suggested that you seek 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:jm

cc: Carol O'Connor, Town Clerk

FOIL-AO-11423

From: Robert Freeman
To: [REDACTED]
Date: Mon, Apr 19, 1999 11:20 AM
Subject: Employment records pertaining to a deceased parent

Dear Ms. Sutton:

I have received your communication in which you questioned your right to obtain records concerning rights of the son or daughter of a deceased to obtain the deceased's employment records from a public school district in New York.

In this regard, as you may be aware, the Freedom of Information Law pertains to agency records. A school district is clearly an agency, and any information in any physical form that it maintains would constitute an "agency record."

As a general matter, the Freedom of Information Law is based on a presumption of access; all records are available, except to the extent that one or more grounds for denial appearing in section 87(2) of the law may be asserted. Some aspects of employment or personnel records are accessible to the general public; others might justifiably be withheld. To obtain additional information on the subject through our website, you can review opinions referenced in the FOI Advisory Opinion Index under the headings of "Personnel records" and "Privacy, public employee."

Some elements of employee records may ordinarily be withheld on the ground that disclosure would result in an "unwarranted invasion of personal privacy" pursuant to section 87(2)(b). For instance, an employee's social security number or, in the context of your inquiry, date of birth, could be withheld under that provision. However, if, you can demonstrate that you are the next of kin of the legal representative of the estate of the deceased, you would have the same rights of access as the subject of the records when he or she was alive.

If you would like to discuss the matter, you can call me at (518)474-2518.

I hope that I have been of assistance.



STATE OF NEW YORK
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FOIL-AO-11424

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Alexander F. Treadwell

April 19, 1999

MEMORANDUM

Executive Director

Robert J. Freeman

TO: Mayor D'Angelis, Village of Elmsford

FROM: Robert J. Freeman *RJF*

SUBJECT: Access to Applications for Absentee Ballots

Based on our recent discussion, you indicated that a question has arisen concerning the disclosure of those portions of applications for absentee ballots that specify the reasons for applying.

In this regard, it has been advised that those aspects of the applications may be withheld in appropriate circumstances on the ground that disclosure would result in "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)] or because disclosure could endanger a person's life or safety [see §87(2)(f)].

For example, if the reason for applying for an absentee ballot involves a medical condition that would preclude a person from voting on the day of the election, I believe that the indication of a medical problem or condition could be withheld as an unwarranted invasion of personal privacy. Similarly, if, for instance, a person seeks an absentee ballot each year due to a vacation schedule or annual family commitment, it has been suggested that disclosure could endanger life or safety, for it could become known that a residence may be unprotected and, therefore, potentially subject to criminal activity.

I hope that I have been of assistance.

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
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FOIL-AO-11425

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Alexander F. Treadwell

April 19, 1999

Executive Director

Robert J. Freeman

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 March 23 in which you questioned the propriety of a response to your request by the Town of East Hampton.

In brief, having sought records pertaining to the case of Simpson v. Town of East Hampton, you wrote that the receipt of your request was acknowledged and that the Town would grant or deny the request by a certain "March deadline." Nevertheless, in a letter dated March 19, it was stated that:

"This letter will inform you that your request for the above-referenced information has been granted. However, the materials covering your request are fairly voluminous. These materials will have to be vetted by the Town Attorney's office and the office of the Town Clerk for division into privileged and non-privileged information. Once this process is complete, the Town will be able to provide you with the non-privileged information and a better estimate of copying and associated charges for which you will be responsible."

It is your view that the Town has delayed disclosure in a manner inconsistent with law and that the statement that the request had been granted, but only after appropriate redactions, represents a contradiction.

In this regard, I offer the following comments.

Mr. Wallace S. Nolen

April 19, 1999

Page -2-

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, 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 first ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." From my perspective, although §3101(c) and (d) of the CPLR authorize confidentiality regarding, respectively, the work product of an attorney and material prepared for litigation, those kinds of records remain confidential in my opinion only so long as they are not disclosed to an adversary or a filed with a court, for example. I do not believe that materials that are served upon or shared with an adversary could be characterized as confidential or exempt from disclosure.

Section 3101 pertains disclosure in a context related to litigation, and subdivision (a) reflects the general principle that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action..." The Advisory Committee Notes pertaining to §3101 state that the intent is "to facilitate disclosure before trial of the facts bearing on a case while limiting the possibilities of abuse." The prevention of "abuse" is considered in the remaining provisions of §3101,

which describe narrow limitations on disclosure. One of those limitations, §3101(c), states that "[t]he work product of an attorney shall not be obtainable." The other provision at issue pertains to material prepared for litigation, and §3101(d)(2) states in relevant part that:

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

Both of those provisions are intended to shield from an adversary records that would result in a strategic advantage or disadvantage, as the case may be. Reliance on both in the context of a request made under the Freedom of Information Law is in my view dependent upon a finding that the records have not been disclosed, particularly to an adversary. In a decision in which it was determined that records could justifiably be withheld as attorney work product, the "disputed documents" were "clearly work product documents which contain the opinions, reflections and thought process of partners and associates" of a law firm "which have not been communicated or shown to individuals outside of that law firm" [Estate of Johnson, 538 NYS 2d 173 (1989)].

In another decision, the relationship between the attorney-privilege as codified in §4503 of the CPLR 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)].

Mr. Wallace S. Nolen
April 19, 1999
Page -4-

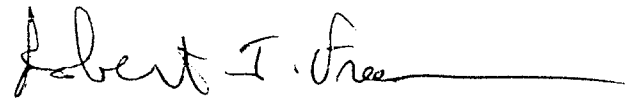
In a discussion of the parameters of the attorney-client relationship and the conditions precedent to its initiation, it has been held that:

"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 my view, insofar as the records in question have been communicated between the Town and its adversary or have been filed with a court, any claim of privilege or its equivalent would be effectively waived. Once records otherwise subject to the attorney-client privilege or in the nature of attorney work product or material prepared for litigation are transmitted to an adversary, i.e., from the Town to its adversary and *vice versa*, I believe that the capacity to claim exemptions from disclosure under §3101(c) or (d) or §4503 of the CPLR or, therefore, §87(2)(a) of the Freedom of Information Law, ends.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Eric N. Brown, Assistant Town Attorney



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 11426

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April 22, 1999

Executive Director

Robert J. Freeman

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 March 24 and the correspondence attached to it. Your comments focus on the response to your request by the Assembly Public Information Officer, Ms. Sharon Walsh.

In this regard, it appears that you may misunderstand the Freedom of Information Law as it pertains to the State Legislature. As suggested in my letter to you of February 9, a separate section of that statute governs rights of access to records of the State Legislature. Based on Ms. Walsh's response, the kinds of records that might fall within the scope of your request would consist of constituent correspondence. If that is so, in view of the provisions of §88(2) of the Freedom of Information Law, I believe that your request would properly have been denied.

Additionally, it is noted that the Freedom of Information Law requires entities to grant or deny access to records that they maintain. If, for example, the Assembly does not maintain the records of your interest, it would not be required to acquire them on your behalf. Similarly, §89(3) provides in part that the Freedom of Information Law pertains to existing records and that an agency need not create or prepare a record in response to a request.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Sharon Walsh

FOIL-AO-11427

From: Robert Freeman
To: JGreenfi@DOS1.ETHICS,
Date: Thu, Apr 22, 1999 8:41 AM
Subject: FOIL Question -Reply

Good Morning --

There are differences of opinion on the subject, but our view generally has been FOI requests, including the names of requesters, are generally public. Exceptions would involve situations in which the content of a request when coupled with a name would, if disclosed, result in an unwarranted invasion of privacy. For instance, if I am a recipient of public assistance and write to a dept. of social services indicating that I am a welfare recipient and I want the records that the dept. has about me, disclosure would tell the world that I'm poor. In my view, that is nobody's business. On the other hand, if I ask for the minutes of the last city council meeting, the request doesn't disclose anything intimate or personal about me. I think that would be available, for disclosure would not rise to the level of an unwarranted invasion of privacy.

Also, if a request is made by an entity, such as a business, or a person acting on behalf of an entity, i.e., a reporter, I don't see any issue involving personal privacy.

I hope that this helps. If not, please feel free to call or email.



STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11428

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April 28, 1999

Executive Director

Robert J. Freeman

Mr. Patrick Sorrentino
97-A-6168
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. Sorrentino:

I have received your letter of March 29 in which you requested assistance in obtaining a subject matter list from the Office of the Richmond County District Attorney.

In this regard, the subject matter list represents one of the few instances in the Freedom of Information Law in which an agency is required to create a particular record. Specifically, §87(3) of that statute provides 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."

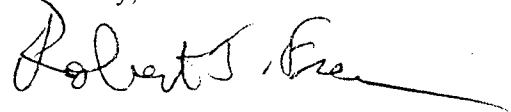
The subject matter list is not, in my opinion, required to identify each and every record of an agency; rather I believe that it must refer, by category and in reasonable detail, to the kinds of records maintained by an agency. Further, although a subject matter list is not prepared with respect to records 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.

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

Mr. Patrick Sorrentino
April 28, 1999
Page -2-

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink that reads "Robert J. Freeman". The signature is written in a cursive style with a long horizontal line extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-A0-11429

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Alexander F. Treadwell

April 29, 1999

Executive Director

Robert J. Freeman

Ms. Anita Rubin

[REDACTED]

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

Dear Ms. Rubin:

I have received your letter of March 29 in which you sought guidance concerning your rights in relation to a request made under the Freedom of Information Law to the Village of Fleischmanns. The records sought pertain to a Village election and focus on a challenge of your vote, as well as challenges to other voters.

In a first response to your request, which was made on March 19 and acknowledged that day, the Mayor wrote that "[n]ormally, FOIL requests can be granted within thirty days" of their receipt and added that you would be contacted if fees for copies are due. In a second response dated March 23, the Village Clerk indicated that some of the information sought would be available upon payment of a fee for copies, and that the remaining information "will take time to compile."

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.

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)].

Ms. Anita Rubin
April 29, 1999
Page -3-


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, 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. Several aspects of your request involve "lists" containing certain information. Insofar as lists have been prepared, I believe that they would constitute records subject to rights of access. However, if there are no lists containing the information sought, the Village, in my opinion, would not be required to prepare new records or lists on your behalf.

Lastly, 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.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Donald E. Kearney, Mayor
Lorraine De Marfio, Village Clerk



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO-253
FOIL-AO-11430

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

April 29, 1999

Executive Director

Robert J. Freeman

Mr. Warren D. Cuddeback



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

Dear Mr. Cuddeback:

I have received your letter of March 30 concerning rights of access to a letter sent by the Orange County Department of Personnel to the Supervisor of the Town of Deerpark pertaining to the qualifications of a particular individual to serve as the Town's Chief of Police.

The letter was the subject of an advisory opinion that I prepared at the request of the Supervisor on February 26 in which it was advised that the letter, based on its specific contents, should be disclosed. Notwithstanding that the opinion, the County denied your request, citing §96 of the "Personal Privacy Protection Act" [sic]. In addition, it was contended that my opinion "fails to take into consideration the express statutory exemption for personnel records of a police officer under the Civil Rights Law, Section 50-a."

You have asked that I review the issue and indicate whether I continue to believe that the record in question should be disclosed. I do.

First, the County's reliance on the Personal Privacy Protection Law is misplaced, for that enactment 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."

Mr. William D. Cuddeback

April 29, 1999

Page -2-

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 [see Seelig v. Sielaff, 201, AD2d 298 (1994)]. Further, for reasons discussed in the opinion of February 26, I continue to believe that disclosure would constitute a permissible rather than an unwarranted invasion of personal privacy. To reiterate, the personal information contained in the letter consists largely of a recitation of positions previously held by the individual in question and the periods of time that he held those positions. Those kinds of items are in my view, clearly public.

Second, I am mindful of §50-a of the Civil Rights Law, which requires that an agency keep confidential those personnel records pertaining to a police officer that are "used to *evaluate performance* toward continued employment or promotion..." From my perspective, there is nothing in the letter that involves an evaluation of performance. In a recent decision, the Court of Appeals, the state's highest court, sustained a denial of access to reprimands of police officers. However, the Court emphasized that:

"...when access to an officer's personnel records relevant to promotion or continued employment is sought under FOIL, nondisclosure will be limited to the extent reasonably necessary to effectuate the purposes of Civil Rights Law § 50-a - - to prevent the potential use of information in the records in litigation to degrade, embarrass, harass or impeach the integrity of the officer. We said as much in Matter of Prisoners' Legal Services (*supra*), when after describing the legislative purpose of section 50-a, we expressly stipulated that 'records having remote or not potential use, like those sought in Capital Newspapers, fall outside the scope of the statute' (73 NY2d, at 33 [emphasis supplied]). Thus, in Capital Newspapers v. Burns, we upheld FOIL disclosure of a single police officer's record of absences from duty for a specific month. By itself, the information was neutral and did not contain any invidious implications capable facially of harassment or degradation of the officer in a courtroom. The remoteness of any potential use of that officer's attendance record for abusive exploitation freed the courts from the policy constraints of Civil Rights Law § 50-a, enabling judicial enforcement of the FOIL legislative objectives in that case" [Daily Gazette v. City of Schenectady, ___ NY2d ___, April 6, 1999].

Because the contents of the letter do not evaluate performance, and because a recitations of positions held is "neutral", §50-a of the Civil Rights Law would not in my opinion serve to authorize the County to deny access to the letter.

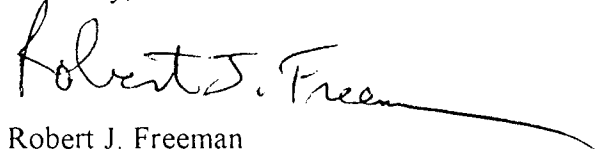
For the reasons expressed above and in the earlier opinion, I believe that the letter of your interest must be disclosed.

Mr. William D. Cuddeback
April 29, 1999
Page -3-

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

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink that reads "Robert J. Freeman". The signature is written in a cursive style and extends to the right with a long horizontal stroke.

Robert J. Freeman
Executive Director

RJF:jm

cc: Richard B. Golden
J. Daniel Bloomer
Catherine O'Grady



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-A0-11431

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Joseph J. Seymour
Alexander F. Treadwell

April 29, 1999

Executive Director

Robert J. Freeman

Mr. Thomas A. Chorba
Director
Job Fair Inc.
312 East Allendale Avenue
Allendale, NJ 07401

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

Dear Mr. Chorba:

As you are aware, I have received your letter of March 25 and the form attached to it.

In brief, you sought access to a database maintained by the State Education Department known as the "Statewide Clearinghouse for Teacher Recruitment." You indicated that your firm "employs teachers in New York State funded schools" and that you "have schools waiting for teachers", including "underserved handicapped children." Upon your firm's request for the database as a recruiter of teachers, you wrote that you were informed that the database is available for use only by public school districts.

It is my understanding that persons identified in the database must complete an "Application for Certificate" in which they include their social security numbers, addresses, dates of birth, and a variety of additional information. The application contains the following statement:

"Please indicate your willingness to have your name, address and certificate title provided to a statewide clearinghouse for teacher recruitment and local school districts who may be interested in recruiting school professionals in your certificate title. This information will be made available on the Internet for persons with approved access."

Following the statement quoted above, an individual checks a "yes" or a "no" box.

The statement indicates that the clearinghouse is to be used "for teacher recruitment *and* local school districts"; nothing on the form specifies that the data will be provided *only* to public school

Mr. Thomas A. Chorba

April 29, 1999

Page -2-

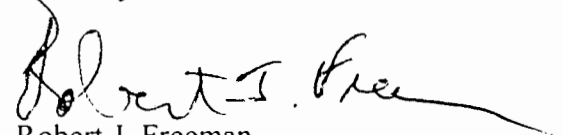
districts. Further, those who completed the form and took the affirmative step of marking the "yes" box have in my view consented to have their names, addresses and certificate title made available for teacher recruitment generally, and not only to school districts.

If the form had contained clear language indicating that the information sought would be made available only to school districts, I would agree that the information could be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)]. Nevertheless, unless the language on the form is altered, I believe that the Department would be obliged to disclose the information in question relating to those who expressed a "willingness" to have the information disclosed by marking the appropriate box to any entity that recruits teachers.

Should the Department alter the form to specify that the information is available only to school districts, the items of your interest submitted following the alteration could in my view be withheld. However, the information contained in the database regarding those who have consented to disclosure "for teacher recruitment and local school districts" would in my view remain available to a bona fide recruitment firm or a school district.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Steve Earle
Eric Braun



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOPL-AO-11432

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Joseph J. Seymour
Alexander F. Treadwell

April 29, 1999

Executive Director

Robert J. Freeman

Mr. Gavin Hinckson
96-R-4194
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. Hinckson:

I have received your letter of March 28 in which you sought an opinion concerning a denial of your request for "all verbatim transcripts made in connection with an investigation conducted by the Inspector General's office" concerning you and an incident that occurred at a correctional facility.

The records access officer for the Department of Correctional Services denied the request on the basis of §87(2)(e)(iv) of the Freedom of Information Law. You appealed the denial on March 8, and as of the date of your letter to this office, you had not received a determination. You contend that the reports must be disclosed because they "contain factual claims" and because the Department "is not a law enforcement agency and does not conduct criminal investigations" and, therefore, cannot rely upon the provision referenced in the denial of your request.

In this regard, I offer the following comments.

First, I believe that many of the functions carried out by the Department of Correctional Services, including some of those performed by its Inspector General, involve law enforcement. Consequently, the Department may, in my view, rely upon §87(2)(e) of the Freedom of Information Law, which pertains to records "compiled for law enforcement purposes", in appropriate circumstances.

Second, as you are likely aware, §87(2)(e)(iv) indicates that an agency may withhold records compiled for law enforcement purposes when disclosure would "reveal criminal investigative techniques or procedures, except routine techniques or procedures." The leading decision concerning that provision is Fink v. Lefkowitz, which involved access to a manual prepared by a special prosecutor that investigated nursing homes, in which the Court of Appeals held that:

"The purpose of this exemption is obvious. Effective law enforcement demands that violators of the law not be apprised the nonroutine procedures by which an agency obtains its information (see Frankel v. Securities & Exch. Comm., 460 F2d 813, 817, cert den 409 US 889). However beneficial its thrust, the purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution..."

In applying the foregoing 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 than 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 evade detection or engage in courses of action or conduct that would interfere with or frustrate law enforcement functions 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)].

Other grounds for denial of may also be relevant. For instance, §87(2)(f) 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 inmates, staff or others, §87(2)(f) would be applicable. Similarly, §87(2)(b) authorizes an agency to withhold records insofar as disclosure would result in

Mr. Gavin Hinckson
April 29, 1999
Page -3-

"unwarranted invasion of personal privacy." The nature and content of the records would determine the extent to which that exception, as well as the others, would be pertinent or applicable.

Lastly, §89(4)(a) of the Freedom of Information Law states in relevant part that:

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

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

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Anthony J. Annucci



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMC-AO-3023
FOIL-AO-11433

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Alexander F. Treadwell

April 29, 1999

Executive Director

Robert J. Freeman

Ms. Shirley G. Bright-Neeper

[REDACTED]

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

Dear Ms. Bright-Neeper:

I have received your letter of April 1. You wrote that you requested from the Orleans County Cornell Cooperative Extension its 1998 annual report, its Form 990, the names of the members of its board of directors, and minutes of meetings. Based on your commentary, there appears to be some question as to whether the entity at issue is subject to the Freedom of Information Law.

From my perspective, it is required to comply with the Freedom of Information Law, as well as the Open Meetings Law, which provides direction concerning minutes of meetings. In this regard, I offer the following remarks.

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

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

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

I note, too, that in a 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.

Similarly, I believe that the board of a county cooperative extension agency is subject to the Open Meetings Law. That statute pertains to meetings of public bodies, and §102(2) defines the phrase "public body" to mean:

"...any entity for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

Again, due to the direction provided by §224(8)(b) of the County Law, the board of a cooperative extension agency performs a governmental function for the state and a public corporation, Orleans County.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 annual report that you requested is typical of similar reports, it is likely that it would be accessible under the law. A Form 990, according to IRS rules, must be made available by the entity that prepared it. Consequently, that document would clearly be available under the Freedom of Information Law.

Lastly, the Open Meetings Law includes direction concerning the minimum contents of minutes and the time within which they must be prepared. Specifically, §106 states that:

"1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.

2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter

Ms. Shirley G. Bright-Neeper
April 29, 1999
Page -3-

which is not required to be made public by the freedom of information law as added by article six of this chapter.

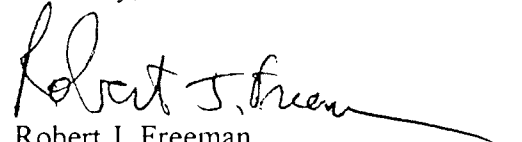
3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

Based upon the foregoing, it is clear that minutes must be prepared and made available within two weeks.

As you requested, copies of this response will be forwarded to those identified in your letter.

I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:jm

cc: Hunter Rawlings
Merrill Ewert
Glenn Applebee
Ron Bricker
Roger Harrison
George Bower
Ann Mathews
Richard Bennett



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FOIL-AO-11434

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April 30, 1999

Executive Director

Robert J. Freeman

Mr. Ed Piazza
91-B-0099
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. Piazza:

I have received your letter of March 30 and the materials attached to it. You have sought advice concerning a request for records of the Office of the Onondaga County District Attorney pertaining to your conviction, as well as those relating to your attorney in the matter, who apparently was convicted of tax evasion and suspended from the practice of law.

In this regard, I offer the following comments.

First, as I understand the situation, your request for records of the District Attorney was denied on the ground that the records had previously been disclosed. In Moore v. Santucci [151 AD 2d 677 (1989)] it was found that an agency need not make available records that had been previously disclosed to the applicant or that person's attorney, unless there is an assertion "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).

Assuming that you can offer such an assertion, the Freedom of Information Law would govern rights of access to the records pertaining to the investigation. I note that some of the items that you requested, such as DDS's and UF-61's, are forms used only by the New York City Police Department.

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

Mr. Ed Piazza
April 30, 1999
Page -5-

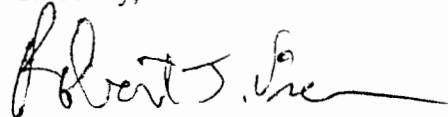
Another possible ground for denial is §87(2)(f), which permits withholding to the extent that disclosure "would endanger the life or safety of any person". The capacity to withhold on that basis is dependent upon the facts and circumstances concerning an event.

In a decision cited earlier 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" (Moore, supra). Based upon that decision, it appears that records introduced into evidence or disclosed during a public judicial proceeding should be available.

Lastly, with respect to the records relating to your attorney, if indeed there was a conviction, records submitted into evidence in the proceeding would likely be accessible from the court in which the conviction occurred. Additionally, if the attorney was suspended, the records used in a disciplinary proceeding in which there is a finding of misconduct are available pursuant to §90(10) of the Judiciary Law from the Appellate Division that conducted the proceeding.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: James P. Maxwell



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FOIL-AD - 11435

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Alexander F. Treadwell

April 30, 1999

Executive Director

Robert J. Freeman

Ms. Noreen Jacobs



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

Dear Ms. Jacobs:

I have received your letter of April 3 and the materials attached to it. You have sought an advisory opinion concerning a request for records maintained by the Division of State Police that you made on behalf of and with a consent to release personal information pertaining to a particular individual who appears to have been convicted of a crime. One aspect of the request involves records sought under the Freedom of Information and Personal Privacy Protection Laws for records relating to the investigation; the other involves disciplinary action that may have been taken with respect to State Police personnel.

In this regard, I offer the following comments.

First, the Personal Privacy Protection Law generally grants rights of access to records to a person to whom the records pertain, §95(7) provides that rights of access 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 of persons in correctional facilities. Under the circumstances, I do not believe that you would have any rights of access under the Personal Privacy Protection Law.

Second, in my view, the Freedom of Information Law would govern rights of access to the records relating to the investigation. 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. 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.

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).

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 respect to records regarding the discipline of police personnel, 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 §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

Ms. Noreen Jacobs

April 30, 1999

Page -6-

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 "was designed to limit access to said personnel records by criminal defense counsel, who used the contents of the records, including unsubstantiated and irrelevant complaints against officers, to embarrass officers during cross-examination" [Capital Newspapers v. Burns, 67 NY 2d 562, 568 (1986)].

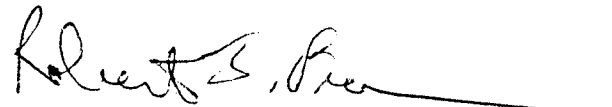
In another decision which dealt with unsubstantiated complaints against correction officers, the Court of Appeals held that the purpose of §50-a "was to prevent the release of sensitive personnel records that could be used in litigation for purposes of harassing or embarrassing correction officers" [Prisoners'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

Most recently, in Daily Gazette v. City of Schenectady (___ NY2d ___, April 6, 1999), the state's highest court sustained a denial of access to reprimands of police officers, which were final determinations indicating misconduct. In so holding, it was concluded that:

"...the subject of petitioners' request itself demonstrates the risk of its use to embarrass or humiliate the officers involved. Petitioners seek comprehensive access to all records of the disciplinary action taken against the 18 police officers, including their identities and individual punishments, for possibly very serious misconduct. It Matter of Prisoners' Legal Services (*supra*), we held that '[d]ocuments pertaining to misconduct or rules of violations by correction officers * * * are the very sort of record which, the legislative history reveals, was intended to be kept confidential' (73 NY2d, at 31 [emphasis supplied]). This holding in Prisoners' Legal Services is thus controlling here in favor of confidentiality under Civil Rights Law § 50-a."

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Lt. Laurie Wagner
Bruce Arnold, Deputy Superintendent



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11436

Committee Members

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Alan Jay Gerson
Walter Grunfeld
Robert L. King
Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

May 3, 1999

Executive Director

Robert J. Freeman

Mr. Charles C. David, Jr.
94-B-2094 D-1-40 B
Marcy Correctional Facility
Box 3600
Marcy, NY 13403-3600

Dear Mr. David:

I have received your letter of March 30, which reached this office on April 5. Enclosed are copies of the advisory opinions that you requested. Please note that several were prepared many years ago and may be out of date.

You wrote that you are involved in research "on the widespread public interest and concern relating to the disproportionate number of stops of minority's [sic] on the highway" and asked how you might seek an advisory opinion from this office.

In this regard, any person may seek an opinion by writing to the Committee, describing a situation (real or hypothetical) relating to a request for records under the Freedom of Information Law, enclosing copies of whatever documentation may be pertinent, and asking for an opinion. As you may be aware, the opinions are not binding. It is our goal, however, that they be educational and persuasive.

In view of the area of your interest, I note that the Freedom of Information Law pertains to existing records, and that §89(3) of the Law states in relevant part that an agency is not required to create a new record in response to a request. If statistics exist that contain the kind of information that you are seeking, I believe that they would be available under the Freedom of Information Law [see §87(2)(g)(i)]. On the other hand, if no such statistics have been prepared, the Division of State Police would not be required to create new records or prepare totals or tabulations on your behalf in order to satisfy a request.

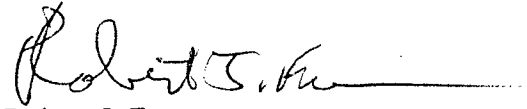
Mr. Charles C. David Jr.

May 3, 1999

Page -2-

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

Encs.



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11437

Committee Members

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Walter Grunfeld
Robert L. King
Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

May 3, 1999

Executive Director

Robert J. Freeman

Mr. Felix F. Welka
[REDACTED]

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

Dear Mr. Welka:

I have received your correspondence of April 3.

You have raised the following question: "Is the School District's Grievance File open for inspection regardless whether [sic] the school district or the employee's union filing the grievance pertaining to personnel or the contract."

If I understand the question, the nature and content of records relating to grievances would determine the extent to which 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 ground for denial of most significance would be §87(2)(b). That provision enables an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy."

If, for example, a grievance relates to an issue involving a public employee in the nature of a health or medical problem, I believe that identifying details pertaining to the employee could justifiably be withheld. On the other hand, if the grievance does not focus on a particular employee but rather deals with a practice or policy of the District, for example, privacy would not be an issue, and the records in question would likely in my view be available in their entirety.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-A - 11438

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Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

May 3, 1999

Executive Director

Robert J. Freeman

Mr. John Anastasia
90-C-0557
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. Anastasia:

I have received your letter of April 1 in which you complained once again with respect to the treatment of requests for records.

Based on your comments, it appears that your right to gain access to the records, those relating to a hearing, is not the issue, for Counsel to the Department of Correctional Services has confirmed that they should be disclosed. Rather, the issue appears to involve delays in disclosure of the 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:

Mr. John Anastasia

May 3, 1999

Page -2-

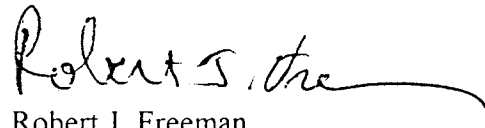
"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial,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

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

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

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and has a long, sweeping horizontal line extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Dawn Phenes



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AD-11439

Committee Members

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Joseph J. Seymour
Alexander F. Treadwell

May 3, 1999

Executive Director

Robert J. Freeman

Mr. William E. Waters
78-B-0035
Wallkill Correctional Facility
Box G
Wallkill, NY 12589-0286

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

Dear Mr. Waters:

I have received your letter of April 1 in which you requested an advisory opinion. The issue involves a request made to the Office of the Kings County District Attorney for copies of any "recommendation letters to the Division of Parole regarding whether or not [you] should be paroled."

In my view, either agency that is a party to the communication, the office of a district attorney or the Division of Parole, would have the authority to deny access to the kind of records that you described.

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

Mr. William E. Waters

May 3, 1999

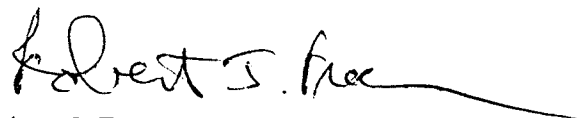
Page -2-

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those 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 a recommendation communicated by one agency to another could be withheld under the provision cited above.

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

Sincerely,

A handwritten signature in black ink that reads "Robert J. Freeman". The signature is written in a cursive style and extends to the right with a long horizontal line.

Robert J. Freeman
Executive Director

RJF:jm

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



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11440

Committee Members

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Walter Grunfeld
Robert L. King
Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

May 3, 1999

Executive Director

Robert J. Freeman

Mr. Norman I. Siegel
County Attorney
County of Oneida
County Court House
Utica, NY 13503

Dear Mr. Siegel:

I have anonymously received a copy of an article published by the Rome *Sentinel* on March 22 in which you criticized my comments concerning a rule adopted by Oneida County that would, in the words of the article, "rule out the use of letters for people requesting documents under the state's Freedom of Information Law." The article indicated that those seeking records must "use a form provided by the County Clerk's office", and that "[i]f people send a letter, they will get the form back in the mail. They must fill that out and send it in."

In this regard, as you may be aware, the Committee on Open Government was created by the enactment of the Freedom of Information Law in 1974. In brief, pursuant to §89(1) of that statute, the Committee is charged with the responsibility of offering advice and opinions pertaining to the Freedom of Information Law to any person or agency. While the opinions are not binding, it our goal that they be educational and persuasive, and that they serve to enhance compliance with and understanding of the law.

With respect to the issue referenced in the article, 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 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

Mr. Norman I. Siegel

May 3, 1999

Page -2-

of coordinating agency response to public requests for access to records.”

In my view, an agency cannot require that a request be made on a prescribed form. The Freedom of Information Law, §89(3), as well as the regulations promulgated by the Committee (§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.

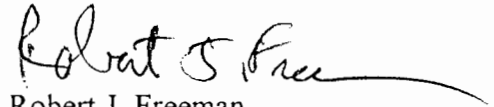
Enclosed are copies of the regulations promulgated by the Committee, as well as model regulations that enable agencies to adopt appropriate regulations by filling in the blanks.

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

Mr. Norman I. Siegel
May 3, 1999
Page -3-

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and has a long, sweeping horizontal line extending to the right from the end of the name.

Robert J. Freeman
Executive Director

RJF:jm

Encs.



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11441

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Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

May 3, 1999

Executive Director

Robert J. Freeman

Mr. Joseph Santos Goncalves, Jr.
98-B-2093
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. Goncalves:

I have received your letter of April 3 and the materials attached to it. You have complained that the Superintendent at your facility failed to respond to your request for certain records in a timely manner. The records sought include a medical report of your injuries allegedly incurred due to an assault by a corrections officer, photographs of your injuries, and the officer's "record denying the above allegations."

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:

Mr. Joseph Santos Goncalves

May 3, 1999

Page -2-

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

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

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, the medical report and photographs indicating your condition or injuries would be available, for none of the grounds for denial would be applicable.

With respect to a record in which the correction officer accused of assault denied the allegations, it appears that a statute other than the Freedom of Information Law would be pertinent. 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 "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).

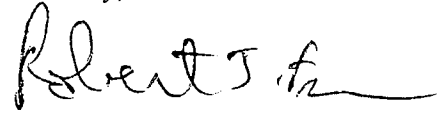
In another decision, which dealt with unsubstantiated complaints against correction officers, the Court of Appeals held that the purpose of §50-a "was designed to limit access to said personnel records by criminal defense counsel, who used the contents of the records, including unsubstantiated and irrelevant complaints against officers, to embarrass officers during cross-examination" (id. at 568). In another decision, which dealt with unsubstantiated complaints against correction officers, the Court of Appeals held that the purpose of §50-a "was to prevent the release of sensitive personnel records that could be used in litigation for purposes of harassing or embarrassing correction officers" [Prisoners' Legal Services v. NYS Department of Correctional Services, 73 NY 2d 26, 538 NYS 2d 190, 191 (1988)].

In short, if my interpretation of the facts is accurate, the record in which the officer denied allegations against him would be exempt from disclosure.

Mr. Joseph Santos Goncalves
May 3, 1999
Page -3-

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman".

Robert J. Freeman
Executive Director

RJF:jm

cc: Superintendent Walter R. Kelly



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11442

Committee Members

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May 3, 1999

Executive Director

Robert J. Freeman

Ms. Karen Rowell

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

Dear Ms. Rowell:

I have received your letter of March 19, which reached this office on April 8. You have sought an advisory opinion concerning a request for invoices for legal services provided to the East Syracuse-Minoa Central School District during a certain period. You were informed initially that you would be required to submit your request on a prescribed form. Further, in response to the request, you were provided with gross figures, rather than the invoices themselves. It is your view that the invoices should have been disclosed, perhaps following redactions.

From my perspective, the District could not have validly required that you seek records on its form. Moreover, for reasons to be discussed in detail, the invoices should have been disclosed following deletions when appropriate. In this regard, I offer the following comments.

First, by way of background, §89(1) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural implementation of that statute (21 NYCRR Part 1401). In turn, §87(1) requires the governing body of a public corporation to adopt rules and regulations consistent those promulgated by the Committee and with the Freedom of Information Law. The Law, §89(3), and the regulations, §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. 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)]. 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 consistently been advised that a failure to complete a form prescribed by an agency cannot serve to delay a response or deny a request for records. A delay due to a failure to use a

prescribed form might result in an inconsistency with the time limitations imposed by the Freedom of Information Law. For example, assume that an individual requests a record in writing from an agency and that the agency responds by directing that a standard form must be submitted. By the time the individual submits the form, and the agency processes and responds to the request, it is probable that more than five business days would have elapsed, particularly if a form is sent by mail and returned to the agency by mail. Therefore, to the extent that an agency's response granting, denying or acknowledging the receipt of a request is given more than five business days following the initial receipt of the written request, the agency, in my opinion, would have failed to comply with the provisions of the Freedom of Information Law.

While the Law does not preclude an agency from developing a standard form, as suggested earlier, I do not believe that a failure to use such a form can be used to delay a response to a written request for records reasonably described beyond the statutory period. However, a standard form may, in my opinion, be utilized so long as it does not prolong the time limitations discussed above. For instance, a standard form could be completed by a requester while his or her written request is timely processed by the agency. In addition, an individual who appears at a government office and makes an oral request for records could be asked to complete the standard form as his or her written request.

In sum, it is my opinion that the use of standard forms is inappropriate to the extent that it unnecessarily serves to delay a response to or deny a request for records.

Second, the Freedom of 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, the State's highest court, expressed its general view of the intent of the Freedom of Information Law most recently in 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.*).

Pertinent with respect to the records that you requested is a decision, Orange County Publications v. County of Orange [637 NYS2d 596 (1995)], that 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" [Orange County Publications v. County of Orange, 637 NYS2d 596, 599 (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'" (*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.

In the context of a school district's duties, insofar as the records identify or could identify particular students, I believe that they must be withheld. Another statute that exempts records from disclosure is the Family Education Rights and Privacy Act ("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 or other aspects of records that would make a student's identity easily traceable must in my view be withheld in order to comply with federal law. Similarly, references to employees involved in disciplinary proceedings when such proceedings have not resulted in any final determination reflective of misconduct could be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see Herald Company v. School District of the City of Syracuse, 430 NY 2d 460 (1980)].

In a decision dealing specifically with bills involving services rendered by attorneys for a school district, that matter involved an applicant ("petitioner") who sought billing statements for legal services provided to the Board ("respondents") by a law firm. Since the statements made

available included "only the time period covered and the total amount owed for services and disbursements", petitioner contended that "she is entitled to that billing information which would detail the fee, the type of matter for which the legal services were rendered and the names of the parties to any current litigation". In its discussion of the issue, the court found that:

"The difficulty of defining the limits of the attorney client privilege has been recognized by the New York State Court of Appeals. (Matter of Priest v. Hennessy, 51 NY2d 62, 68.) Nevertheless, the Court has ruled that this privilege is not limitless and generally does not extend to the fee arrangements between an attorney and client. (Matter of Priest v. Hennessy, supra.) As a communication regarding a fee has no direct relevance to the legal advice actually given, the fee arrangement is not privileged. (Matter of Priest v. Hennessy, supra. at 69.)

"There appear to be no New York cases which specifically address how much of a fee arrangement must be revealed beyond the name of the client, the amount billed and the terms of the agreement. However, the United States Court of Appeals, in interpreting federal law, has found that questions pertaining to the date and general nature of legal services performed were not violative of client confidentiality. (Cotton v. United States, 306 F.2d 633.) In that Court's analysis such information did not involve the substance of the matters was not privileged...

"...Respondents have not justified their refusal to obliterate any and all information which would reveal the date, general nature of service rendered and time spent. While the Court can understand that in a few limited instances the substance of a legal communication might be revealed in a billing statement, Respondents have failed to come forward with proof that such information is contained in each and every document so as to justify a blanket denial of disclosure. Conclusory characterizations are insufficient to support a claim of privilege. (Church of Scientology v. State of New York, 46 NY 2d 906, 908.)...Therefore, Petitioner's request for disclosure of the fee, type of matter and names of parties to pending litigation on each billing statement must be granted" (Knapp v. Board of Education, Supreme Court, Steuben County, November 13, 1990).

In sum, as you suggested, the blanket denial of access by the District was inconsistent with the language of the Freedom of Information Law and judicial interpretations of that statute.

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.

Ms. Karen Rowell
May 3, 1999
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I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Dr. Fritz Hess
Frederick N. Thomsen



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DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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May 3, 1999

Executive Director

Robert J. Freeman

Mr. Bennett Weiss

[REDACTED]

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

Dear Mr. Weiss:

I have received your letter of April 8 and the correspondence attached to it.

You have questioned the propriety of a fee sought to be charged by the Newburgh Enlarged City School District for copies of videotapes. You indicated that the District has in the past made copies after you have provided blank cassette tapes. The records access officer, however, wrote that "pro-rated costs for the staff person in the Instructional Television Office to procure a videotape and audiotapes, as well as the replication time required to reproduce the tapes you have requested."

In this regard, §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."

Mr. Bennett Weiss

May 3, 1999

Page -2-

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, employee or clerical time, 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 an audiotape or videotape would involve the cost of electricity (if that can be determined), plus the cost of an information storage medium, i.e., a cassette.

I note that 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

Mr. Bennett Weiss

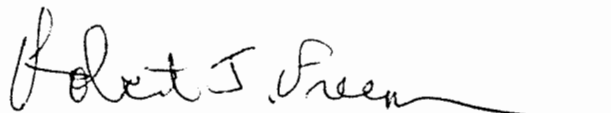
May 3, 1999

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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,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and extends across the width of the page.

Robert J. Freeman
Executive Director

RJF:jm

cc: Philomena Pezzano



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May 4, 1999

Executive Director

Robert J. Freeman

Mr. Brian Hunt
96-B-0328
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. Hunt:

I have received your letter of April 6. In brief, you asked whether there is any provision of law that would enable you to "make [an agency] give [you] the documents and pay the fee a little at a time."

In short, there is no such provision in the New York Freedom of Information Law. It is noted that while the federal Freedom of Information Act, which applies to federal agencies, includes provisions authorizing fee waivers, there is no equivalent provision in the New York statute. Further, it has been held that an agency subject to the New York Freedom of Information Law 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



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May 4, 1999

Executive Director

Robert J. Freeman

Mr. Harvey M. Elentuck



The staff of the Committee on Open 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 correspondence of April 6. For reasons expressed on several occasions in the past, I will not prepare a new opinion concerning access to observation reports. However, I agree with your inference that the requirements relating to the right to appeal a denial of access to records imposed by Community School District 3 are, in your words, "more restrictive" than the law.

Cirino T. Lombard, Special Assistant to the Superintendent, wrote that "an applicant denied access to records may file an appeal by delivering a copy of the original request, the specific grounds for your appeal and the denial letter to the Chancellor..."

The requirements concerning the ability to appeal a denial of access to records are found in the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), which govern the procedural aspects of the Freedom of Information Law and have the force and effect of law. Specifically, §1401.7(e) of the regulations states that:

"The time for deciding an appeal by the individual or body designated to hear appeals shall commence upon receipt of written appeal identifying:

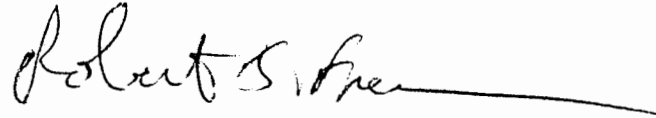
- (1) the date and location of requests for records;
- (2) the records that were denied; and
- (3) the name and return address of the appellant."

In short, there is no obligation to include a copy of an original request when appealing, nor is there a requirement that "specific grounds for your appeal" be expressed. While an appellant may offer reasons in an effort to convince an appeals person or body to overturn an initial denial of access, there is no requirement to do so.

Mr. Harvey M. Elentuck
May 4, 1999
Page -2-

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal line extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Cirino T. Lombard



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May 4, 1999

Executive Director

Robert J. Freeman

Mr. Joaquin Winfield
97-A-5399
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. Winfield:

I have received your correspondence of April 4. You referred to an appeal made under the Freedom of Information Law that had not been answered and expressed the belief that you cannot seek "judicial intervention" because your administrative remedies have not been exhausted.

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

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

Mr. Joaquin Winfield
May 4, 1999
Page -2-

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Anthony J. Annucci



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Executive Director

Robert J. Freeman

May 4, 1999

Ms. Susan Ferraro



The staff of the Committee 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. Ferraro:

I have received your letter of April 5, as well as the correspondence attached to it. You have sought an advisory opinion concerning a request made under the Freedom of Information Law to the Village of Fleischmanns.

By way of background, you wrote to the Village Clerk on March 19 and sought a variety of information relating to a Village election conducted on the preceding day. The receipt of the request was acknowledged on March 25, and the Mayor indicated at that time that "[n]ormally, FOIL requests can be granted or denied within 30 days of the above date." On April 1, you were informed that some of the records sought would be made available upon payment of a fee for copies; that others did not exist; that some would be available but "will take some time to compile"; and that in other cases, the village would engage in "researching" requests to determine rights of access.

In this regard, I offer the following comments.

First, it is emphasized at the outset that the Freedom of Information Law pertains to existing records, 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. Several aspects of your request involve "lists" of various items. If no lists containing the information sought exist, the Village would not be obliged to prepare new records on your behalf. In the future, unless it is clear that a list has been prepared, it is suggested that you request existing records, i.e., records identifying voters who were challenged.

In a related vein, in order to avoid unnecessary delays in disclosure, when requesting records, I recommend that you specify whether you want to inspect them or have copies. An agency cannot charge for the inspection of accessible records. If you want copies, you might offer to pay a fee of

up to a certain amount and to be informed prior to making copies only if the total exceeds that amount.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. I point out, however, that other statutes may be pertinent with respect to the records that you requested, and that §89(6) of the Freedom of Information Law states that if records are available under some other provision of law, they remain available, notwithstanding an apparent ability to deny access under the Freedom of Information Law.

By means of example, there are many instances in which home addresses may be withheld under §87(2)(b), which permits an agency to deny access to records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." Nevertheless, in a statute dealing with absentee ballot applications, Election Law, §8-402, subdivision (7) states that:

"The board shall keep a record of applications for absentee ballots as they are received, showing the names and residences of the applicants, and their party enrollment in the case of primary elections, and, as soon as practicable shall, when requested, give to the chairman of each political party or independent body in the county, and shall make available for inspection to any qualified voter upon request, a complete list of all applicants to whom absentee voters' ballots have been delivered or mailed, containing their names and places of residence as they appear on the registration record, including the election district and ward, if any..."

Similarly, §3-220(1) of the Election Law states in part that: "All registration records, certificates, lists and inventories referred to in, or required by, this chapter shall be public records..."

Based on the foregoing, it is clear in my view that absentee ballot applications, for instance, and voter registration lists identifying those who voted, should be readily available.

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

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

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:

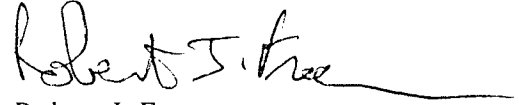
"...the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objectives cannot hope to be attained unless 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. Having reviewed other requests involving the Village of Fleischmanns, it appears that every request, irrespective of its nature, is acknowledged with the same statement. 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).

Ms. Susan Ferraro
May 4, 1999
Page -4-

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Donald E. Kearney, Mayor
Lorraine De Marfio, Village Clerk



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AD-11448

Committee Members

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Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

May 4, 1999

Executive Director

Robert J. Freeman

Ms. Marcie Haskell
Chair
Trojans for Troy
131 Euclid Avenue
Troy, NY 12180

Dear Ms. Haskell:

I have received your letter of April 14 in which you wrote that you were "surprised" to read my comment that a member of the Troy City Council "acting alone, would have no more authority than a member of the public" when seeking records from the City. You then referred to Section 2.08.1 of the City Charter, which states that: "Any officer of the city is required to furnish reports, information or estimates to any councillor or the City of Troy."

In this regard, I must admit to having been unaware of the City Charter provision at the time my comment was offered. I am also unaware, however, of the intent or legislative history of that provision, and I do not know how broadly it is intended to be construed. Further, while it is the duty of the Committee on Government to offer advice and interpretations relating to the Freedom of Information Law, I do not believe that I can appropriately interpret Section 2.08 of the City Charter.

I note that if the language of that provision is construed literally, the results would likely conflict with law or be unreasonable. "Information" maintained by the City of Troy would include matters involving records that are sealed, others that are confidential by statute, and others, particularly those pertaining to criminal law enforcement or containing intimate personal information, that may be protected for a series of valid reasons. For instance, personnel records relating to employees include their social security numbers; health insurance records may include reference to medical conditions or diseases. I question whether under the City Charter provision, any member of the City Council has the right to obtain all social security numbers or personally identifiable information, perhaps based on curiosity, regarding medical conditions or diseases of City employees and their family members.

When members of governing bodies have requested records, it has generally been advised that if the request is reasonable, that person 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.

Ms. Marcie Haskell

May 4, 1999

Page -2-

A governing body of a public corporation 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 of a governing body 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. In such a case, a member seeking records could presumably be treated in the same manner as the public generally.

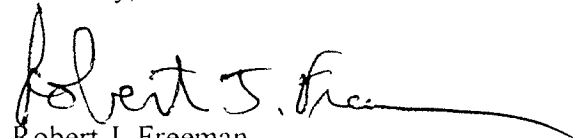
I note that Section 15.07 of the City Charter was also marked. That provision states that: "All books and records of any department in the city shall be public records." In judicial decisions construing similar local enactments, the courts have chosen not to engage in literal constructions of those provisions. For instance, §51 of the General Municipal Law states in general that records of a municipality are available. However, in responding to a contention that §51 requires that all records of a municipality be made available, regardless of their contents, the state's highest court, the Court of Appeals, held in 1985 that:

"Such a result would nullify the FOIL exemptions, which the Legislature - presumably aware of General Municipal Law §51 at the time it enacted FOIL - could not have intended. To give effect to both statutes, the FOIL exemptions must be read as having engrafted, as a matter of public policy, certain limitations on the disclosure of otherwise accessible records" [Xerox Corporation v. Town of Webster, 65 NY 131, 490 NYS 2d 488, 489 (1985)].

Provisions of the New York City Charter reenacted in 1989, §§1058 and 1059, refer to public access to *any* books and records of City agencies and offices of the borough presidents. Despite the fact that they were enacted following the passage of the Freedom of Information Law, the Appellate Division unanimously determined, citing Xerox, that the exceptions appearing in the Freedom of Information Law were deemed to have been "engrafted" on those provisions [Turner v. Department of Finance of the City of New York, 242 AD2d 146 (1998)].

In short, it is reiterated that I do not believe that I have the authority to interpret the provision of the City Charter at issue.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Mark Pattison, Mayor



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AD-11449

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Warren Mitofsky
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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

May 5, 1999

Executive Director

Robert J. Freeman

Mr. Bornallah Wright
Marcy Correctional Facility
94-A-2919
P.O. Box 3600
Marcy, NY 13403-3600

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

Dear Mr. Wright:

I have received your letter of April 9 in which you raised a variety of issues relating to your requests for records directed to the office of a district attorney.

In this regard, I offer the following comments.

First, 5 USC §552 is the federal Freedom of Information Act. That statute pertains only to federal agencies, and it has no application to records maintained by an office of a district attorney or any other entity of state or local government. If you find a decision rendered under the federal Act that you consider pertinent, certainly you may cite it in an effort to express a point of view or to offer guidance. Nevertheless, the decision would not be binding in New York; the courts would not be bound by the decision when dealing with access to state or local government records. The governing statute in the context of your inquiry is the New York Freedom of Information Law. Although it is similar in structure to the federal Act, the language of the two statutes differs, and the judicial interpretation of the two statutes has been different as well. In short, as indicated in the opinion of April 7, there is nothing in the state law or in any judicial decision involving that statute that would require the preparation of the equivalent of a Vaughn index.

Second, if a response by the office of the district attorney contains errors, if pages are missing, or if there may have been a misunderstanding, rather than considering initiating an Article 78 proceeding, it is suggested that you write to that office and briefly explain the difficulty.

Mr. Bornallah Wright

May 5, 1999

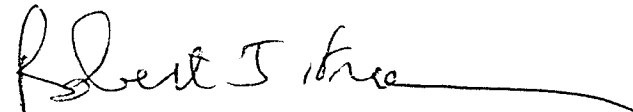
Page -2-

Third, at the end of the opinion sent to you last month, it was explained that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests and appeals, as well as the steps that can be taken if an agency fails to respond to a request or an appeal. It is recommended that you review that portion of the response.

Lastly, I am unaware of the particular records that are maintained by office of district attorneys. However, if you are unsure of the entity that maintains the records of your interest, it is suggested that you seek them from any of the entities that might maintain them. For instance, in addition to the district attorney, a request might be made to a police department. Even though the courts are not subject to the Freedom of Information Law, court records are generally available under other statutes (see e.g., Judiciary Law, §255), and a request might be made to the clerk of the appropriate court.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11450

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Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

May 4, 1999

Executive Director

Robert J. Freeman

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 April 10 in which you raised issues in relation to a request made under the Freedom of Information Law to the Hyde Park Central School District.

In a letter of March 11, you requested "a list of the number and use of the classrooms in each school district building as well as any other information which could illuminate the question of alleged overcrowding." As of the date of your letter, you had not yet received a response. Further, you wrote that the Superintendent indicated that "the Law states that the District respond in ten (10) days with either the information and/or an approximation of when the information can presented, providing it is a legitimate request." You questioned the accuracy of that statement.

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.

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)].

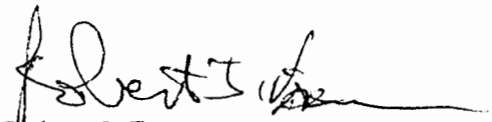
Mr. P.N. Prentice
May 4, 1999
Page -3-

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, it is emphasized that the Freedom of Information Law pertains to existing records, and that §89(3) of the statute provides in part that an agency is not required to create a record in response to a request. Therefore, if there is no "list" containing the information sought, the District would not be obliged to prepare a list that includes those items on your behalf. In the future, rather than seeking a list, it is suggested that you request existing records, i.e., records indicating the number and use of classrooms in each school building.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Superintendent of Schools



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11451

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Robert L. King
Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

May 5, 1999

Executive Director

Robert J. Freeman

Mr. Norris Capobianco
89-A-9758
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. Capobianco:

I have received your letter of April 12. You have sought guidance concerning delays in response to your requests by the freedom of information officer 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,

Mr. Norris Capobianco
May 5, 1999
Page -2-

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

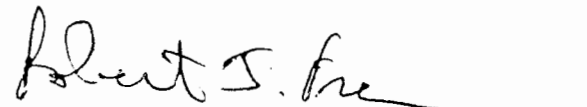
In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge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

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 freedom of information officer.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and extends across the width of the page.

Robert J. Freeman
Executive Director

RJF:jm

cc: K. Weaver



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-Ad- 3024
FOIL-Ad- 11452

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Joseph J. Seymour
Alexander F. Treadwell

May 5, 1999

Executive Director

Robert J. Freeman

Mr. Richard Jannaccio
President
West Flushing Civic Association, Inc.
P.O. Box 7770
Flushing, NY 11352

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

Dear Mr. Jannaccio:

I have received your letter of April 13 in which you raised a series of issues concerning the implementation of the Freedom of Information and Open Meetings Laws by Community Board 7 in Queens.

According to your letter, until recently, one could "walk into" the offices of Community Board 7 "during business hours, request specific public information and be given it right away." You wrote, however, that the practice has been changed, that individuals are now required to seek records in writing, and that access has been delayed. Further, you indicated that the "the decision to stifle the flow of information was made unilaterally by CB7's Executive Board on March 8, when they usurped authority and shut out the rank and file Board members from voting on the proposed rule change", and that "because the decision was made in a backroom meeting closed to the public, the Executive Board was also in violation of the City Charter, Chapter 70, Sec. 2800, d(3): 'Each community board shall take action only at a meeting open to the public.'" At the end of your letter, you made a series of allegations and accusations concerning the activities and character of Claire Shulman, the Borough President, and you asked that this office "investigate this matter immediately, and take the appropriate enforcement action in order to preserve and protect open government."

In this regard, it is noted at the outset that the Committee on Open Government has neither the authority nor the resources to conduct an investigation. While the Committee has the ability to offer advice and opinions pertaining to open government laws, it is not empowered to enforce those statutes. Additionally, the ensuing remarks focus on the activities of the Community Board, not the Borough President. Her office and her duties are, in my view, separate from those of the Community Board in the context of the issues that you presented.

Mr. Richard Jannaccio

May 5, 1999

Page -2-

First, notwithstanding past practice, it is clear that an agency, such as a community board, has the authority to require that requests for records be made in writing, and that there is no obligation that an agency respond instantly to a request. While agencies frequently waive the requirement that requests be made in writing and make records available immediately on request, under the terms of the Freedom of Information Law, they are not required to do so. 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..."

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

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

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

If a request is voluminous and a significant amount of time is needed to locate records and review them to determine rights of access, a delay in disclosure, 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.

Second, in my opinion, the Executive Board is subject to the Open Meetings Law, and that entity could not have validly adopted a new policy.

By way of background, prior to its passage, the bill that became the Open Meetings Law was debated on the floor of the Assembly and 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 a determination rendered soon after its enactment in which it was held that committees of a board of education were not subject to the Open Meetings Law [see Daily Gazette Co., Inc. v. North Colonie Board of Education, [67 AD2d 803 (1978)]], a series of amendments to the Open Meetings Law was enacted in 1979 to ensure that those entities fall within its coverage. Among the changes was a redefinition of the term "public body", which has since been defined in §102(2) to include:

"...any entity for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

Although the original definition made reference to entities that "transact" public business, the current definition makes reference to entities that "conduct" public business. Moreover, the definition makes specific reference to "committees, subcommittees and similar bodies" of a public body.

In view of the amendments to the definition of "public body", I believe that any entity consisting of two or more members of a public body, such as a committee or subcommittee consisting of members of a community board, would fall within the requirements of the Open Meetings Law [see Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984 (1981)]. Further, as a general matter, a quorum consists of a majority of the total membership of a body (see e.g., General Construction Law, §41). Therefore, if, for example, a community board consists of 51, its quorum would be 26; in the case of a committee consisting of nine, a quorum would be five.

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)].

Mr. Richard Jannaccio

May 5, 1999

Page -4-

Third, the Executive Board would not have had the authority, in my opinion, to have considered a change in or the adoption of policy regarding the treatment of requests for records in private.

I point out that every meeting of a public body must be convened as an open meeting, and that §102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. As such, it is clear that an executive session is not separate and distinct from an open meeting, but rather that it is a part of an open meeting. Moreover, the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

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

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed and it must be carried by majority vote of a public body's membership before such a session may validly be held.

The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session. Therefore, a public body may not conduct an executive session to discuss the subject of its choice.

Consideration of policy in relation to requests for records would not have fallen within any of the grounds for entry into executive session, and any person would have had the right to attend a meeting of a public body held to discuss that issue.

Lastly, in my opinion, only the Community Board itself, at meeting during which a quorum is present, and only by means of an affirmative vote of a majority of its total member, would have the authority to alter or adopt policy; the Executive Board in my view does not have had the authority to do so.

Reference was made earlier to §41 of the General Construction Law, and a key element in the implementation of the Open Meetings Law is its relationship to that statute. That provision states that:

"Whenever three or 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

Mr. Richard Jannaccio

May 5, 1999

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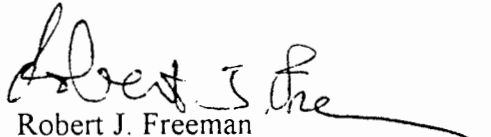
all of them, shall constitute a quorum and not less than a majority of the whole number may perform and exercise such power, authority or dy. For the purpose of this provision the words 'whole number' shall be construed to mean the total number which the board, commission, body or other group of persons 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, for example. Further, in order to carry a motion or take action, there must be an affirmative vote of a majority of the total membership of a public body. In construing §41 of the General Construction Law, it has consistently been found that action may be taken only by means of an affirmative vote of the majority of the total membership of a public body [see e.g., Rockland Woods, Inc. v. Suffern, 40 AD 2d 385 (1973); Walt Whitman Game Room, Inc. v. Zoning Board of Appeals, 54 AD 2d 764 (1975); Guiliano v. Entress, 4 Misc. 2d 546 (1957); and Downing v. Gaynor, 47 Misc. 2d 535 (1965); also Ops Atty Gen 88-87 (informal)]. While a committee of a public body is itself a public body, a committee generally cannot take final action that is binding on the larger body, i.e., a community board. Only the latter could do so.

In an effort to enhance compliance with and understanding of Open Government laws, copies of this opinion will be forwarded to the Community Board and others.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Community Board 7

Hon. Claire Shulman, Borough President

Melinda Katz, Director of Community Boards



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-A-11453

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

May 6, 1999

Executive Director

Robert J. Freeman

Mr. Richard Washington



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

Dear Mr. Washington:

I have received your letter of April 10 in which you asked that I contact the Superintendent of the Woodbourne Correctional Facility to "remind him" of his duty to respond to your request for records made under the Freedom of Information Law. I will do so by sending him a copy of this response.

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

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

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

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

Mr. Richard Washington

May 6, 1999

Page -2-

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

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

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: John Keane, Superintendent



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL - AD - 11454

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Alexander F. Treadwell

May 6, 1999

Executive Director

Robert J. Freeman

Mr. Edmund Galke



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

Dear Mr. Galke:

I have received your letter of April 15 in which you complained with respect to what you characterized as "the commission of a criminal act by a contractor performing work for the NYSDOT." You indicated that your requests for records directed to that agency and the State University Construction Fund kept at regional offices and job sites have been denied.

You have sought guidance in the matter, and I offer the following comments.

First, it is unclear where or to whom you requested records. In this regard, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) require that each agency designate one or more persons as "records access officer." That person has the duty of coordinating an agency's response to requests. If you have not done so already, it is suggested that you direct requests to the agencies that you believe maintain the records of your interest.

Second, in a related vein, §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.

Third, if a request is denied, the applicant has the right to appeal pursuant to §89(4)(a), 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

Mr. Edmund Galke

May 6, 1999

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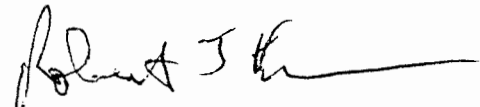
the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Next, while I am unfamiliar with the records of your interest, 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.

Lastly, if you believe that criminal acts have been committed, it is suggested that you contact the appropriate law enforcement agency or perhaps the Office of the State Inspector General.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FUEL-AO-11455

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

May 6, 1999

Executive Director

Robert J. Freeman

Ms. Joan McCune

[REDACTED]

The staff of the Committee 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. McCune:

I have received your letter of April 8 and the materials relating to it. You have questioned the propriety of the deletion of portions of a record made available to you under the Freedom of Information Law by the Office of Mental Retardation and Developmental Disabilities (OMRDD).

In this regard, in an effort to attempt to ascertain whether the deletions were made in a manner consistent with law, I discussed the matter with an attorney at OMRDD. She informed me that all of the deletions involve personally identifying information. If that is so, I believe that the deletions would have been appropriate.

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. In my view, either of the two of the grounds for denial may be relevant in the context of the issue presented.

The first ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §33.13 of the Mental Hygiene Law, which in subdivision (a) states in relevant part that:

"A clinical record for each patient or client shall be maintained at each facility licensed or operated by the office of mental health or the office of mental retardation and developmental disabilities, hereinafter referred to as the offices. The record shall contain information on all

Ms. Joan McCune
May 6, 1999
Page -2-

matters relating to the admission, legal status, care and treatment of the patient or client and shall include all pertinent documents relating to the patient or client."

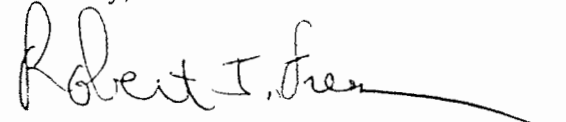
Further, subdivision (c) provides that information "about patients or clients reported" to the Office of Mental Health or OMRDD "and clinical records or clinical information tending to identify patients or clients, at office facilities shall not be a public record and shall not be released by the office or its facilities to any person or agency", except in specified circumstances. In my opinion, none of those circumstances would apply in relation to your request.

The other provision of significance, §87(2)(b), authorizes an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." Additionally, §89(2) states that "an agency may delete identifying details when it makes records available" and includes examples of unwarranted invasions of personal privacy. The second such example pertains to "disclosure of items involving the medical or personal records of a client or patient in a medical facility."

From my perspective, assuming that the deletions involve personally identifying details, they could justifiably have been made under either of the grounds for denial described in the preceding commentary.

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

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and extends across the width of the page.

Robert J. Freeman
Executive Director

RJF:jm

cc: Paul R. Kietzman



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-A-11456

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Alexander F. Treadwell

May 6, 1999

Executive Director

Robert J. Freeman

Mr. Bart Lucido

[REDACTED]

Ms. Ellen Zimkin

[REDACTED]

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

Dear Mr. Lucido and Ms. Zimkin:

I have received correspondence from both of you pertaining to requests for records relating to an election in the Village of Elmsford. In brief, you have sought an advisory opinion concerning rights of access to "absentee ballots, absentee ballot requests and copies of signed envelopes."

In this regard, it is noted at the outset that the Freedom of Information Law deals generally with rights of access to government records. In some instances, other statutes deal with particular records and include specific direction concerning disclosure or perhaps the ability to withhold those records. In those latter cases, the statute providing specific direction with respect to the disclosure of particular records prevails over the Freedom of Information Law.

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.

As I understand the Election Law, absentee ballots and ballot envelopes are beyond the coverage of the Freedom of Information Law and may be examined only pursuant to court order. Relevant with regard to those records are §87(2)(a) of the Freedom of Information Law and §3-222(3) of the Election Law. The former pertains to records that are "specifically exempted from disclosure by state or federal statute." The latter is such a statute, for it and provides in relevant part that:

Mr. Bart Lucido
Ms. Ellen Gallagher Zimkin
May 6, 1999
Page -2-

“Except as hereinafter provided, packages of protested, void and wholly blank ballots, packages of unused ballots and all absentee and military, special federal, special presidential and emergency ballots and ballot envelopes, if any, opened or unopened, shall be preserved for two years after the election. Except as hereinafter provided, boxes contained voted paper ballots shall be preserved inviolate for four months after the election, or until one month before the next election occurring within five months after a preceding election if such boxes are needed for use at such next election and if the officer or board in charge of such voted paper ballots is required by law to furnish ballot boxes therefor. Provided, however, that such ballot boxes and such packages may be opened, and their contents and the absentee and military, special federal, special presidential and emergency ballots and ballot envelopes may be examined, upon the order of any court or justice of competent jurisdiction” (emphasis added).

Based on the foregoing, absentee ballots and ballot envelopes must be "preserved inviolate", unless a court order is issued authorizing their examination.

There are many instances in which home addresses may be withheld under §87(2)(b) of the Freedom of Information Law, which permits an agency to deny access to records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." Nevertheless, in a statute dealing with absentee ballot applications, Election Law, §8-402, subdivision (7) states that:

“The board shall keep a record of applications for absentee ballots as they are received, showing the names and residences of the applicants, and their party enrollment in the case of primary elections, and, as soon as practicable shall, when requested, give to the chairman of each political party or independent body in the county, and shall make available for inspection to any qualified voter upon request, a complete list of all applicants to whom absentee voters’ ballots have been delivered or mailed, containing their names and places of residence as they appear on the registration record, including the election district and ward, if any...”

Similarly, §3-220(1) of the Election Law states in part that: "All registration records, certificates, lists and inventories referred to in, or required by, this chapter shall be public records..." Registration records including voters’ residence addresses.

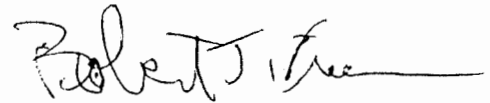
Based on the foregoing, it is clear in my view that the names and address of applicants for absentee ballots and voter registration lists identifying those who voted should be readily available. I recognize that the provisions referenced above involve county boards of elections. However, I am unaware of any provision of the Election Law, Article 15, which pertains to villages elections, that would provide direction to the contrary.

Mr. Bart Lucido
Ms. Ellen Gallagher Zimkin
May 6, 1999
Page -3-

With respect to the content of the applications, I believe that the Freedom of Information Law would govern in determining rights of access. As indicated in a memorandum addressed to Mayor DeAngelis on April 19, portions of those documents might justifiably be withheld. For example, if the applicant includes reference to a medical condition or disability, that portion of the record could in my opinion clearly be withheld as an unwarranted invasion of personal privacy.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Arthur J. DeAngelis, Mayor



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 11457

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Alexander F. Treadwell

May 10, 1999

Executive Director

Robert J. Freeman

Ms. Eleni Hailazopoulos



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

Dear Ms. Hailazopoulos:

I have received your letter of April 9 and the materials relating to it. You have sought assistance in your efforts in obtaining records from the New York City Police Department, the New York City Department of Parks and Recreation, and the Office of the Queens County District Attorney.

Having reviewed the materials, I offer the following comments.

First, reference is repeatedly made in the materials to the FOIA, the Electronic FOIA and the Privacy Act. Those statutes are federal enactments that pertain only to federal agencies; they are not applicable to the agencies from which you have requested records. While the New York Freedom of Information Law, which is applicable, includes electronic records within its coverage, the requirements imposed by the federal acts to which you referred are not pertinent in the context of your requests.

I note, too, that while the federal Freedom of Information Act includes provisions concerning fee waivers, there is no similar provision in the New York counterpart. Moreover, it has been held that an agency may charge its established fee, even if the applicant for records is indigent [see Whitehead v. Morgenthau, 518 NYS2d 552 (1990)].

The issue of fees may be significant, for you have sought numerous and varied records. In this regard, 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. There often situations in which some aspects of a record, but not the entire record, may properly be withheld in accordance with the grounds for denial appearing in §87(2). In that event, I do not believe that an applicant would have the right to inspect the record.

In order to obtain the accessible information, upon payment of the established fee, I believe that the agency would be obliged to disclose those portions of the records after having made appropriate deletions from a copy of the record. In that circumstance, an agency could seek payment of the requisite fee for photocopies, which would be made available after the deletion of certain details (see Van Ness v. Center for Animal Care and Control and the New York City Department of Health, Supreme Court, New York County, January 28, 1999).

Second, several points were made concerning the ability to obtain information in an electronic form, such as a computer tape or disk. In this regard, as you are aware, §86(4) of the Freedom of Information Law defines the term "record" expansively to include:

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

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, Szikszy 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)]. Similarly, while an agency may be able to locate a particular record, such as an incident report, that is stored electronically, it does not necessarily follow that there is a database consisting of incident reports. An individual report might be retrievable on the basis of a name or other identifier, and that may be the only means of locating a particular report that is maintained electronically.

Third, I would conjecture that many of the records that you have requested would be accessible or deniable in part based on their contents. For instance, it is likely that several of the

grounds for denial would be pertinent in determining rights of access to incident report, complaint reports or witness statements.

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.

Another issue may be the extent to which your requests "reasonably describe" the records sought as required by §89(3) of the Freedom of Information Law. For instance, one element of a request involved "all incident/complaint reports generated by parks enforcement patrol from the county of Queens throughout the period of 1/95 up to and including 12/98." In the leading decision concerning the standard imposed by the law, the Court of Appeals in Konigsberg v. Coughlin [68 NY 2d 245, 249 (1986)] 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 Police 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

Ms. Eleni Hailazopoulos

May 10, 1999

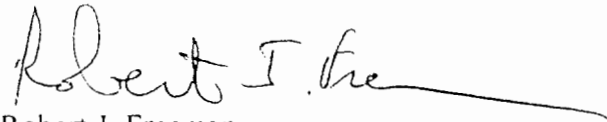
Page -5-

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, since you questioned whether copies of records were accurate, §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.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and extends across the width of the page.

Robert J. Freeman
Executive Director

RJF:jm

cc: Sgt. Richard Evangelista
Karen R. Cavanaugh
Thomas Rozinski
Jennifer Friedman



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AJ-11458

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

May 11, 1999

Executive Director

Robert J. Freeman

Ms. Jackie Faville
Chairperson
Save Our Services
115 East State Street
Gloversville, NY 12078

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

Dear Ms. Faville:

I have received your letter of April 14 concerning a request by your organization, Save Our Services-Gloversville, for records relating to an application by the Nathan Littauer Hospital for bonds from the Fulton County Industrial Development Agency (IDA) to construct a new outpatient surgery center. Although much of the application was disclosed, various schedules containing financial information were withheld in their entirety.

It is your view that the documentation in question is "important for the community, to help [you] evaluate whether the hospital should receive bonds and/or Mortgage Recording Tax Exemptions for their new expansion project", and because the decision by the IDA will affect all Fulton County taxpayers. You also contended that "the IDA has erred by simply granting Nathan Littauer a blanket exemption from disclosure of this financial information."

From my perspective, it is likely that the "blanket exemption" to which you referred is inconsistent with the language of the Freedom of Information Law and its judicial interpretation. In this regard, I offer the following comments.

First, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. It is emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In my view, the phrase quoted in the preceding sentence evidences a recognition on the part of the Legislature that a single record or report, for example, might include portions that are available under the statute, as well as

portions that might justifiably be withheld. That being so, I believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

The Court of Appeals, the state's highest court, most recently expressed 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 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.*).

Second, as I understand the matter, the only exception that would be pertinent is §87(2)(d), and the extent to which it would serve as a valid basis for denial is questionable. That provision permits an agency to withhold records or portions thereof that:

"are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise..."

In my opinion, the question under §87(2)(d) involves the extent, if any, to which disclosure would "cause substantial injury to the competitive position" of a commercial 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 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

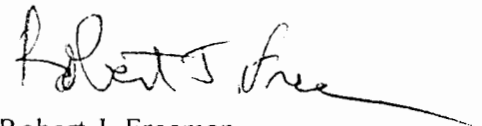
to whom valuable information is released under FOIA. If those competitors are charged only minimal FOIA retrieval costs for the information, rather than the considerable costs of private reproduction, they may be getting quite a bargain. Such bargains could easily have competitive consequences not contemplated 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).

In the context of your inquiry, impairment of the government's ability to acquire the records at issue or similar materials in the future should not, in my opinion, be a consideration; the entity is seeking a benefit from government. Similarly, attracting a business or industry to the County does not appear to be pertinent, for the funding involves the expansion of an existing facility. It is also likely that substantial amounts of financial information relating to the Hospital are maintained by and accessible from the State Department of Health. Insofar as the financial information sought is duplicative of or analogous to that sought, §87(2)(d) would be inapplicable. Further and perhaps most importantly, the characterization of the documentation as financial information would not alone be adequate to justify a denial of access. Only to the extent that disclosure would "cause substantial injury" to the Hospital's competitive position would a denial of access be appropriate.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Fulton County Industrial Development Agency
J. Paul Kolodziej



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FOIL-AO-11459

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May 11, 1999

Executive Director

Robert J. Freeman

Ms. Lindy Hatzmann



The staff of the Committee 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. Hatzmann:

I have received your letter of April 12 in which you asked that I address a point made a conversation in which it was advised that if records are shown to you, an agency waives its capacity to withhold those records.

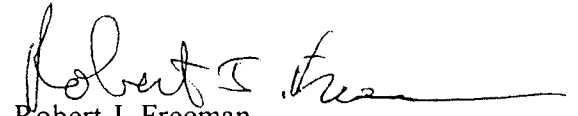
As I suggested at the public forum last night (and I really did not recall the specifics of your letter, which I found near the top of the stack of requests for opinions when I returned to the office this morning), in general, when records are available for inspection under the Freedom of Information Law, I believe that they are available for copying and that an agency must provide copies upon payment of the requisite fee [see Freedom of Information Law, §89(3)]. Therefore, assuming that a disclosure was not inadvertent and was made "intelligently and voluntarily" [see McGraw-Edison v. Williams, 509 NYS 2d 285, 287 (1986)], it would appear that an agency would have waived its right to prohibit a person who inspected a record from copying a record that was previously disclosed for the purpose of inspection.

In the case cited in the preceding paragraph, among the records inspected was a document that the agency believed was exempted from disclosure and which should have been withheld. It was held that an inadvertent disclosure of an exempt records did not create a right to copy the record (McGraw-Edison Co. v. Williams, *supra*). If indeed records may justifiably be withheld, but they were inadvertently made available for inspection, an agency, based on McGraw-Edison, could properly deny a request that the records be copied.

Ms. Lindy Hatzmann
May 11, 1999
Page -2-

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm



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FOIL-AJ-11460

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Alexander F. Treadwell

May 11, 1999

Executive Director

Robert J. Freeman

Mr. Moses L. Green 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. Green:

I have received your letter of April 12 and the materials attached to it. According to the correspondence, you requested from the New York City Police Department a list of the names, addresses and telephone numbers of "former DOT agents that were terminated under (NYCPD)." You faced a series of delays and were informed that the Police Department does not maintain the information sought. You asked "where do [you] go from here."

In this regard, I offer the following comments.

First, it is emphasized that the Freedom of Information Law pertains to existing agency records and that §89(3) of that statute states in part that an agency is not required to create a record in response to a request. Therefore, if the Police Department does not maintain a "list" of those terminated or does not maintain records identifying persons employed by a different agency who were terminated, the Department would not be required to prepare or acquire records on your behalf in an effort to satisfy your request.

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.

It is recommended that you follow the course of action suggested by Sergeant Evangelista, that you seek records from the Department of Transportation identifying the employees of your interest who may have been terminated within a certain period.

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 an agency must disclose a portion of a record identifying a public employee who was terminated, §89(7) of the Law provides that the home addresses of present and former public employees

Mr. Moses L. Green Jr.
May 11, 1999
Page -2-

need not be disclosed. Similarly, I believe that home telephone numbers of those persons may be withheld as an "unwarranted invasion of personal privacy" [see §87(2)(b)].

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

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

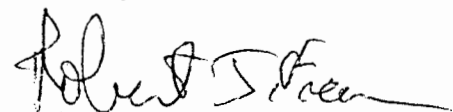
If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively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

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

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

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Sgt. Richard Evangelista



STATE OF NEW YORK
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FOEL-AD-11461

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May 11, 1999

Executive Director

Robert J. Freeman

Mr. Richard Winkler
81-B-2146
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. Winkler:

I have received your letter of April 13 in which you requested an advisory opinion concerning your right to obtain the "arrest report" of a witness who testified at your trial, as well as statements made by that person and related records. You also indicated that recent requests for the records had not been answered.

In this regard, I offer the following comments.

First, it is assumed that your reference to arrest reports and arrest records involves the criminal history of the witness. If that is so, I note that the general repository of criminal history records is the Division of Criminal Justice Services. While the subject of a criminal history record may obtain such record from the Division, it has been held that criminal history records maintained by that agency are exempt 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

Mr. Richard Winkler

May 11, 1999

Page -2-

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 or perhaps a police department in possession of the records would be required to disclose.

It is also noted that while records relating to convictions may be available from the courts or other sources, when charges are dismissed in favor of an accused, records relating to arrests that did not result in convictions are generally sealed pursuant to §160.50 of the Criminal Procedure Law.

Second, relevant to the matter is the decision rendered in Moore v. Santucci [151 AD 2d 677 (1989)], in which it was held that if records have been disclosed during a public proceeding, they are generally available under the Freedom of Information Law. In that decision, it was also found, however, that an agency need not make available records that had been previously disclosed to the applicant or that person's attorney, unless there is an allegation "in evidentiary form, that the copy was no longer in existence." In my view, if you can "in evidentiary form" demonstrate that neither you nor your attorney maintain records that had previously been disclosed, the agency would be required to respond to a request for the same records. I also point out, however, that the decision in Moore specified that the respondent office of a district attorney was "not required to make available for inspection or copying any suppression hearing or trial transcripts of a witness' testimony in its possession, because the transcripts are court records, not agency records" (id. at 680).

Third, assuming that the records sought involving witnesses have not been previously disclosed, I believe that the Freedom of Information Law would determine rights of access. As a general matter, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, several of the grounds for denial could be pertinent.

Section 87(2)(b) permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". From my perspective, the propriety of a denial of access would, under the circumstances, be dependent upon the nature of statements by witnesses or the contents of other records have already been disclosed. If disclosure of the records in question would not serve to infringe upon witnesses' privacy in view of prior disclosures, §87(2)(b) might not justifiably serve as a basis for denial. However, if the statements in question include substantially different information, that provision may be applicable.

Also potentially relevant is §87(2)(e), which permits an agency to withhold records that:

"are compiled for law enforcement purposes and which, if disclosed, would:

- i. interfere with law enforcement investigations or judicial proceedings;
- ii. deprive a person of a right to a fair trial or impartial adjudication;

Mr. Richard Winkler

May 11, 1999

Page -3-

- iii. identify a 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.

Fourth, §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.

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..."

Mr. Richard Winkler

May 11, 1999

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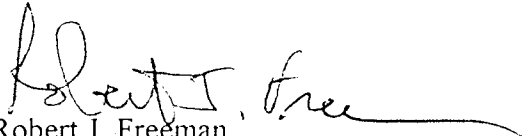
If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively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

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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
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FOIL-AO-11462

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Alexander F. Treadwell

May 12, 1999

Executive Director

Robert J. Freeman

Mr. Mark Roddy
98-A-5907
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. Roddy:

I have received your letter of April 16 in which you sought assistance in obtaining various court records under the Freedom of Information 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."

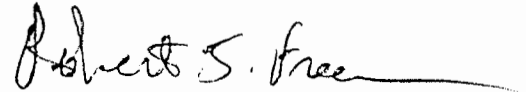
Based on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law (see e.g., Judiciary Law, §255) may grant broad public access to those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

Mr. Mark Roddy
May 12, 1999
Page -2-

It is suggested that you resubmit your request to the clerk of the court, citing an applicable provision of law as the basis for your request.

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

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm



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May 12, 1999

Executive Director

Robert J. Freeman

Mr. Keith Rhames
90-T-3317
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. Rhames:

I have received your letter of April 14 in which you sought assistance in obtaining records pertaining to your case from the New York City Police Department.

In this regard, first, I point out that every agency must designate one or more persons as "records access officer" pursuant to 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 for records, and a request should ordinarily be sent to that person. It is suggested that a request be made in this instance to Sgt. Richard Evangelista, Records Access Officer, New York City Police Department, Room 110C, One Police Plaza, New York, NY 10038.

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

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

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

constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

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

For your information, the person designated by the Department to determine appeals is Susan Petito, Special Counsel.

Third, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. 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 "DD5's", also known as "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)](11)). 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. Yudelton, 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:

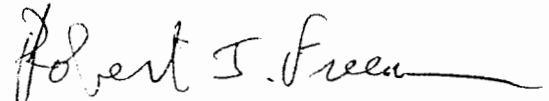
"...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of 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).

Mr. Keith Rhames
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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,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in dark ink and has a long, horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11464

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May 12, 1999

Executive Director

Robert J. Freeman

Mr. Ignazio Vito Cavalluzzi

[REDACTED]

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

Dear Mr. Cavalluzzi:

I have received your letter of April 19, as well as the correspondence attached to it. In brief, beginning in December of 1998, you requested various records from the City of Mount Vernon Board of Education relating to your position and its abolition. However, as of the date of your letter to this office, you had received no response.

In this regard, I offer the following comments.

First, 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. While I believe that the person in receipt of your requests should have responded in a manner consistent with the Freedom of Information Law or forwarded the requests to the appropriate person, it is suggested that you renew your request and direct it to the records access officer. It is also suggested that you contact the District Clerk or the Superintendent in order to ascertain the identity of the person designated as 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..."

Mr. Ignazio Vito Cavalluzzi

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

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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 much of the documentation that you requested pertains to yourself, I note that §87(2)(b) permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." Because you cannot invade your own privacy, insofar as the records pertain to you, that provision would not serve as a basis for a denial of access. The only other person who would apparently be identified in the records, other than minutes of meetings, is an employee that you named. You requested records relating to her hiring, her title and her salary.

Here I point out that §87(3)(b) of the Freedom of Information Law specifies that each agency is required to maintain a payroll record that identifies every officer or employee by name, public office address, title and salary. As such, the title and salary of the person named would clearly be accessible under the law.

With respect to the other materials relating to that person, 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);

Mr. Ignazio Vito Cavalluzzi

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Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that items relating to public officers or employees are irrelevant to the performance of their official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977, dealing with membership in a union; Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1981, involving the back of a check payable to a municipal attorney that could indicate how that person spends his/her money; Seelig v. Sielaff, 200 AD 2d 298 (1994), concerning disclosure of social security numbers].

I note, too, 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 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)]."

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.

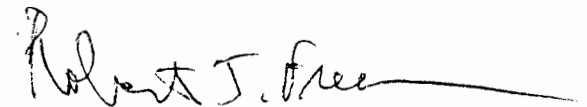
While the documentation at issue consists of "intra-agency material", much of it would be factual in nature and be available, therefore, under §87(2)(g)(i); other elements of the documentation would reflect an agency's policy (i.e., a job description) or a final agency determination (i.e., records indicating that a position was abolished or that a person was hired). It would appear that the only aspects of the records that could be withheld under §87(2)(g) would be predecisional materials consisting of advice, opinions, recommendations and the like.

Lastly, minutes of meetings of public bodies are clearly available (see Open Meetings Law, §106), and it has been held that tape recordings of open meetings are accessible under the Freedom of Information Law (see Zaleski v. Hicksville Union Free School District, Board of Education of Hicksville Union Free School, Sup. Ct., Nassau Cty., NYLJ, Dec. 27, 1978).

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

FOIL-AO-11465

From: Robert Freeman
To: Internet:karen_oliver@admgat.kenton.k12.ny.us
Date: Wed, May 12, 1999 3:29 PM
Subject: FOI

Dear Ms. Oliver:

I have received your email inquiry. The short answer to your question is that the fee for reproducing records other than photocopies is based on the "actual cost of reproduction". If information is transferred onto a disk, the fee would be based on computer time and the cost of the disk; if information is printed out from a disk, the fee would be based on computer time and the cost of paper; if a paper record is photocopied, the fee could be up to 25 cents per photocopy up to 9 by 14 inches.

If you need additional information, please call at (518) 474-2518 (I will be here for the rest of the day but out of the office on Thursday and Friday). If you want a more expansive written opinion, please let me know. That kind of opinion could be prepared within approximately three weeks based on our current backlog.

I hope that I have been of assistance.



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AJ-11466

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May 17, 1999

Executive Director

Robert J. Freeman

Mr. Jeffrey Shankman
JMJ Associates
P.O. Box 3338
New York, NY 10163-3338

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

Dear Mr. Shankman:

I have received your letter of April 22 and the materials attached to it. As I understand the matter, the documentation relates to a request for records made to the Department of Public Service for records pertaining to settlement negotiations involving the Department and the parties to a proceeding cited as Case 98-C-1079.

While some of the records sought were disclosed, others underwent substantial redaction pursuant to §87(2)(g) of the Freedom of Information Law. With respect to the remaining records that were withheld, Mr. Steven Blow, the Department's Records Access Officer, wrote that:

“they are excepted from disclosure pursuant to a specific State statute - namely, §3101(c) of the Civil Practice Law and Rules, which sets forth the attorney work product privilege. Please be advised as well that the Department has in its possession more than 100 documents that are excepted from disclosure pursuant to POL §87(2)(a) in that they are ‘confident information’ [sic] within the meaning of §15 of the Public Service Law, which prohibits employees and agents of the Department from divulging such information. I find that such ‘confidential information’ includes ‘discussions, admissions, concessions and offers to settle,’ within the meaning of 16 NYCRR §3.9(d).”

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.

Insofar as the request involved intra-agency materials, §87(2)(g) authorizes an agency to withhold records that:

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

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

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

If the deletions from intra-agency materials do not consist of the kinds of information described in subparagraphs (i) through (iv) of §87(2)(g), I believe that they would have properly been made.

With respect to the remainder of the records at issue, the analysis is more complex, for it involves several provisions of law. Among them is §15 of the Public Service Law, which states in relevant part that:

"Any employee or agent of the department who divulges any confidential information which may come to his knowledge during the course of any inspection or examination of property, accounts, records or memoranda of any person, corporation or municipality subject to the jurisdiction of the commission, except insofar as he may be directed by the commission, or by a court or judge, or authorized by law, shall be guilty of a misdemeanor."

Another is 16 NYCRR §3.9(d), which is entitled "Confidentiality of settlement discussions" and states that:

Mr. Jeffrey Shankman

May 17, 1999

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"No discussion, admission, concession or offer to stipulate or settle, whether oral or written, made during any negotiation session concerning a stipulation or settlement shall be subject to discovery, or admissible in any evidentiary hearing against any participant who objects to its admission. Participating parties, their representatives and other persons attending settlement negotiations shall hold confidential such discussions, admissions, concessions, and offers to settle and shall not disclose them outside the negotiations except to their principals, who shall also be bound by the confidentiality requirement, without the consent of the parties participating in the negotiations. The Administrative Law Judge assigned to the case, or the director of the appropriate division if no judge has been assigned, may impose appropriate sanctions for the violation of this subdivision which may include exclusion from the settlement process."

Based on Mr. Blow's response, it appears that the basis for the promulgation of §3.9(d) is the authority to withhold "confidential information" pursuant to §15 of the Public Service Law. From my perspective, the term "confidential" is unclear, and the extent to which the Department may claim confidentiality under that statute is equally unclear. In my view, it may be contended that §15 merely permits the Department to confer confidentiality with respect to those records that may be withheld under the Freedom of Information Law.

I note that §15 was initially enacted in 1910, as was §16. Subdivision (1) of the latter states that "All proceedings of the commission and all documents and records in its possession shall be public records." If construed literally, all records of the Public Service Commission, without exception, would be accessible to any person. However, in considering language in a statute that was enacted prior to the Freedom of Information Law that is as broad as §16, the Court of Appeals found, in essence, that such a result would be anomalous. In brief, §51 of the General Municipal Law states that all records of a municipality are public. Nevertheless, in responding to a contention that §51 requires that all records of a municipality be made available, regardless of their contents, the Court of Appeals held in 1985 that:

"Such a result would nullify the FOIL exemptions, which the Legislature - presumably aware of General Municipal Law §51 at the time it enacted FOIL - could not have intended. To give effect to both statutes, the FOIL exemptions must be read as having engrafted, as a matter of public policy, certain limitations on the disclosure of otherwise accessible records" [Xerox Corporation v. Town of Webster, 65 NY 131, 490 NYS 2d 488, 489 (1985)].

In my view, despite the breadth of the language ostensibly granting access to records of the Department of Public Service pursuant to §16, the exceptions in the Freedom of Information Law, as in the case of §51 of the General Municipal Law, should be considered to have been "engrafted" onto §16.

While there is no judicial decision on the matter of which I am aware, it is likely in my opinion that the same principle would apply with respect to the ability to claim that records are confidential under §15 of the Public Service Law. Because that statute was enacted long prior to the Freedom of Information Law, and because it does not refer to particular records, but rather to a non-specific capacity to claim confidentiality, a court, as in Xerox, may consider that confidentiality may be claimed only in conjunction with the exceptions to rights of access appearing in §87(2) of the Freedom of Information Law.

If that conclusion may be reached, and if §3.9(d) of the regulations is based on the authority to withhold records conferred by §15, the regulations would authorize the Department to deny access to its records only to the extent authorized by the Freedom of Information Law. Similarly, if there is no statutory basis for the confidentiality provisions contained in the regulation in question, the same conclusion would be reached, that the Department could not withhold records unless a statute so permits, i.e., the Freedom of Information Law. I note that 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)]. Therefore, for purposes of §87(2)(a) of the Freedom of Information Law concerning records that "are specifically exempted from disclosure by state or federal statute", an agency's regulations would not constitute a statute that could diminish rights of access otherwise conferred by law.

In conjunction with the foregoing, if the Freedom of Information Law governs rights of access, the claims of confidentiality with respect to documents prepared in relation to settlement discussions would in my opinion be questionable.

Mr. Blow's response cited §3101(c) of the Civil Practice Law and Rules (CPLR), which exempts attorney work product from disclosure. Insofar as that provision may validly be asserted, I believe that the records would be exempt from the Freedom of Information Law in accordance with §87(2)(a). From my perspective, although §3101(c) of the CPLR authorizes confidentiality regarding the work product of an attorney, those records remain confidential in my opinion only so long as they are not disclosed to a third party or an adversary or a filed with a court, for example. I do not believe that materials that are served upon or shared with an adversary could be characterized as confidential or exempt from disclosure.

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

Mr. Jeffrey Shankman

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provision that may be at issue pertains to material prepared for litigation, and §3101(d)(2) states in relevant part that:

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

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

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

In a discussion of the parameters of the attorney-client relationship and the conditions precedent to its initiation, it has been held that:

Mr. Jeffrey Shankman
May 17, 1999
Page -6-

"In general, 'the privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client'" [People v. Belge, 59 AD 2d 307, 399 NYS 2d 539, 540 (1977)].

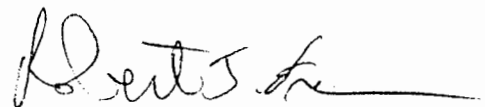
The thrust of case law concerning material prepared for litigation is consistent with the preceding analysis, in that §3101(d) may properly be asserted as a means of shielding such material from an adversary.

In my view, insofar as the records in question have been communicated between or among the Department and the parties, 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 a third party, I believe that the capacity to claim exemptions from disclosure under §3101(c) or (d) of the CPLR or, therefore, §87(2)(a) of the Freedom of Information Law, ends.

If the preceding analysis is accurate, the extent to which the records sought may be withheld would be limited.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Steven Blow
Gerald L. Lynch



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 11467

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Alexander F. Treadwell

May 17, 1999

Executive Director

Robert J. Freeman

Mr. John A. Conrad
Conrad Geoscience Corp.
8 Raymond Avenue
Poughkeepsie, NY 12603

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

Dear Mr. Conrad:

I have received your e-mail communication in which you referred to a memo that you had inspected but was withheld when you asked for a copy. The agency indicated that the record in question is an "intra-agency document, and that it is not subject to FOIL." You have questioned the propriety of a refusal to make a copy of a record that had already been disclosed for your inspection.

In this regard, as a general matter, when records are available for inspection under the Freedom of Information Law, I believe that they are available for copying and that an agency must provide copies upon payment of the requisite fee [see Freedom of Information Law, §89(3)]. Therefore, assuming that a disclosure was not inadvertent and was made "intelligently and voluntarily" [see McGraw-Edison v. Williams, 509 NYS 2d 285, 287 (1986)], it would appear that an agency would have waived its right to prohibit a person who inspected a record from copying a record that was previously disclosed for the purpose of inspection.

In the case cited in the preceding paragraph, among the records inspected was a document that the agency believed was exempted from disclosure and which should have been withheld. It was held that an inadvertent disclosure of an exempt record did not create a right to copy the record (McGraw-Edison Co. v. Williams, *supra*). If indeed records may justifiably be withheld, but they were inadvertently made available for inspection, it would appear that an agency could properly deny a request that the records be copied.

The provision upon which the denial was based, §87(2)(g), permits an agency to withhold records that:

Mr. John A. Conrad
May 17, 1999
Page -2-

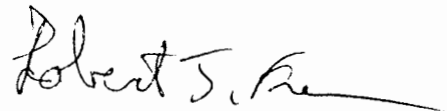
"are inter-agency or intra-agency materials which are not:

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

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

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Ruth Earl



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11468

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Alexander F. Treadwell

May 17, 1999

Executive Director

Robert J. Freeman

Mr. David Garcia
01725-049
Niagara Unit
P.O. Box 904
Ray Brook, NY 12977-0300

Dear Mr. Garcia:

I have received your letter of May 10 in which you requested records from this office pertaining to criminal charges concerning yourself.

In this regard, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee does not maintain records generally and it does not possess the records of your interest.

If you are seeking records maintained by a unit of state or local government in New York, a request may be made to the agency's designated records access officer. The records access officer has the duty of coordinating an agency's response to requests. I note, too, that §89(3) of the Freedom of Information Law requires that an applicant must "reasonably describe" the records sought. Therefore, a request should include sufficient detail to enable agency staff to locate and identify the records.

Lastly, the statute that you cited is the federal Freedom of Information Act, which applies only to federal agencies. While that Act authorizes an agency to waive fees in certain circumstances, there is no similar provision in the New York Freedom of Information Law. Therefore, an agency subject to the New York Freedom of Information Law may charge its established fees, even if 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
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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

May 17, 1999

Executive Director

Robert J. Freeman

Hon. 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 April 23 in which you sought an opinion regarding a request for a copy of an environmental assessment form (EAF), a negative declaration determination and related materials. The records sought pertain to a SEQR determination.

In this regard, the regulations promulgated by the Department of Environmental Conservation require disclosure of the kinds of records at issue. Specifically, 6 NYCRR §617.12(b)(3) states that:

“All SEQR documents and notices, including but not limited to, EAF’s, negative declarations, positive declarations, scopes, notices of completion of an EIS, EISs, notices of hearing and findings must be maintained in files that are readily accessible to the public and made available on 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-A0-11470

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

May 18, 1999

Executive Director

Robert J. Freeman

Mr. Paul Hynard
97-A-0015
Watertown Correctional Facility
F-2 Building
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. Hynard:

I have received your letter of April 23 and the materials attached to it. As I understand the matter, you have sought assistance in obtaining records from Suffolk County concerning an incident involving correction officers and your medical treatment.

If my interpretation of the matter is accurate, the records relating to the correction officers would properly have been withheld; the medical records should have been disclosed. 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." 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 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 NY2d 562, 568 (1986)]. In another decision

Mr. Paul Hynard
May 18, 1999
Page -2-

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)]. The Court in an opinion rendered last month reiterated its view of §50-a, citing that decision and stating that:

"...we recognized that the decisive factor in determining whether an officer's personnel record was exempted from FOIL disclosure under Civil Rights Law § 50-a was the potential use of the information contained therein, not the specific purpose of the particular individual requesting access, nor whether the request was actually made in contemplation of litigation.

'Documents pertaining to misconduct or rules violations by corrections officers – which could well be used in various ways against the officers – are the very sort of record which *** was intended to be kept confidential. *** The legislative purpose underlying section 50-a *** was *** to protect the officers from the use of records *** as a means for harassment and reprisals and for the purpose of cross-examination' (73 NY2d, at 31 [emphasis supplied])" (Daily Gazette v. City of Schenectady, ___ NY2d ___, April 6, 1999).

In short, the records of your interest that pertain to correction officers would appear to be exempt from disclosure.

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 resubmit your request and make specific reference to §18 of the Public Health Law when seeking medical records.

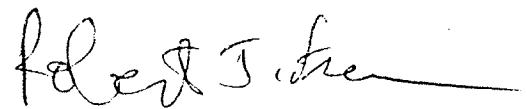
To obtain additional information concerning access to medical records and the fees that may be charged for searching and copying those records, you may write to:

Mr. Paul Hynard
May 18, 1999
Page -3-

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,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Derrick J. Robinson



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11471

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Alexander F. Treadwell

May 18, 1999

Executive Director

Robert J. Freeman

Mr. Paul Hynard
97-A-0015
Watertown Correctional Facility
F-2 Building
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. Hynard:

I have received your letter of April 20 and the correspondence attached to it. You have sought assistance in obtaining a report that you gave to the New York City Police Department. You indicated that you have requested the report but that you received no response.

In this regard, 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 has the duty of coordinating an agency's response to requests, and requests should ordinarily be sent to that person. It is suggested that you renew your request and send it to Sgt. Richard Evangelista, Records Access Officer, New York City Police Department, One Police Plaza, New York, NY 10038.

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..."

Mr. Paul Hynard
May 18, 1999
Page -2-

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

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

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

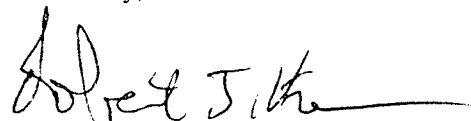
For your information, the person designated by the Police Department to determine appeals is Susan Petito, Special Counsel.

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 the record sought consists of information that you provided, it is unlikely that any of the grounds for denial would be pertinent.

Lastly, you cited the federal Freedom of Information Act and asked for a waiver of fees. That statute pertains only to federal agencies. Further, although the federal Act includes provisions concerning fee waivers, there is no similar provision in the New York Freedom of Information Law. I note, too, that it has been held that an agency subject to the New York law may charge its established fee, even if the request is made by an indigent inmate [see Whitehead v. Morgenthau, 518 NYS2d 552 (1990)].

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11472

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

May 18, 1999

Executive Director

Robert J. Freeman

Mr. Richard Hodges
87-A-2529
Coxsackie Correctional Facility
Box 200
Coxsackie, NY 12051-0200

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

Dear Mr. Hodges:

I have received your letter of April 20. You have sought assistance in obtaining hospital records pertaining to yourself that you contend are maintained by the Department of Corrections' Archives. You indicated that the Department's Records Access Officer, Thomas Antenen, has refused to obtain them from the Archives.

In this regard, it is unclear on the basis of your letter whether the records in question remain in the legal custody of the Department of Correction. If they continue to be in the custody of that agency, I believe that it would be required to respond to your request in a manner consistent with law. Assuming that you can provide sufficient detail to enable Department staff to locate and identify the records at issue, you would meet the standard of "reasonably describing" the records imposed by §89(3) of the Freedom of Information Law.

On the other hand, it is possible that the records, due to their age, might have been transferred to the New York Municipal Archives and that they are now in the legal custody of that entity, which is part of the New York City Department of Records and Information Services. It is suggested that you write directly to the Municipal Archives at 31 Chamber Street, Suite 103, New York, NY 10007 and that you seek the records from that agency. Again, any such 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
cc: Thomas Antenen



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AD-11423

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Joseph J. Seymour
Alexander F. Treadwell

May 20, 1999

Executive Director

Robert J. Freeman

Mr. Demetri Kolokotronis



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

Dear Mr. Kolokotronis:

I have received your recent letter in which you asked whether there is a "hardship clause in the FOIA that allows citizen requested documents without paying copying fees."

In this regard, the federal Freedom of Information Act, which applies to federal agencies only, includes provisions regarding fee waivers. The New York Freedom of Information Law, which applies to records maintained by state and local government, does not contain any similar provision. I note, too, that it has been held that an agency may charge its established fee, even if the applicant is indigent [see Whitehead v. Morgenthau, 552 NYS 2d 518 (1990)].

If a record is available in its entirety under the New York Freedom of Information Law, an applicant may inspect it at no charge. If copies are requested, §87(1)(b)(iii) states that the fee for copies generally cannot exceed twenty-five cents per photocopy; in the case of records that cannot be photocopied, i.e., tape recordings, computer disks, etc., the fee would be based upon the actual cost of reproduction.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11474

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Alexander F. Treadwell

May 20, 1999

Executive Director

Robert J. Freeman

E-mail

TO: Lila Martin

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. Martin:

I received your e-mail message dated April 28 yesterday. Please note that the e-mail address that you used was inaccurate, and that that resulted in the delay in response.

You wrote that your request to inspect Cornwall High School yearbooks was denied by the principal, and you questioned the propriety of her response.

From my perspective, there is no basis for prohibiting you from looking at the yearbooks. In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to agency records. A school district clearly is an "agency" [see Freedom of Information Law, §86(3)], and §86(4) of that statute defines the term "record" to mean:

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

Based on the foregoing, assuming that the District or the High School maintains a copy of a yearbook, I believe that the yearbook would constitute a "record" that falls within the scope of rights conferred by the Freedom of Information Law.

Ms. Lila Martin

May 20, 1999

Page -2-

Second, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, none of the grounds for denial could justifiably be asserted to withhold a yearbook.

While records identifiable to students ordinarily may be withheld pursuant to the federal Family Educational Rights and Privacy Act (20 USC §1232g), in the case of a yearbook, by its nature, those identified have consented to disclosure. Moreover, any purchaser of a yearbook has acquired personally identifying details concerning students that appear throughout the yearbook, i.e., through photographs of individuals, classes, teams, clubs, etc. Because those details have been and could be made known to any purchaser of a yearbook and any others with whom the contents of the yearbook have been shared, I do not believe that the District would have any basis for denying access to a yearbook. Moreover, frequently yearbooks are kept and made available to the public at public libraries. If you cannot view the yearbooks at a public library, again, it is my view that the District must make them available for inspection.

I note, too, that as a matter of routine, newspapers throughout the state frequently print special supplements involving student athlete or similar awards that include not only the photographs of students and the schools that they attend, but also their grade point average, class rank, SAT scores, academic honors and athletic achievements. In short, the disclosure or publication of the kind of record requested from the Cornwall Central School District is not uncommon. Again, to suggest that information derived from a yearbook that could have been purchased by anyone could justifiably be withheld would, in my view, be inconsistent with law.

I hope that I have been of assistance.

RJF:jm

cc: Dr. Margaret Dames, Superintendent



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11475

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Alexander F. Treadwell

May 20, 1999

Executive Director

Robert J. Freeman

Ms. Judy Manzer
Utica Observer- Dispatch
221 Oriskany Plaza
Utica, NY 13501

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

Dear Ms. Manzer:

As you are aware, I have received your correspondence of February 8 and May 20. As indicated to you by phone, based upon previous conversations, it was my belief that you did not seek a written advisory opinion relative to your letter of February 8. Based upon the receipt of the more recent correspondence, you indicated that you are seeking an opinion from this office.

In brief, some time ago you requested records relating to the investigation of Gary Evans, including his activities, his escape and his death. The Division of State Police denied the request pursuant to §160.50 of the Criminal Procedure Law.

Section 160.50 pertains to situations in which a criminal action or proceeding against a person is terminated in favor of that person. In those situations, the records pertaining to the event relating to the arrest are typically sealed. It is my understanding that the intent of §160.50 is to preclude the disclosure of information regarding an arrest that did not result in a conviction in order that the fact of the arrest and related details are not made known later to the detriment of the individual against whom the charges were terminated. Since Mr. Evans died, it does not appear that the intent or thrust of §160.50 would be pertinent. Moreover, as I understand that provision, it would not be applicable. Subdivision (3) describes the instances in which a criminal action or proceeding against a person is considered terminated in favor of such person. From my perspective, none of those circumstances would be pertinent. I note that paragraph (j) of subdivision (3) refers to the sealing of records following the arrest of an individual but prior to the filing of an accusatory instrument. Since Mr. Evans had been indicted and arraigned, paragraph (j) would not apply. In short, if my interpretation of §160.50 is accurate, it would not serve as a basis for a denial of access.

Ms. Judy Manzer

May 20, 1999

Page -2-

In that event, 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.

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.*).

Ms. Judy Manzer

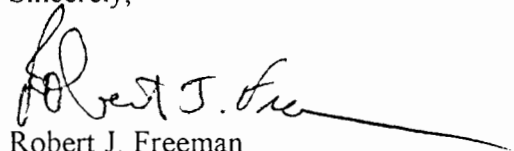
May 20, 1999

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In the context of your request, I am not suggesting that all of the records sought must be disclosed. Nevertheless, based on the direction given by the Court of Appeals, I believe that the records must be reviewed individually by the agency for the purpose of determining the extent to which their contents fall within the scope of one or more of the grounds for denial of access.

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

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal line extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Lt. Col. Bruce M. Arnold

Lt. Laurie M. Wagner



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FOIL-AO-11476

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May 24, 1999

Executive Director

Robert J. Freeman

Mr. Angel Vasquez
95-A-7258
Mid-Orange Correctional Facility
900 Kings Highway
Warwick, NY 10990-0900

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

Dear Mr. Vasquez:

I have received your letter of April 19. You have asked if I "can make the Bronx Criminal Court Clerk, under the Freedom of Information Law, send [you] a copy of [a certain] bench warrant..."

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 entity of government to grant or deny access to records.

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

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

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

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

Mr. Angel Vasquez

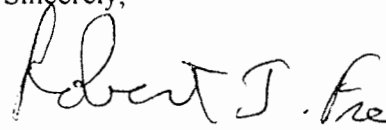
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Based on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law (see e.g., Judiciary 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 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,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in dark ink and extends to the right with a long horizontal flourish.

Robert J. Freeman
Executive Director

RJF:jm



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Alexander F. Treadwell

May 24, 1999

Executive Director

Robert J. Freeman

Ms. Christine A. Wills



The staff of the Committee on Open 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 letters of April 19 and May 10, as well as related materials. As in the case of previous correspondence, you have sought an opinion concerning your right to obtain records from the Office of the Rensselaer County District Attorney pertaining to a drug raid in the City of Troy in 1992. The request was initially denied, and the denial was affirmed in a determination of your appeal on May 7.

From my perspective, while some of the records sought could justifiably have been withheld, others would appear to be available, perhaps in part. In this regard, I offer the following comments.

First and 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 most recently in Gould v. New York City Police Department [87 NY 2d 267 (1996)], stating that:

Ms. Christine A. Wills

May 24, 1999

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"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 "DDS's", could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g), an exception separate from those cited in response to your request. The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (*id.*, 276). The Court then stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (*id.*, 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, directing that:

"...to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents (*Matter of Fink v. Lefkowitz, supra*, 47 N.Y.2d, at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material (*see, Matter of Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 133, 490 N.Y.S. 2d, 488, 480 N.E.2d 74; *Matter of Farbman & Sons v. New York City Health & Hosps. Corp., supra*, 62 N.Y.2d, at 83, 476 N.Y.S.2d 69, 464 N.E.2d 437)" (*id.*).

In the context of your request, it appears that a variety of records have been withheld in their entirety. While I am not suggesting that the records sought must necessarily be disclosed in full, based on the direction given by the Court of Appeals in several decisions, I believe that the records must be reviewed for the purpose of identifying those portions 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).

Ms. Christine A. Wills

May 24, 1999

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One aspect of the request involved the "exact dates and approximate times said surveillance were conducted, and by what officers." The records were withheld under §87(2)(e)(i) and (iv). Those provisions state that an agency may withheld records compiled for law enforcement purposes when disclosure would:

"i. interfere with law enforcement investigations or judicial proceedings...

iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

Since the event occurred seven years ago, it is difficult to envision how disclosure now would interfere with an investigation or, therefore, justify reliance on §87(2)(e)(i)..

The leading decision concerning §87(2)(e)(iv) 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...

"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)."

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. The request, however, does not involve the *nature* of the surveillance, but merely the dates and times. As such, it is questionable in my view whether or the extent to which that exception would be pertinent or applicable.

Ms. Christine A. Wills

May 24, 1999

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The names of the officers would, in my view, be public. In short, they would have been involved in the performance of their official duties. Further, again, the event to which the records relate occurred nearly seven years ago.

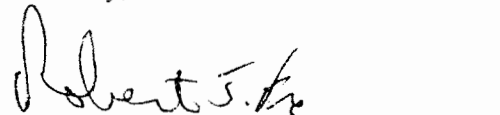
Another aspect of the request concerns the "exact date and approximate time said neighborhood complaints were lodged..." The request was denied on the basis of §87(2)(e)(iii) "as it would identify a confidential source or disclose confidential information relating to a criminal investigation." Additionally, §87(2)(f), which enables an agency to withhold records insofar as disclosure "would endanger the life or safety of any person", was cited. In the case of both exceptions, if there were few people living in the neighborhood at the time of the event, and if the deletion of personally identifying details would not serve to preclude you or others from ascertaining the identity of confidential informants or residents, the denial would likely have been proper. However, if numerous people lived or were present in the neighborhood at the time of the event, it is doubtful, in my opinion, that the identities of individuals could be ascertained after names or other personal details are deleted. If that is so, I believe that portions of the records indicating the date and approximate time that complaints were made would be accessible.

One element of the request apparently involved a tape recorded conversation between a confidential informant and a person later named as a defendant. If indeed the recording includes the voice of an informant, on the basis of §87(2)(e)(iii), I would agree with the District Attorney's denial of access. Similarly, if a \$20 dollar bill was marked, and disclosure of the bill "would permit the public to potentially determine the method said \$20 bill is 'marked' to ensure its authenticity", a denial of access would appear to be appropriate, for disclosure might enable potential lawbreakers to evade detection with that knowledge. Moreover, currency, in my view, would constitute evidentiary material rather than a "record" as defined by §86(4) of the Freedom of Information Law [see Allen v. Strojnowski, 129 AD2d 200, motion for leave to appeal denied, 70 NY 2d 871 (1989)]. If that is so, the Freedom of Information Law would not apply.

In sum, while some aspects of your request appear to have been properly denied, others likely should have been granted.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Joseph M. Ahearn
Andrew M. Martin



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FOL-AJ-11478

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May 25, 1999

Executive Director

Robert J. Freeman

Ms. Francine George



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

Dear Ms. George:

I have received your letter of April 22 and the correspondence attached to it. The materials pertain to a request made under the Freedom of Information Law for records of the Family Medicine Service Group in Syracuse.

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

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

Based on the foregoing, in general, the Freedom of Information Law applies to entities of state and local government. If the Family Medicine Service Group is not a governmental entity, that statute would not be applicable.

The correspondence makes reference to a contract between the entity of your interest and the New York State Department of Health. If that is so, it is assumed that the Department of Health would have a copy of the contract and that, therefore, you could request and obtain that record from the Department, which is clearly subject to the requirements of the Freedom of Information Law. Similarly, if the Family Medicine Service Group has relationships with other units of government, while the Group would not be obliged to disclose its records, records maintained by those units of

Ms. Francine J. George

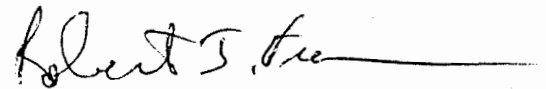
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government concerning their relationship with the Group would fall within the coverage of the Freedom of Information Law. In that event, requests for records could be made to those units of government.

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

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman", followed by a horizontal line extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Dr. Lorne Becker



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Alexander F. Treadwell

May 25, 1999

Executive Director

Robert J. Freeman

Mr. Andrews Hernandez
97-R-3658
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. Hernandez:

I have received your letter of April 22. You have sought an opinion concerning rights of access to records relating to an internal investigation of a police officer. It is likely in my view that the records of your interest may 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.

The first ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §50-a of the Civil Rights Law. In brief, that statute provides that personnel records of police and correction officers that are used to evaluate performance toward continued employment or promotion are confidential. The Court of Appeals, the State's highest court, in reviewing the legislative history leading to its enactment, has held that 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 NY2d 562, 568 (1986)]. In another decision which dealt with unsubstantiated complaints against correction officers, the Court of Appeals held that the purpose of §50-a "was to prevent the release of sensitive personnel records that could be used in litigation for purposes of harassing or embarrassing correction officers" [*Prisoners' Legal Services v. NYS Department of Correctional Services*, 73 NY 2d 26, 538 NYS 2d 190, 191 (1988)]. The Court in an opinion rendered last month reiterated its view of §50-a, citing that decision and stating that:

Mr. Andrews Hernandez

May 25, 1999

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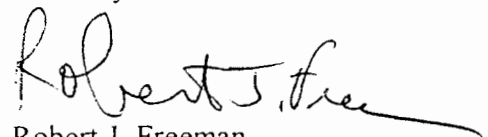
"...we recognized that the decisive factor in determining whether an officer's personnel record was exempted from FOIL disclosure under Civil Rights Law § 50-a was the potential use of the information contained therein, not the specific purpose of the particular individual requesting access, nor whether the request was actually made in contemplation of litigation.

'Documents pertaining to misconduct or rules violations by corrections officers – which could well be used in various ways against the officers – are the very sort of record which *** was intended to be kept confidential. *** The legislative purpose underlying section 50-a *** was *** to protect the officers from the use of records *** as a means for harassment and reprisals and for the purpose of cross-examination' (73 NY2d, at 31 [emphasis supplied])" (Daily Gazette v. City of Schenectady, ___ NY2d ___, April 6, 1999).

In short, records pertaining to a police officer that are used to evaluate performance toward continued employment or promotion and which could be used in a litigation context are, according to judicial decisions, exempt from disclosure under §50-a of the Civil Rights Law and, therefore, §87(2)(a) of the Freedom of Information Law.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Sgt. Richard Evangelista



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Alexander F. Treadwell

May 25, 1999

Executive Director

Robert J. Freeman

Mr. Ken Dufty

Ms. Sandra Woodward

[REDACTED]

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

Dear Mr. Dufty and Ms. Woodward:

I have received your letter of April 23 and the correspondence attached to it. You have sought guidance concerning difficulty in obtaining copies of certain records from the City of Rensselaer. Based on the information provided in your letter, I offer the following comments.

First, the City's Building Inspector permitted you to inspect a file relating to your property, which apparently consisted of approximately one hundred pages. When you asked for a copy of the file, he indicated that you must submit a request under the Freedom of Information Law and that "he would not release it until the 10-day FOIL waiting period had expired."

In this regard, the Freedom of Information Law contains no "10-day waiting period." On the contrary, §89(3) of that statute states in relevant part that:

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

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.

Mr. Ken Dufty
Ms. Sandra Woodward
May 25, 1999
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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 indicates in every instance that it will determine to grant or deny access to records following a certain "waiting period" or other particular period, such a practice or policy would be contrary to the thrust of the Freedom of Information Law.

Second, in a related vein, 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. It is unclear whether the City's records access officer, who I believe is the City Clerk, had any knowledge of the situation described. If the Building Inspector is not a records access officer, the response to your request should, in my opinion, have been coordinated by the records access officer.

Third, you wrote that you were informed in response to your request for copies that there were different and far fewer records in the file than you had inspected. Here 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" 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."

Mr. Ken Dufty
Ms. Sandra Woodward
May 25, 1999
Page -3-

Based on the foregoing, the documentation that you inspected, as well as the new materials in the file, would constitute City "records" that fall within the coverage of the Freedom of Information Law.

Further, since the contents of the file were made available to you for inspection by the Building Inspector, the same records must be made available for copying. In short, when records are available under the Freedom of Information Law, they must be made available for inspection and copying [see §§87(2) and 89(3)].

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

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

Lastly, while I am not suggesting that it applies, I point out that §89(8) of the Freedom of Information Law states that:

"Any person who, with intent to prevent public inspection of a record pursuant to this article, willfully conceals or destroys any such record shall be guilty of a violation.

Additionally, §240.65 of the Penal Law states that:

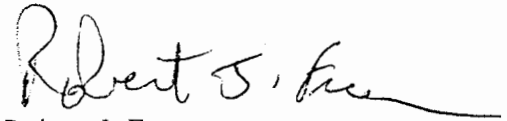
"A person is guilty of unlawful prevention of public access to records when, with intent to prevent the public inspection of a record pursuant to article six of the public officers law, he willfully conceals or destroys any such record."

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.

Mr. Ken Dufty
Ms. Sandra Woodward
May 25, 1999
Page -4-

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in dark ink and has a long, sweeping horizontal line extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Lynn Ganance, Mayor
Lou Lourinia, Building Inspector



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AD-11481

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Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

May 26, 1999

Executive Director

Robert J. Freeman

Mr. Phillip Byers
95-A-6203
Elmira Correctional Facility
Box 500
Elmira, NY 14902-0500

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

Dear Mr. Byers:

I have received your letter of April 20. You have questioned your right to obtain the rap sheet 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 rap sheets or criminal history records, the general repository of those records is the Division of Criminal Justice Services. While the subject of a criminal history record may obtain such record from the Division, it has been held that criminal history records maintained by that agency are exempted from public disclosure pursuant to §87(2)(a) of the Freedom of Information Law [Capital Newspapers v. Poklemba, Supreme Court, Albany County, April 6, 1989]. Nevertheless, if, for example, criminal conviction records were used in conjunction with a criminal proceeding by a district attorney, it has been held that the district attorney must disclose those records [see Thompson v. Weinstein, 150 AD 2d 782 (1989)].

It is noted that in a decision rendered by the Appellate Division, 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

Mr. Phillip Byers

May 26, 1999

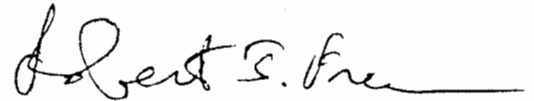
Page 2-

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 inquiry involves a situation analogous to that present 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,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman", with a long horizontal line extending to the right.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FUJL-AJ-11482

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

May 26, 1999

Executive Director

Robert J. Freeman

Ms. Eleanor Kapsiak



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

Dear Ms. Kapsiak:

I have received your letter of April 26, as well as the materials attached to it. You have sought assistance in obtaining records from the Kenmore-Town of Tonawanda Union Free School District.

According to the materials, you requested a report given to the Board of Education at a meeting which "shows class sizes and staffing at all of our 13 schools" and "figures for 1999-2000 and 1998 and 1999." The District Clerk denied the request on the ground that the report is "an internal government communication describing options for discussion purposes only..."

From my perspective, while some aspects of the report might justifiably be withheld, others 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 ground for denial of apparent 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;

Ms. Eleanor Kapsiak

May 26, 1999

Page -2-

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

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

Ms. Eleanor Kapsiak

May 26, 1999

Page -3-

'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 Court of Appeals, the state's highest court, it is my view that the records in question, to the extent that they consist of "statistical or factual tabulations or data", are accessible, unless a provision other than §87(2)(g) could be asserted as a basis for denial.

Another decision highlighted that the contents of materials falling within the scope of section 87(2)(g) represent the factors in determining the extent to which inter-agency or intra-agency materials must be disclosed or may be withheld. For example, in Ingram v. Axelrod, the Appellate Division held that:

"Respondent, while admitting that the report contains factual data, contends that such data is so intertwined with subject analysis and opinion as to make the entire report exempt. After reviewing the report in camera and applying to it the above statutory and regulatory criteria, we find that Special Term correctly held pages 3-5 ('Chronology of Events' and 'Analysis of the Records') to be disclosable. These pages are clearly a 'collection of statements of objective information logically arranged and reflecting objective reality'. (10 NYCRR 50.2[b]). Additionally, pages 7-11 (ambulance records, list of interviews) should be disclosed as 'factual data'. They also contain factual information upon which the agency relies (Matter of Miracle Mile Assoc. v Yudelson, 68 AD2d 176, 181 mot for lve to app den 48 NY2d 706). Respondents erroneously claim that an agency record necessarily is exempt if both factual data and opinion are intertwined in it; we have held that '[t]he mere fact that some of the data might be an estimate or a recommendation does not convert it into an expression of opinion' (Matter of Polansky v Regan, 81 AD2d 102, 104; emphasis added). Regardless, in the instant situation, we find these pages to be strictly factual and thus clearly disclosable" [90 AD 2d 568, 569 (1982)].

Similarly, the Court of Appeals has specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

"While the reports in principle may be exempt from disclosure, on this record - which contains only the barest description of them - we cannot determine whether the documents in fact fall wholly within the scope of FOIL's exemption for 'intra-agency materials,' as claimed by respondents. To the extent the reports contain 'statistical or factual tabulations or data' (Public Officers Law section 87[2][g][i], or other material subject to production, they should be redacted and made available to the appellant" (id. at 133).

Most recently, in response to a contention offered by the New York City Police Department 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 "internal" 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).]

Ms. Eleanor Kapsiak

May 26, 1999

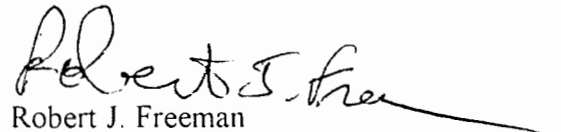
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In my view, insofar as the records at issue consist of recommendations, advice or opinions, for example, they may be withheld; insofar as they consist of statistical or factual information, I believe that they must be disclosed.

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: David Paciencia
Karen E. Oliver



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AJ-11483

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

May 26, 1999

Executive Director

Robert J. Freeman

Mr. Edward B. Johnson
98-A-2472
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. Johnson:

I have received your letter of April 26 in which you sought assistance in relation to your unanswered requests for records sought from the Internal Affairs Division of the Nassau County Correctional Center.

In this regard, I offer the following comments.

First, pursuant to the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), each agency is required to designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests, and requests should ordinarily be made to that person. While I believe that the person in receipt of your request should have responded in a manner consistent with law or forwarded the request to the records access officer, it is suggest that you resubmit your request and address it to the records access officer.

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

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

Mr. Edward B. Johnson

May 26, 1999

Page -2-

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

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

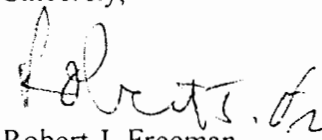
"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial,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

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

I believe that the person designated to determine appeals under the Freedom of Information Law is the Nassau County Attorney.

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-AD - 11484

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Alexander F. Treadwell

May 26, 1999

Executive Director

Robert J. Freeman

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 April 24 in which you sought assistance in relation to your requests for records of the New York City Police Department that 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 acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

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

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

Mr. Edward Safoschnik
May 26, 1999
Page -2-

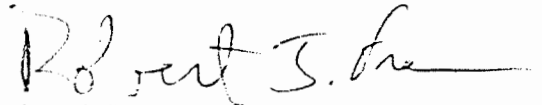
who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

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

A handwritten signature in cursive script, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOL-AO-11485

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Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

May 26, 1999

Executive Director

Robert J. Freeman

Mr. Paul Hynard
97-A-0415
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. Hynard:

I have received your letter of April 24 and the materials attached to it. You complained that your requests for certain records maintained at the Arthur Kill Correctional Facility had not been answered.

In this regard, I offer the following comments.

First, several aspects of your correspondence refer to provisions of the federal Freedom of Information Act, 5 USC §552. That statute applies only to records of federal agencies; the governing statute in this instance is the New York Freedom of Information Law.

Second, 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 law or otherwise compel an agency to grant or deny access to records.

Third, the regulations promulgated by the Department of Correctional Services indicate that a request for records kept at a correctional facility should be made to the Superintendent or his designee. While I believe that the person in receipt of your request should have responded in a manner consistent with law or forwarded the request to the appropriate person, it is suggest that you resubmit the request in accordance with the Department's regulations.

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:

Mr. Paul Hynard

May 26, 1999

Page -2-

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

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

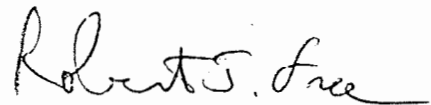
"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial,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

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

FOIL-AO-11486

From: Robert Freeman
To: Internet: novoice@webtv.net
Date: Wed, May 26, 1999 10:36 AM
Subject: Form of request

Dear Mr. Kinney:

I have received your inquiry in which you asked whether there is "a specific format for writing a request for a freedom of information release to a city police department."

There is no particular form or format that must be used when seeking records from an agency. Under section 89(3) of the Freedom of Information Law, an agency may require that an applicant request records in writing, and the applicant must "reasonably describe" the records sought. Therefore, a request should contain sufficient detail to enable agency staff to locate and identify the records.

A sample letter of request is included in our publication "Your Right to Know", which is available via our website at the following address:

www.dos.state.ny.us/coog/coogwww/html

I hope that I have been of assistance.



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11487

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Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

May 26, 1999

Executive Director

Robert J. Freeman

Mr. John Beatty

[REDACTED]

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

Dear Mr. Beatty:

I have received your letter of April 30, as well as the materials related to it.

As I understand the matter, you requested and obtained a variety of personnel records pertaining to yourself from the New York City Health and Hospitals Corporation in 1995. You have complained now, however, that certain attachments referenced in a memorandum should have been made available. The attachments consist of evaluations of your performance and materials involving "derogatory comments against...co-workers (Attached) which are prohibited by HHC, Local, State and Federal policies." You wrote that you are interested in obtaining the attachments, including "a particularization" of the policies to which reference was made.

If you believed at the time that the records in question had been denied, as indicated by the Corporation's records access officer, you could have appealed within thirty days. It is unclear on the basis of your letter whether you appealed or whether the documents of your interest were requested or withheld.

Under the circumstances, it is suggested that you submit a new request to the Corporation's records access officer, supplying sufficient detail to enable staff to locate and identify the records sought.

I note that the Freedom of Information Law pertains to existing records, and that §89(3) of that statute states in part that an agency is not required to create a record in response to a request. If, for example, the materials regarding derogatory remarks do not include a "particularization" of policies allegedly violated, the Corporation in my view would not be required to prepare a new record containing the information sought.

Mr. John Beatty

May 26, 1999

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Insofar as the records sought 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.

Potentially relevant in determining rights of access is §87(2)(g), which permits an agency to deny access to records that:

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

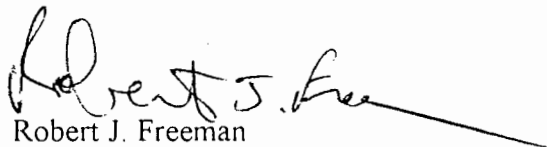
- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations; or
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

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

While I am not familiar with the contents of the records, also of possible significance is §87(2)(b), which authorizes an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." If portions of the records identify or pertain to persons other than yourself, that provision might, depending on the nature of the information, be relevant.

I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AJ-11488

Committee Members

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David A. Schulz
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Alexander F. Treadwell

May 26, 1999

Executive Director

Robert J. Freeman

Mr. Pascual Carpenter
91-A-5770
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. Carpenter:

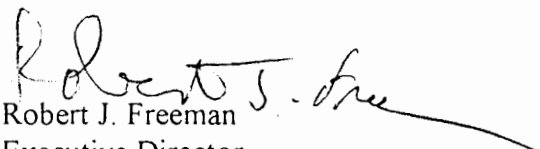
I have received your letter of May 26, as well as the correspondence attached to it. You have sought advice concerning the obligation of the Office of the New York County District Attorney to produce an "itemized listing" of records maintained by that agency in connection with your case file.

In this regard, it is emphasized that the Freedom of Information Law pertains to existing records. Moreover, §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.

In short, if the Office of the District Attorney does not maintain an itemized list of the documents contained in your case file, it would not be obliged by the Freedom of Information Law to prepare such a list on your behalf.

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: Nina Keller
Gary J. Galperin



STATE OF NEW YORK
DEPARTMENT OF STATE
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FOIL AD - 11489

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May 26, 1999

Executive Director

Robert J. Freeman

Mr. Ross Corbett
98-R-8421
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. Corbett:

I have received your letter of April 25. You wrote that requests for records of Schenectady Police Department needed in your defense have been "disregarded." In conjunction with that claim and your remaining remarks, I offer the following comments.

First, pursuant to the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), each agency is required to designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests, and requests should ordinarily be made to that person. While I believe that the person in receipt of your request should have responded in a manner consistent with law or forwarded the request to the records access officer, it is suggest 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..."

Mr. Ross Corbett

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

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

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

Third, the 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.

In a related vein, I note that the Freedom of Information Law does not include any provision concerning the waiver of fees for copies of records, and that it has been held that an agency may charge its established fees even when a request is made pursuant to that statute by an indigent inmate [see Whitehead v. Morgenthau, 552 NYS2d 518 (1990)].

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

Mr. Ross Corbett

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"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; 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,

Mr. Ross Corbett
May 26, 1999
Page -7-

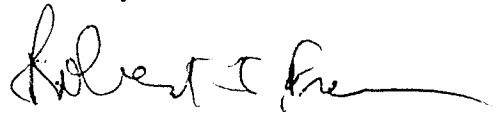
151 AD 2d 677, 679 (1989)]. Based upon that decision, it appears that records introduced into evidence or disclosed during a public judicial proceeding should be available. However, in the same decision, it was also found that:

"...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-A0-11490

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Alexander F. Treadwell

May 26, 1999

Executive Director

Robert J. Freeman

Mr. Peter Klempka
98-R-0828
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. Klempka:

I have received your letter of April 27, as well as the materials attached to it. As I understand the matter, you have requested records pertaining to your participation in the DWI program at your facility. The extent to which the records have been made available is unclear and in dispute.

If you believe that you have been denied access to records, you have the right to appeal pursuant to §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

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

I note that the Committee on Open Government is not empowered to grant or deny access to records; the function of this office involves providing advice and opinions concerning public access to government records.

With respect to rights of access, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent

Mr. Peter Klempka
May 26, 1999
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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 in considering rights of access to the records of your interest is §87(2)(g). That provision permits an agency to withhold records that:

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

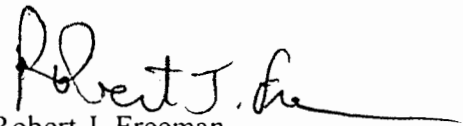
- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations; or
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

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.

Lastly, since your request of April 13 referred to the federal Freedom of Information and Privacy Acts (5 USC §§ 552 and 552a), I point out that those statutes pertain only to federal agencies. Further, while the federal Freedom of Information Act includes provisions regarding fee waivers, the New York Freedom of Information Law contains no similar provision, and 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)].

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: G. Kimmel



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL AD- 11491

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May 27, 1999

Executive Director

Robert J. Freeman

Ms. Christine A. Sproat
Gellert & Cutler, P.C.
75 Washington 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 Ms. Sproat:

I have received your letter of April 30 and the materials attached to it. In your capacity as an attorney with the firm that represents the Town of Beekman, you wrote that you "followed up on a letter written to the Attorney General's Office by the outgoing chairperson of the Ethics Board, Eugene Fraher, who asked for an advisory opinion as to whether he had to turn over pending and closed files to the new Chairperson of the Board who wishes to have all Ethics Board files in one secure location." The Attorney General's office advised that you seek the views of this office.

You added that a new chairperson was elected earlier this year and three new members have joined the Board. The outgoing chairperson indicated that "he would not let the new members review any pending files since these complainants did not want the new members of the Board to review their complaints." While you have apparently offered a legal opinion on the matter, Mr. Fraher "has stated that he wants to wait for a response to his from the Attorney General's Office before he turns over any files."

In this regard, as you may be aware, the Committee on Open Government, a unit of the Department of State, is authorized to render opinions concerning the Freedom of Information Law pursuant to §89(1) of that statute. When the Office of the Attorney General receives inquiries pertaining to the Freedom of Information Law, that agency typically forwards them to the Committee, and that has been the practice since the enactment of the Freedom of Information Law in 1974. As such, I believe that this response will serve as a valid alternative to obtaining an opinion from the Office of the Attorney General. Like the opinions of the Attorney General, the opinions of the Committee on Open Government are advisory in nature. While they are not binding, it is our hope that they are educational and persuasive.

With respect to the substance of the matter, I believe that the records at issue are the property of the Town, and that the individual who physically possesses the records has no authority to control their use or dissemination. In this regard, I offer the following comments.

First, from my perspective, irrespective of where records may be kept, they are Town records. It is emphasized that the Freedom of Information Law pertains to agency records and that §86(4) of the Law defines the term "record" expansively to mean:

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

In a case in which an agency contended, in essence, that it could choose which documents it considered to be "records" for purposes of the Freedom of Information Law, the state's highest court rejected that claim. As stated by the Court of Appeals:

"...respondents' construction -- permitting an agency to engage in a unilateral prescreening of those documents which it deems to be outside the scope of FOIL -- would be inconsistent with the process set forth in the statute. In enacting FOIL, the Legislature devised a detailed system to insure that although FOIL's scope is broadly defined to include all governmental records, there is a means by which an agency may properly withhold from disclosure records found to be exempt (see, Public Officers Law §87[2]; §89[2],[3]). Thus, FOIL provides that a request for access may be denied by an agency in writing pursuant to Public Officers Law §89(3) to prevent an unwarranted invasion of privacy (see, Public Officers Law §89[2]) or for one of the other enumerated reasons for exemption (see, Public Officers Law §87[2]). A party seeking disclosure may challenge the agency's assertion of an exemption by appealing within the agency pursuant to Public Officers Law §89(4)(a). In the event that the denial of access is upheld on the internal appeal, the statute specifically authorizes a proceeding to obtain judicial review pursuant to CPLR article 78 (see, Public Officers Law §89[4][b]). Respondents' construction, if followed, would allow an agency to bypass this statutory process. An agency could simply remove documents which, in its opinion, were not within the scope of the FOIL, thereby obviating the need to articulate a specific exemption and avoiding review of its action. Thus, respondents' construction would render much of the statutory exemption and review procedure ineffective; to adopt this construction would be contrary to the

Ms. Christine A. Sproat

May 27, 1999

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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 records at issue would not have come into the possession of the former chairperson of the Ethics Board except in the performance of his duties in that role. That being so, it is my opinion that records involving the performance of those duties clearly fall within the scope of the Freedom of Information Law.

This is not to suggest that the records would be accessible to the public under the Freedom of Information Law; on the contrary, I believe that unsubstantiated complaints and related records typically may be withheld from the public on the ground that disclosure would constitute an "unwarranted invasion of personal privacy" [see §87(2)(b)]. It is reiterated, however, that the materials issue are, in my view, Town records that fall within the coverage of the Freedom of Information Law.

Second, in a related vein, §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". Therefore, even though a person other than the clerk may have physical possession of the records in question, I believe that the town clerk would have legal custody of the records.

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, which is so in most towns, I believe that she would 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.

Third, and in a related area, the "Local Government Records Law", Article 57-A of the Arts and Cultural Affairs Law, deals with the management, custody, retention and disposal of records by local governments.

With respect to the retention of records, §57.25 of the Arts and Cultural Affairs Law states in relevant part that:

"1. It shall be the responsibility of every local officer to maintain records to adequately document the transaction of public business and the services and programs for which such officer is responsible; to retain and have custody of such records for so long as the records are needed for the conduct of the business of the office; to adequately protect such records; to cooperate with the local government's records management officer on programs for the orderly and efficient management of records including identification and management of inactive records and identification and preservation of records of enduring value; to dispose of records in accordance with legal requirements; and to pass on to his successor records needed for the continuing conduct of business of the office..."

While a person other than the clerk may have physical possession of the records in question, I do not believe that that person has legal custody of them. As indicated earlier, §30 of the Town Law specifies that the town clerk is the custodian of town records. Consistent with that provision

Ms. Christine A. Sproat

May 27, 1999

Page -5-

is §57.19 of the Arts and Cultural Affairs Law, which states in part that a town clerk is the "records management officer" for a town.

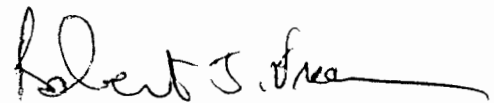
A failure to share records or to inform the clerk of their existence may effectively preclude the clerk from carrying out her duties as records management officer, or as records access officer for purposes of responding to requests under the Freedom of Information Law. If the records access officer does not know of the existence or location of Town records, that person may not have the ability to grant or deny access to records in a manner consistent with the requirements of the Freedom of Information Law. Further, §57.25(a) specifies that it is the responsibility of the former chairperson "to pass on to his successor records needed for the continuing conduct of business of the office."

Lastly, notwithstanding the preceding references to the Freedom of Information Law, as I understand the matter, it does not involve disclosures made under that statute. Rather, it pertains to disclosures to members of the Ethics Board in the performance of their official duties. The former chairperson is one member of the Board. As a general matter, a single member would not have the authority to take action or adopt policy or rules. In my view, the Board, by means of a majority vote of its total membership, has the authority to act or adopt policy or rules, so long as those actions are carried out in a manner consistent with law. It is my understanding that the Ethics Board consists of seven members. Since the former chairperson has one vote, I believe that he is required to accede to the actions that the majority is legally empowered to take.

In sum, while the records at issue may be in the physical possession of the former chairperson of the Ethics Board, I do not believe that he enjoys legal custody or control of the records.

I hope that I have been of assistance. Should any questions arise concerning the foregoing, please feel free to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 11492

Committee Members

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

May 27, 1999

Executive Director

Robert J. Freeman

James F. Gesualdi, Esq.
[REDACTED]
[REDACTED]

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

Dear Mr. Gesualdi:

I have received your letter of April 27 in which you sought an opinion concerning the propriety of a denial of access to records by the Town of Hempstead.

In your capacity as attorney for a residents association opposed to a proposed construction project in their community, you requested "building permits and/or other applications, plans, drawings" and the like pertaining to the project from the Town. In a response to the request by the First Deputy Commissioner of the Town Department of Buildings, it was stated that "this office does not divulge the information contained in a building permit application as it is subject to change and not a permanent record until a permit is issued."

From my perspective, the response is inconsistent with law, and the building permit application should have been disclosed. In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to all records, irrespective of whether they are preliminary, "subject to change", or other than permanent. It is emphasized that §86(4) of that statute defines the term "record" expansively to mean:

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

James F. Gesualdi, Esq.
May 27, 1999
Page -2-

Based on the foregoing, once an entity has submitted documents to the Town, those documents constitute "records" that fall within the scope of 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, none of the grounds for denial would be pertinent or applicable as a basis for withholding the records sought.

I would conjecture that the denial is based on the rationale that underlies §87(2)(g), which enables an agency to withhold some aspects of "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."

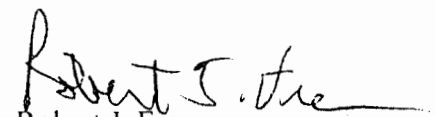
In view of the foregoing, the exception pertains to communications between or among state or local government officials at two or more agencies ("inter-agency materials"), or communications between or among officials at one agency ("intra-agency materials"). Frequently, much of the content of preliminary materials, such as proposals or recommendations, that are transmitted from one government employee or official to another may be withheld under that provision. In this instance, however, the records sought were submitted by an entity that is not governmental in nature and, therefore, is not an "agency" as that term is defined in the Freedom of Information Law. Consequently, the exception that would permit a denial of access in the context of governmental communications would not be applicable in the context of your request.

In sum, that the documentation of your interest is subject to change and not permanent is, in my opinion, irrelevant to rights of access. For the reasons discussed in the preceding commentary, I believe that it must be disclosed, for there is no basis for a denial of access conferred by the Freedom of Information Law.

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

I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:jm
cc: Richard T. DiResta
Pamela Doran Zeilman

FOIL-AO-11493

From: Robert Freeman
To: internet:beach@alpha.sunyniagara.cc.ny.us
Date: Fri, May 28, 1999 3:45 PM
Subject: Fees for computer generated records

Dear Ms. Beach:

I have received your message, and I believe that there must have been some misunderstanding. While I might have spoken to Chief Deputy Taylor (I do not recall the conversation), I would not have advised that he could charge \$3 per copy for a record maintained in a computer. On the contrary, as you are aware, the fee in the circumstance described would be based on the actual cost of reproduction in accordance with section 87(1)(b)(iii) of the Freedom of Information Law. Actual cost would involve computer time, which may be so minimal that it can not be quantified, and the cost of the storage medium, which in this instance would be a sheet of paper.

If you need a written opinion that is more expansive, if you want me to speak with Chief Deputy Taylor or anyone else with the County, please let me know; I would be pleased to oblige and to clarify understanding of the law.

If you would like to obtain information on the subject online, our website address is:

www.dos.state.ny.us/coog/coogwww.html

A memorandum, "A Primer on Electronic Information" may be useful. Also, in the index to opinions rendered under the FOIL, click on to "F" and scroll down to "fees - actual cost of reproduction". The higher the number, the more recent is the opinion.

If you would like to discuss the matter, I can be reached at (518)474-2518.

I hope that I have been of assistance.



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 11494

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Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

June 1, 1999

Mr. Jean Belot
96-A-4612
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. Belot:

I have received your letter of May 6. You have sought assistance in obtaining records from the City of Poughkeepsie based on your offer pay the requisite fee for copies on an installment basis.

In this regard, it has been held that an agency may require payment in advance of photocopying records sought under the Freedom of Information Law (see Sambucci v. McGuire, Supreme Court, New York County, November 4, 1982). I note, too, that it has been held that an agency may charge its established fee for copies, even though the applicant is an indigent inmate [see Whitehead v. Morgenthau, 552 NYD2d 518 (1990)].

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Corporation Counsel



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-A0 / 11495

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Joseph J. Seymour
Alexander F. Treadwell

June 1, 1999

Executive Director

Robert J. Freeman

Mr. E. Spangenberg
97-R-8524 SA82-48T
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. Spangenberg:

I have received your letter of May 3 in which you sought an opinion concerning your right 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."

Mr. E. Spangenberg

June 1, 1999

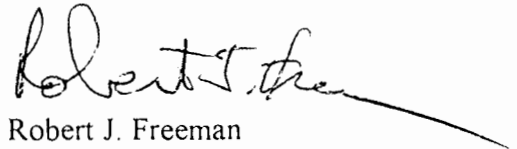
Page -2-

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,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman", with a long horizontal line extending to the right.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOJL-A - 11496

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Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

June 1, 1999

Executive Director

Robert J. Freeman

Mr. John Langdon



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

Dear Mr. Langdon:

I have received your letter of April 30 in which you complained with respect to a delay by the Town of Webster in making records available that you requested 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..."

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, other duties that must be carried out 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.

Mr. John Langdon

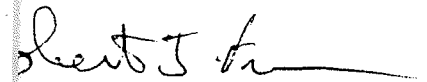
June 1, 1999

Page -2-

In short, if records are clearly available to the public under the Freedom of Information Law, and they are readily retrievable, there may be no basis for a lengthy delay in disclosure. However, as suggested above, if there is valid basis for extending the time to make records available beyond five business, such a delay would be consistent with law.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Cathryn C. Thomas



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 11497

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Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

June 1, 1999

Executive Director

Robert J. Freeman

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 April 27 in which you complained that the Division of Parole had not responded to your requests for records. You asked whether there is any provision of the Freedom of Information Law that is "more compelling" than §89(3), "one that bites instead of being treated like a Law without teeth."

In this regard, there is no provision other than that cited that offers "teeth." Nevertheless, §89(3) provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

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

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

Mr. Anthony Carty
June 1, 1999
Page -2-

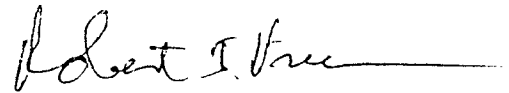
who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

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

For your information, the person designated by the Division of Parole to determine appeals is Terrence X. 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-DO-11498

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David A. Schulz
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Alexander F. Treadwell

June 1, 1999

Executive Director

Robert J. Freeman

Mr. Edward Magee
98-B-1001
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. Magee:

I have received your letter of April 28 and the correspondence attached to it. You have sought assistance in obtaining information concerning the suspension of an employee of the Southern Tier Regional Crime Laboratory. You wrote that the person in question "was suspended for filing false reports..."

In this regard, I offer the following comments.

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

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

If the Southern Tier Regional Crime Laboratory is a governmental entity of the state or a unit of local government, I believe that it would constitute an "agency" required to comply with the Freedom of Information Law. If it is not a governmental entity, that statute would not apply, and there would be no public right of access to its records.

Mr. Edward Magee

June 1, 1999

Page -2-

Second, assuming that the Southern Tier Regional Crime Laboratory is an "agency", 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.

Particularly relevant to an analysis of rights of access 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

Mr. Edward Magee

June 1, 1999

Page -3-

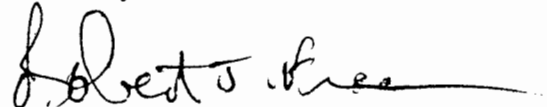
asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. Insofar as a request involves a final agency determination, I believe that the determination must be disclosed, again, unless 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]. To the extent that such a determination includes reference to unproven charges or unsubstantiated allegations, those portions of the record 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)].

In sum, based on the decisions cited above, reference to findings of misconduct involving a public employee would be accessible; reference to charges that could not be proven could be withheld.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

Oml-AO-3030
FOIL-AO-11499

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

June 1, 1999

Executive Director

Robert J. Freeman

Ms. Joyce Shepard, CSW
President
CACC
18-55 Corporal Kennedy St., Suite L-2
Bayside, NY 11360

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

Dear Ms. Shepard:

I have received your letter of May 4 in which you raised a variety of issues concerning compliance with the Open Meetings and Freedom of Information Laws by Community Board 7 and its committees.

In view of your questions, it is important in my view to describe the coverage of the Open Meetings Law. That statute pertains to meetings of "public bodies", and §102(2) defines the phrase "public body" to mean:

"...any entity for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

Based on the foregoing, a governing body, such as a community board, clearly constitutes a "public body" required to comply with the Open Meetings Law. Further, since the definition makes specific reference to a committee or subcommittee of a public body, committees of a Community Board consisting of two or more members of the Board would also constitute public bodies subject to the Open Meetings Law. If, for instance, a community board consists of 51, its quorum would be 26. If the Board designates a committee consisting of 9, the committee would be a public body and a quorum of the committee would be 5.

Ms. Joyce Shepard

June 1, 1999

Page -2-

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 in appropriate circumstances as a governing body [see e.g., Glens Falls Newspapers, Inc. v. Solid Waste and Recycling Committee of the Warren County Board of Supervisors, 195 AD2d 898 (1993)]. A contention that a committee is not covered by the Open Meetings Law based on Roberts Rules is, in my view, without merit; Roberts Rules are not law.

If members of a public body meet, but there is no quorum present, i.e., if there is not a majority of the total membership, the Open Meetings Law would not apply. Similarly, meetings among public officials generally are not subject to the Open Meetings Law. In short, unless a quorum of a public body has convened for the purpose of conducting public business collectively, as a body, the Open Meetings Law would not apply.

You wrote that the Community Board has refused to accept requests made under the Freedom of Information Law that are transmitted by a fax machine. In this regard, an agency, pursuant to §89(3) of the Freedom of Information Law, may require that a request for records be made in writing, and it is my view that an agency must accept requests made via a fax machine, unless the use of the machine adversely impacts on the agency's capacity to carry out its duties. For example, if a law enforcement agency uses a fax machine to carry out essential law enforcement functions, interference with the use of the machine could hamper its ability to perform its duties effectively. In short, in a circumstance in which public use of a fax machine would interfere with an agency's functions, its use for making requests under the Freedom of Information Law might be restricted, so long as requests traditionally made are accepted, i.e., requests made in writing by mail or by personal delivery. On the other hand, if the acceptance of requests made via fax machine would not substantially interfere with an agency's functions, such as protecting public safety, a refusal to accept requests by fax would, in my opinion, be unreasonable and inconsistent with law.

You also wrote that you were informed that you could inspect records "at 4PM only." Further, if you cannot complete your review by the close of business, you were instructed to return the next day at the same time. Based upon the regulations promulgated by the Committee on Open Government and a decision rendered by the Appellate Division, Second Department, the public has the right to inspect the records during regular business hours.

By way of background, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee to promulgate regulations concerning the procedural implementation of the Law (see 21 NYCRR Part 1401). In turn, §87(1) requires agencies to adopt rules and regulations consistent with the Law and the Committee's regulations. Section 1401.2 of the regulations, provides in relevant part that:

"(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall

Ms. Joyce Shepard
June 1, 1999
Page -3-

not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so..."

Section 1401.4 of the regulations, entitled "Hours for public inspection", states that:

"(a) Each agency shall accept requests for public access to records and produce records during all hours they are regularly open for business."

Relevant to your inquiry and the foregoing is the decision to which allusion was made earlier in which one of the issues was the validity of a similar limitation regarding the time permitted to inspect records established by a village pursuant to regulation. The Court held that the village was required to enable the public to inspect records during its regular business hours, stating that:

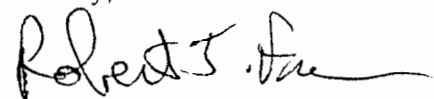
"...to the extent that Regulation 6 has been interpreted as permitting the Village Clerk to limit the hours during which public documents can be inspected to a period of time less than the business hours of the Clerk's office, it is violative of the Freedom of Information Law..."
[Murtha v. Leonard, 620 NYS 2d 101 (1994), 210 AD 2d 411].

Lastly, you asked whether you can review a public employee's schedule. 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.

In a decision concerning access to Mayor Koch's appointment calendar, it was found that such a record must be disclosed (Kerr v. Koch, Supreme Court, New York County, February 1, 1988). Consequently, it has been advised that those entries relating to the performance of one's official duties generally must be disclosed. However, references to personal activities or events, such as birthdays, appointments with doctors, family gatherings and the like could in my opinion be withheld on the ground that disclosure would result in "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

cc: Adrian Joyce, Chair
Marilyn Bitterman, District Manager.



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 11500

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Alexander F. Treadwell

June 1, 1999

Executive Director

Robert J. Freeman

Mr. Ronald Perry
96-A-0908
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. Perry:

I have received your letter of May 3. You have sought an opinion concerning the names of agencies from which you may obtain the hospital admission record of a person other than yourself.

In short, I know of no agency that would be required to disclose the information in question under the Freedom of Information Law. Although that statute provides broad rights of access to government records, §87(2)(b) 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 an admission to a hospital consists in great measure of what might be characterized as a medical record or history relating to the person needing care or service (see

Mr. Ronald Perry

June 1, 1999

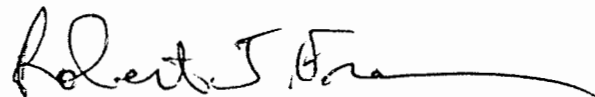
Page -2-

Hanig v. NYS Department of Motor Vehicles, 79 NY 2d 106 (1992)]. Consequently, in my opinion, records identifying those to whom medical services were rendered may be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy.

It is also noted that other provisions of law forbid the disclosure of medical records, except in specified circumstances (see e.g., Public Health Law, §§18 and 2803-c).

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

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3031
FOIL-AO-11501

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Alexander F. Treadwell

June 1, 1999

Executive Director

Robert J. Freeman

Ms. Patricia Pagano



The staff of the Committee on Open 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 May 5. In brief, you complained that the Village of Manorhaven has delayed responding to requests for records and that the Village Board of Trustees has discussed issues during executive sessions in a manner inconsistent with law.

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)].

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.

Ms. Patricia Pagano

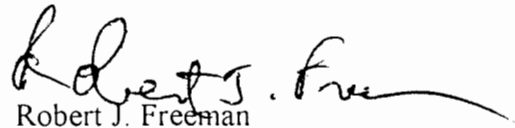
June 1, 1999

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Second, the Open Meetings Law is based on a presumption of openness. Stated differently, a public body must conduct its meetings in public, unless there is a basis for entry into executive session. Paragraphs (a) through (h) of §105(1) of the Open Meetings Law specify the subjects that may properly be considered during an executive session. Because the ability to enter into executive session is limited, a public body may not conduct an executive session to discuss the subject of its choice.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees
Rosemary Pernice, Clerk



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL Ad - 11502

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Alexander F. Treadwell

June 1, 1999

Executive Director

Robert J. Freeman

Mr. Bill VanAllen



The staff of the Committee on Open 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 letter of May 6 in which you sought an opinion concerning your right to obtain death records, autopsy reports and related records under the Freedom of Information Law.

In this regard, 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. 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."

Mr. Bill VanAllen
June 1, 1999
Page -2-

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. Unless you are the "next of kin", a court order would be required to obtain such records.

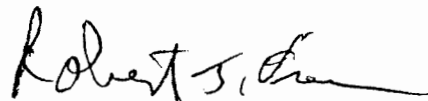
With regard to death records, §4174(1)(a) of the Public Health Law, which pertains to access to death records, states that such records are available:

"(1) when a documented medical need has been demonstrated, (2) when a documented need to establish a legal right or claim has been demonstrated, (3) when needed for medical or scientific research approved by the commissioner, (4) when needed for statistical or epidemiological purposes approved by the commissioner, (5) upon specific request by municipal, state or federal agencies for statistical or official purposes, (6) upon specific request of the spouse, children, or parents of the deceased or the lawful representative of such persons, or (7) pursuant to the order of a court of competent jurisdiction on a showing of necessity; except no certified copy or certified transcript of a death record shall be subject to disclosure under article six of the public officers law..."

Article six of the Public Officers Law is the Freedom of Information Law. As such, based upon the provision quoted above, death records, when accessible, are available only under the circumstances prescribed in the Public Health Law.

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 Clerk, Town of Lloyd
Ulster County Medical Examiner



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-A - 11503

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

June 1, 1999

Executive Director

Robert J. Freeman

Ms. CherylAnn Armeno
Coalition for Junkyard Enforcement
P.O. Box 354
Fleischmanns, NY 12430

Hon. Donald E. Kearney
Mayor
Village of Fleischmanns
P.O. Box I-3
Fleischmanns, NY 12430

The staff of the Committee 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. Armeno and Mayor Kearney:

I have received your letters, which are respectively dated May 3 and May 25. In short, Ms. Armeno has complained that Mayor Kearney "has made a regular practice to advise FOIL requests that there will be a normal 30 day period to wait for any information", and advisory opinions have been sent to other residents of the Village of Fleischmanns in which it was suggested that a such a practice is inconsistent with the Freedom of Information Law. In his letter, the Mayor sought an opinion concerning the propriety of an acknowledgement of receipt of a request by the Department of Motor Vehicles (DMV) indicating that "Normally, F.O.I.L. requests can be granted or denied within 30 days" of the date of acknowledgement.

In my view, the situation relating to requests for records of the DMV cannot be compared with or equated to that relating to requests for records of the Village of Fleischmanns. Having conferred with DMV's Records Access Officer, that agency receives thousands of requests per month characterized as "simple" and approximately 100 requests per month characterized as "complex" or "complicated". While I could not locate current figures regarding its population, it is my understanding that the entire population of the Village of Fleischmanns is well under 1,000. Considering the volume of requests and the sizes of the two agencies, again, I do not believe that they can effectively be compared for the purpose of considering their time for responding to requests for

Ms. CherylAnn Armeno
Hon. Donald E. Kearney
June 1, 1999
Page -2-

records. What may be a reasonable time to respond in one agency may not represent a reasonable time in another. Typically, in a municipality similar in size to the Village of Fleischmanns, the Clerk or other official can locate records within a matter of minutes.

I point out that the notion of reasonableness was stressed in opinions previously rendered at the requests of other residents of the Village. Specifically, it was stated 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.”

It was also suggested that:

“...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

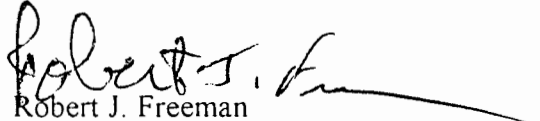
Ms. CherylAnn Armeno
Hon. Donald E. Kearney
June 1, 1999
Page -3-

any event is implicit" [Westchester News v. Kimball,
50 NY 2d 575, 579 (1980)].

In sum, due to its size and the number of requests received by DMV, its likely that a delay in disclosure of records of approximately a month is reasonable. For the same reasons, the size of the Village of Fleischmanns and the nature of the requests that have been described to me, it seems that the Village, to comply with law, should be granting access to accessible records within five business days of their receipt of the requests.

I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:jm

cc: Kenneth Munnely



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AU-11504

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Joseph J. Seymour
Alexander F. Treadwell

June 4, 1999

Executive Director

Robert J. Freeman

Mr. Willie Lee Walker
97-B-2418
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. Walker:

I have received your letter of May 30 in which you requested that this office provide copies of certain documents or information concerning where you may be able to obtain them.

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning rights of access to government records, primarily under the state's Freedom of Information Law. The Committee does not have possession of records generally. In short, I cannot provide the records of your interest because this agency does not maintain them.

To seek the records of your interest, a request should be made to the "records access officer" at the agency or agencies that you believe maintain the records. Pursuant to the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), each agency must designate one or more persons as records access officer, and that person has the duty of coordinating an agency's response to requests.

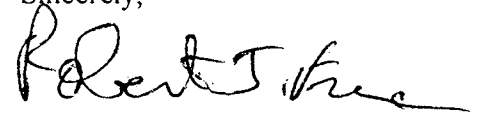
It is also noted that §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, a request should contain sufficient detail to enable agency staff to locate and identify the records.

Lastly, in brief, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Since one of the items of interest is a "complaint log sheet", I point out that several of the grounds for denial may be pertinent and that it is likely that the log would not be available in its entirety.

Mr. Willie Lee Walker
June 4, 1999
Page -2-

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman". The signature is fluid and cursive, with a long horizontal stroke at the end.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FUEL-AO-11505

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Alexander F. Treadwell

June 4, 1999

Executive Director

Robert J. Freeman

Mr. Edward Magee
98-B-1001
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. Magee:

I have received your letter of May 4, as well as the correspondence attached to it. In brief, you requested certain records from the Division of State Police. The request was denied and you were informed of the right to appeal. You have asked whether there is "somewhere else" where you can appeal.

Assuming that your question involves another source of appealing a denial of access to records under the Freedom of Information Law, there is no other vehicle for appealing. I direct your attention to §89(4)(a) of the Freedom of Information Law which deals with the right to appeal a denial of access to records and states that:

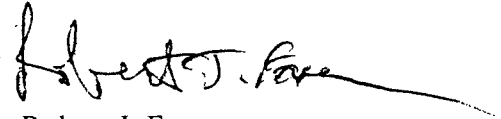
"any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal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

I believe that the provision quoted above represents the only means of appealing a denial of access to records.

Mr. Edward Magee
June 4, 1999
Page -2-

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Lt. Laurie Wagner



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO-255
FOIL-AO-11506

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Alexander F. Treadwell

June 8, 1999

Executive Director

Robert J. Freeman

Gary Fusfield, Esq.



The staff of the Committee on Open 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 May 7 and the materials attached to it. You have questioned whether a denial of access to records by the Workers' Compensation Board was consistent with law and an opinion previously prepared by this office at your request.

In brief, you requested that you be granted access to "the name, address and business relationships of all persons or entities currently under investigation by the Workers' Compensation Board." The request was denied on the grounds that "disclosure would constitute an unwarranted invasion of personal privacy and the records sought pertain to current investigations." In a reference to an opinion that I wrote on November 20, 1998, you focused on a decision that I cited construing the federal Freedom of Information Act in which it was stated 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 [Cohen v. Environmental Protection Agency, 575 F. Supp. 425 (D.C.D.C. 1983)].

The opinion prepared in November involved the legality of a public announcement made by a Compensation Claims Referee that your business practices were under investigation. Following a lengthy analysis of the issue, it was advised that the Personal Privacy Protection Law would not have prohibited the disclosure of that information.

It appears that the Workers' Compensation Board may differ with that analysis. Nevertheless, I believe that a different provision would enable the Board to withhold the records in question.

In its denial of your request, the Board's records access officer wrote that disclosure would constitute an unwarranted invasion of privacy under §87(2)(b) of the Freedom of Information Law, and he also wrote that §95(5)(a) of the Personal Privacy Protection Law "provides that an agency

Gary Fusfield, Esq.

June 8, 1999

Page -2-

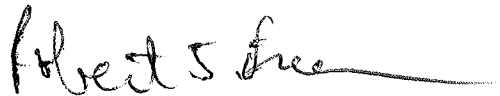
may exempt from disclosure personal information regarding a data subject, 'if such information is compiled for law enforcement purposes and would if disclosed...(1) interfere with law enforcement investigations or judicial proceedings.' In my view, §95(5)(1) would not be applicable, for it involves an exception to rights of access when a person seeks records pertaining to himself or herself. Your request did not involve records about yourself, but rather about others who may be subjects of investigations.

Notwithstanding the foregoing, I believe that §87(2)(e)(i) of the Freedom of Information Law is pertinent and applicable. That provision permits an agency with withhold records compiled for law enforcement purposes when disclosure would "interfere with law enforcement investigations or judicial proceedings." If an individual becomes aware that he or she is the subject or knows of the details of an investigation, he or she could tailor his or her activities so as to evade detection, destroy records or evidentiary material, or engage in other actions designed to frustrate a government agency's investigation.

Irrespective of whether disclosure might constitute an unwarranted invasion of personal privacy, when §87(2)(e)(i) or any other ground for denial, can properly be asserted, I believe that an agency may justifiably withhold records.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and is positioned above the printed name and title.

Robert J. Freeman
Executive Director

RJF:jm

cc: David C. Gannon



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11507

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June 11, 1999

Executive Director

Robert J. Freeman

Mr. Eric Gonzalez
99-R-0109
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. Gonzalez:

Your letter addressed to "Information Services" at the Department of State has been forwarded to the Committee on Open Government. The Committee, a unit of the Department, is authorized to provide advice concerning the Freedom of Information Law. In short, you asked how you might obtain any records pertaining to you from any unit of government.

In this regard, there is no central source of government records pertaining to individuals. Further, a request to an agency for records about yourself, without additional information, would not meet the standard imposed by the Freedom of Information Law. Section 89(3) of that statute states in relevant part that an applicant must "reasonably describe" the records sought. Therefore, a request should include sufficient detail (i.e., dates, identification numbers, file designations, etc.) to enable the staff of an agency to locate and identify the records of your interest.

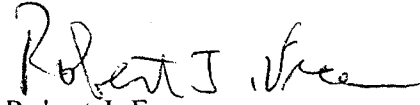
It is noted that the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) require that each agency designate one or more persons as "records access officer." That person has the duty of coordinating an agency's response to requests, and requests should be made to the records access officer at the agency or agencies that you believe would maintain records pertaining to you.

Lastly, there is no provision in the Freedom of Information Law concerning fee waivers, and it has been held that an agency may charge its established fee, even if the applicant is an indigent inmate [Whitehead v. Morgenthau, 552 NYS2d 518 (1990)].

Mr. Eric Gonzalez
June 11, 1999
Page -2-

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman". The signature is written in a cursive style with a large initial "R".

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AU - 11508

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Alexander F. Treadwell

June 11, 1999

Executive Director

Robert J. Freeman

Mr. Michael Henderson
98-R-6323
Gouverneur Correctional Facility
P.O. Box 480
Gouverneur, NY 13642-0370

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

Dear Mr. Henderson:

I have received your letter of May 6 in which you sought assistance in obtaining Family Court records.

In this regard, I point out that the statutes that you cited in your request, the federal Freedom of Information and Privacy Acts, pertain only to records maintained by federal agencies; they would not apply to records of a state court. Similarly, the New York Freedom of Information Law pertains to agency records and §86(3) of that statute defines the term "agency" to include:

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

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

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

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

Mr. Michael Henderson
June 11, 1999
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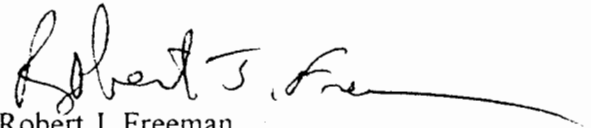
Relevant to the matter is §166 of the Family Court Act. That statute states that:

"The records of any proceeding in the family court shall not be open to indiscriminate public inspection. However, the court in its discretion in any case may permit the inspection of any papers or records. Any duly authorized agency, association, society or institution to which a child is committed may cause an inspection of the record of investigation to be had and may in the discretion of the court obtain a copy of the whole or part of such record."

In view of the foregoing, it is suggested that you resubmit your request to the clerk of the court, indicating that you are not seeking indiscriminate inspection of or access to the records, but rather that the records are pertinent to a proceeding in which you are involved.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FUJL-AO - 11509

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June 11, 1999

Executive Director

Robert J. Freeman

Mr. Al DiLorenzo
86-A-3282
Auburn Correctional Facility
P.O. Box 618
Auburn, NY 13021-0618

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

Dear Mr. DiLorenzo:

I have received your letter of May 5 in which you complained that your facility did not provide the information that you sought under the "Patient's Bill of Rights". You sought the "full names of caregivers" who provided services in a certain unit, and you indicated that the agency sought to charge fee for making the information available.

In this regard, I am unaware of any provision that would require that an entity prepare a new record containing the full names of those who provided medical treatment or care to an individual. I note, too, that the Freedom of Information Law pertains to existing records and states in §89(3) that an agency is not required to create a record in response to a request. In short, if no single record exists containing the full names of caregivers, I do not believe that the facility would be required to prepare such a record on your behalf.

With respect to fees, §18 of the Public Health Law permits a provider of medical services to charge up to seventy-five per photocopy when making medical records available to the subject of the records, and the Freedom of Information Law authorizes an agency to charge up to twenty-five cents per photocopy for records made available under that statute.

Mr. Al DiLorenzo

June 11, 1999

Page -2-

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

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and extends across the width of the page.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-A-11510

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

June 11, 1999

Executive Director

Robert J. Freeman

Ms. Raquel Montalvo
44538-011
FMC Carswell
P.O. Box 27137
Forth Worth, TX 76127

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

Dear Ms. Montalvo:

I have received your letter of May 6 and the correspondence attached to it. You have sought assistance in relation to a request for records maintained by the New York City Police Department.

Having reviewed your request, I believe that it is appropriate. The Department's records access officer is located at One Police Plaza, and I believe that the person so designated is Sgt. Richard Evangelista.

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

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

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

Ms. Raquel Montalvo

June 11, 1999

Page -2-

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

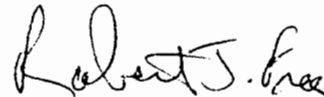
In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Since the records of your interest are statements that you provided, it is unlikely that there would be a basis for a denial of access.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Sgt. Richard Evangelista



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DEPARTMENT OF STATE
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FODL-AU-11511

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Alexander F. Treadwell

June 11, 1999

Executive Director

Robert J. Freeman

Mr. Douglas Coleman
97-A-5490
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. Coleman:

I have received your recent undated letter, which reached this office on May 10. You have sought assistance in obtaining the employee manual used by correction officers employed by the Department of Correctional Services.

In this regard, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all record of an agency are available, except to the extent that records or portions thereof fall within one or more of the grounds for denial appearing in section 87(2)(a) through (i) of the Law. I am unfamiliar with the contents of the record in which you are interested. However, from my perspective, three of the grounds for denial may be relevant to your inquiry.

Specifically, section 87(2)(g) states that an agency may withhold records that:

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

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of

Mr. Douglas Coleman

June 11, 1999

Page -2-

statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different basis for denial is applicable. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. It would appear that the records in question consist of instructions to staff that affect the public or an agency's policy. Therefore, I believe that rules and regulations would be available, unless a different basis for denial could be asserted.

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

"are compiled for law enforcement purposes and which, if disclosed, would:

i. interfere with law enforcement investigations of judicial proceedings...

ii. deprive a person of a right to a fair trial or impartial adjudication;

iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or

iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

Under the circumstances, it appears that most relevant is section 87(2)(e)(iv). The leading decision concerning that provision is Fink v. Lefkowitz, which involved access to a manual prepared by a special prosecutor that investigated nursing homes, in which the Court of Appeals held that:

"The purpose of this exemption is obvious. Effective law enforcement demands that violators of the law not be apprised the nonroutine procedures by which an agency obtains its information (see Frankel v. Securities & Exch. Comm., 460 F2d 813, 817, cert den 409 US 889). However beneficial its thrust, the purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution.

"To be distinguished from agency records compiled for law enforcement purposes which illustrate investigative techniques, are those which articulate the agency's understanding of the rules and regulations it is empowered to enforce. Records drafted by the body charged with enforcement of a statute which merely clarify procedural or substantive law must be disclosed. Such information in the hands

of the public does not impede effective law enforcement. On the contrary, such knowledge actually encourages voluntary compliance with the law by detailing the standards with which a person is expected to comply, thus allowing him to conform his conduct to those requirements (see Stokes v. Brennan, 476 F2d 699, 702; Hawkes v. Internal Revenue Serv., 467 F2d 787, 794-795; Davis, Administrative Law [1970 Supp], section 3A, p 114).

"Indicative, but not necessarily dispositive of whether investigative techniques are nonroutine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel (see Cox v. United States Dept. of Justice, 576 F2d 1302, 1307-1308; City of Concord v. Ambrose, 333 F Supp 958). It is no secret that numbers on a balance sheet can be made to do magical things by scrupulous nursing home operators the path that an audit is likely to take and alerting them to items to which investigators are instructed to pay particular attention, does not encourage observance of the law. Rather, release of such information actually countenances fraud by enabling miscreants to alter their books and activities to minimize the possibility or being brought to task for criminal activities. In such a case, the procedures contained in an administrative manual are, in a very real sense, compilations of investigative techniques exempt from disclosure. The Freedom of Information Law was not enacted to furnish the safecracker with the combination to the safe" (id. at 572-573).

In applying those criteria to specific portions of the manual, which was compiled for law enforcement purposes, the Court found that:

"Chapter V of the Special Prosecutor's Manual provides a graphic illustration of the confidential techniques used in a successful nursing home prosecution. None of those procedures are 'routine' in the sense of fingerprinting or ballistic tests (see Senate Report No. 93-1200, 93 Cong 2d Sess [1974]). Rather, they constitute detailed, specialized methods of conducting an investigation into the activities of a specialized industry in which voluntary compliance with the law has been less than 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

Mr. Douglas Coleman
June 11, 1999
Page -4-

attention to requests by nursing homes for Medicaid reimbursement rate increases based upon projected increase in cost. As this is simply a routine technique that would be used in any audit, there is no reason why these pages should not be disclosed" (id. at 573).

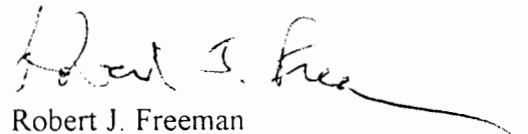
Again, although I am unfamiliar with the record in question, it would appear that those portions which, if disclosed, would enable individuals to hamper effective law enforcement, adversely affect security or evade detection could likely be withheld. It is noted that in another decision which dealt with 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 correction officers from carrying out their duties effectively.

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

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

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOL-A-11512

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Joseph J. Seymour
Alexander F. Treadwell

June 11, 1999

Executive Director

Robert J. Freeman

E-Mail

TO: Debbie Beach <beach@alpha.sunyniagara.cc.ny.us>
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, unless otherwise indicated.

Dear Ms. Beach:

As you are aware, I have received your correspondence concerning the fees charged by the Niagara County Sheriff's Department for copies of information stored in a computer. In addition, as promised, I have discussed the matter with Chief Deputy Taylor.

By way of background, unless a different statute applies, §87(1)(b)(iii) of the Freedom of Information Law authorizes agencies to charge up to twenty-five cents for photocopying records up to nine by fourteen inches, or the actual cost for the reproduction of other records, i.e., those that are not reproduced by means of photocopying, such as information stored in a computer.

In some instances, extracting or generating information stored in a computer may be a relatively easy task that involves typing a few keystrokes and entering brief commands. In that kind of situation, it is likely that the actual cost of reproduction would be minimal, for that cost would reflect computer time and the cost of the medium onto which the information is reproduced, such as paper, a computer tape or disk. In other instances, the task may be more complicated, for it may involve the services of a computer technician and a lengthy series of steps that must be taken to locate, extract and reproduce the information.

Having discussed the matter with Chief Taylor, it appears that the basis of your inquiry relates to the latter kind of situation. He indicated that you have made numerous requests, and that many have resulted in disclosures that could readily be made. With respect to the request at issue, however, Chief Taylor informed me that the records sought are not current and that retrieving them involves

Ms. Debbie Beach

June 11, 1999

Page -2-

substantial effort on the part of persons having technical expertise. In that kind of situation, case law indicates that the actual cost of reproduction may include the personnel time expended in the effort to reproduce the records [see Brownstone Publishers, Inc. v. New York City Department of Buildings, 550 NYS2d 564, affirmed, 166 AD2d 294 (1990)].

Assuming that the fee sought to be charged reasonably represents the actual cost of reproducing the records, I believe that the County would be acting in compliance with law. Conversely, when the fee assessed by an agency for reproducing other than paper records exceeds the actual of reproduction, the agency, in my view, would be acting in a manner inconsistent with law.

I hope that I have been of assistance.

RJF:jm

cc: Deputy Chief Taylor



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 11513

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June 11, 1999

Executive Director

Robert J. Freeman

Mr. A. Stephen Corina

[REDACTED]

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

Dear Mr. Corina:

I have received your letter of June 12 in which you sought assistance in obtaining the time cards of an employee of Schenectady County. Based on the Freedom of Information Law and its judicial interpretation, the records in question must, in my view, 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.

Although two of the grounds for denial relate to attendance records or time sheets, neither in my opinion would justify a denial of access.

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

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

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

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

Attendance records could be characterized as "intra-agency materials." However, those portions reflective of dates or figures concerning the issue of leave time or absences, the times that employees arrive at or leave work, or which identify employees by name 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." This office 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 Co. v. County of Monroe, 59 AD2d 309 (1977), aff'd 45 NY2d 954 (1978); 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 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 obligations of any employee is to appear for work when scheduled to do so. Concurrent with this is the rights of an employee to properly use sick leave available to him or her. In the instant case, intervenor had an obligation to report for work when scheduled along with a right to use sick leave in accordance with his collective bargaining agreement. The taxpayers have an interest in such use of sick leave for economic as well as safety reasons. Thus it can hardly be said that disclosure of the dates in February 1983 when intervenor made use of sick leave would constitute an unwarranted invasion of privacy. Further, the motives of petitioners or the means by which they will report the information is not determinative since all records of government agencies are presumptively available for inspection without regard to the status, need, good faith or purpose of the applicant requesting access..." (Capital Newspapers v. Burns, supra, 94-95).

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

Mr. A. Stephen Corina

June 11, 1999

Page -3-

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.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, 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:jm

cc: Joseph Parillo, Jr., Clerk of the Legislature
Thomas Hayner, County Attorney



STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

FOIL-AO ✓ 11514

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June 11, 1999

Executive Director

Robert J. Freeman

Mr. Murray N. Jacobson
Town Attorney
Town of Clarkstown
10 Maple Avenue
New City, NY 10956-5099

Dear Mr. Jacobson:

I appreciate having received a copy of your determination of May 10 in relation to a request made under the Freedom of Information Law by Richard P. Bunyan. Mr. Bunyan requested agreements between the Town of Clarkstown and "all private investigative companies" as well as records concerning payments made to those companies during the past two years.

From my perspective, while many aspects of the records might justifiably have been withheld, it is likely in my view that the denial of access to the records sought in their entirety was inappropriate. 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 most recently in 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 my view, the situation may be likened to a case in which a request was made for detailed records involving monies paid to a law firm by a county [see Orange County Publications, Inc. v. County of Orange [637 NYS 2d 596 (1995)]]. Specifically, the 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.

Mr. Murray N. Jacobson

June 11, 1999

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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).

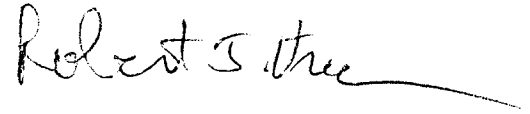
In the context of Mr. Bunyan's request, I would agree that substantial portions of the records may be withheld, for disclosure could, as I understand the situation, interfere with law enforcement investigations, endanger people's lives or safety, or reveal other than routine criminal investigative techniques and procedures. Nevertheless, I would conjecture that disclosure of portions of the records identifying an entity with which the Town has contracted or the amount paid to any such entity would not likely fall within any of the grounds for denial. Those items, if disclosed, would not likely result in the harmful effects of disclosure described in the provision to which you referred.

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

Mr. Murray N. Jacobson
June 11, 1999
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I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and has a long, sweeping horizontal line extending to the right from the end of the name.

Robert J. Freeman
Executive Director

RJF:jm

cc: Richard P. Bunyan



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AD' 11515

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Alexander F. Treadwell

June 14, 1999

Executive Director

Robert J. Freeman

Mr. Kevin Smith
87-A-9373
Green Haven Correctional Facility
Drawer B
Stormville, NY 12582-0010

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

Dear Mr. Smith:

I have received your letter of May 9. You wrote that you have requested records from the Office of the Kings County District Attorney and, as I understand your comments, although the receipt of your request has been acknowledged, there has been no indication of when the request would be granted or denied.

In this regard, as stated in my letter to you of March 8, §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 a case that described an experience that may be 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 request has been constructively denied and that you may appeal the denial 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."

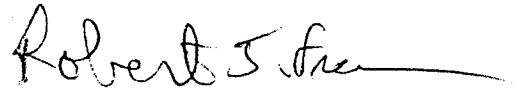
Alternatively, based on the holding in Bernstein, it appears that you could seek judicial review of the denials now. I suggest, however, that you appeal in an effort to avoid the time and cost of litigation.

I believe that person designated by the District Attorney is Jodi Mandel, Assistant District Attorney.

Mr. Kevin Smith
June 14, 1999
Page -3-

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink that reads "Robert J. Freeman". The signature is written in a cursive style with a long horizontal line extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Jodi Mandel, Assistant District Attorney



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KOIL-AD-11516

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June 14, 1999

Executive Director

Robert J. Freeman

Mr. Charles Doyen
88-C-0074
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. Doyen:

I have received your letter of May 7, as well as the materials attached to it. You have raised a series of questions relating to your requests for records.

First, you asked whether, "as the person charged [and convicted] of a sex offense", you are "entitled to access of records, relative to [your] arrest and conviction, from New York State Agency's under the provision of the New York State Freedom of Information Law and specifically, under the exceptions contained in Section 50-b(2)(a) of the Civil Rights Law."

From my perspective, the Freedom of Information Law does not apply, and §50-b of the Civil Rights Law would not confer rights of access to the records sought, even though you may be the person charged. As I understand §50-b, although an agency may not be prohibited from disclosing records falling within the coverage of that statute to you, it is not obliged to do so, for that statute does not confer a right of access.

Subdivision (1) of §50-b states that:

"The identity of any victim of a sex offense, as defined in article one hundred thirty or §255.25 of the penal law, shall be confidential. No report, paper, picture, photograph, court file or other documents, in the custody or possession of any public officer or employee, which identifies such victim shall be made available for public inspection. No such public officer or employee shall disclose any portion of any police report, court file, or other document, which tends to identify such a victim except as provided in subdivision two of this section."

Mr. Charles Doyen

June 14, 1999

Page -2-

The initial ground for denial in the Freedom of Information Law, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." Section 50-b of the Civil Rights Law exempts records identifiable to a victim of a sex offense from disclosure. Consequently, the Freedom of Information Law in my view provides no rights of access to those records. Any authority to disclose or obtain the records in question would be based on the direction provided by the ensuing provisions of §50-b.

In this regard, the introductory language of subdivision (2) provides that "[t]he provisions of subdivision one of this section shall not be construed to prohibit disclosure of information to: a. Any person charged with the commission of a sex offense..." While an agency is not forbidden from disclosing records subject to §50-b to a person charged, I do not believe that §50-b creates a right of access on behalf of such person. Further, subdivision (3) states in relevant part that "The court having jurisdiction over the alleged sex offense may order any restrictions upon disclosure authorized in subdivision two of this section..."

In sum, it is my view that issues involving the disclosure of the records in question would be governed by §50-b of the Civil Rights Law, rather than the Freedom of Information Law.

Next, you indicated that requests for records directed to the Ontario County District Attorney and the Supreme Court have not been answered. In this regard, the Freedom of Information Law excludes the courts and court records from its coverage. This is not suggest that court records might not be available, but rather that access is governed by different provisions of law (see e.g., Judiciary Law, §255).

When the Freedom of Information Law is applicable, as in the case of a records of the office of a district attorney, that statute 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

Mr. Charles Doyen

June 14, 1999

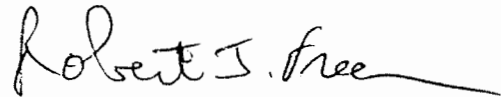
Page -3-

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

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

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and has a long, sweeping underline that extends to the right.

Robert J. Freeman
Executive Director

RJF:jm

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



STATE OF NEW YORK
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FOIL-AD-11517

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Alexander F. Treadwell

June 14, 1999

Executive Director

Robert J. Freeman

Mr. Marvin Datz

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

Dear Mr. Datz:

I have received your letter of May 10 in which you allege that the New York City Police Department and the State Department of Motor Vehicles have failed to comply with the Freedom of Information Law, and in which you asked for assistance and intervention relative to those requests.

In this regard, although the Committee on Open Government is authorized to offer advice and opinions concerning the Freedom of Information Law, this office is not empowered to "intervene" or enforce the law. As such, the following remarks are not binding on an agency and are intended to offer guidance.

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:

Mr. Marvin Datz

June 14, 1999

Page -2-

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

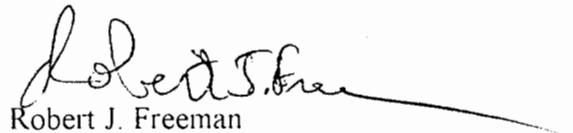
In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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 several aspects of your requests, you sought lists containing certain information. Here I point out that the Freedom of Information Law pertains to existing records, and that §89(3) of that statute provides in part that an agency need not create a record in response to a request. If no list exists containing the information sought, an agency would not be required to prepare a list on your behalf.

Lastly, since you requested records involving complaints or investigations concerning a particular police officer, I point out that any such records likely are exempt from disclosure. Section 50-a of the Civil Rights Law states in relevant part that personnel records pertaining to a police officer that are "used to evaluate performance toward continued employment or promotion" are confidential and cannot be disclosed without the consent of the officer.

I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:jm

cc: Sgt. Richard Evangelista, Records Access Officer
Alexandra Sussman, Records Access Officer



STATE OF NEW YORK
DEPARTMENT OF STATE
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FUJL-AD-11518

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June 14, 1999

Executive Director

Robert J. Freeman

Ms. Estelle Levy



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

Dear Ms. Levy:

I have received your letter of May 10 as well as related correspondence. You indicated that neither a request for records of an agency of the City of New York nor your appeal were answered, and you raised issues involving the relationship between the City Parks Foundation and the New York City Department of Parks and Recreation..

In this regard, 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, having reviewed your requests, it is emphasized that the Freedom of Information Law pertains to existing records, and that §89(3) of that statute provides that an agency is not required to create a record in response to a request. Therefore, if, for example, there is no record that "substantiates" or describes the "legal basis" for certain actions, an agency would not be required to prepare new records containing the information sought.

Third, while the City Parks Foundation is a not-for-profit corporation whose status under the Freedom of Information Law has not been clearly determined, insofar as it performs functions for an agency of the City of New York, such as the Department of Parks and Recreation, the records maintained by the Foundation concerning those functions would, based on the judicial interpretation of the Freedom of Information Law, constitute Department records that fall within the coverage of that statute, even if the records are not in the physical possession of the Department.

As you are aware, §86(4) of the Freedom of Information Law defines the term "record" expansively to include:

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

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.

In a decision rendered by the Court of Appeals, the state's highest court, it was found that materials maintained by a not-for-profit corporation providing services for a branch of the State University that were kept on behalf of the University constituted "records" falling within 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)].

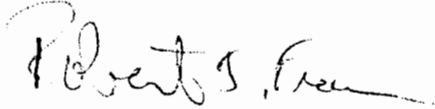
Ms. Estelle Levy
June 14, 1999
Page -3-

In sum, insofar as records sought are maintained for a city 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, you questioned whether the City Council could validly provide funding directly to the City Parks Foundation. That issue does not involve a matter within the advisory jurisdiction of the Committee on Open Government. Consequently, I cannot offer an opinion concerning that aspect of your inquiry.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in dark ink and is positioned above the printed name.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
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FOIL-AO-11519

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Alexander F. Treadwell

June 14, 1999

Executive Director

Robert J. Freeman

Mr. Ross Corbett
98-R-8421
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. Corbett:

I have received your letter in which you wrote that your requests for records pertaining to your case from Schenectady County Court have been ignored.

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:

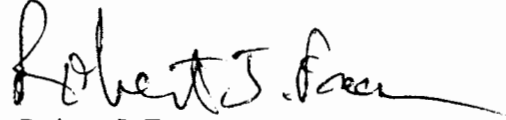
"the courts of the state, including any municipal or district court, whether or not of record."

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.

Mr. Ross Corbett
June 14, 1999
Page -2-

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

Sincerely,

A handwritten signature in black ink that reads "Robert J. Freeman". The signature is written in a cursive style with a long horizontal flourish at the end.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11520

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June 14, 1999

Executive Director

Robert J. Freeman

Mr. K. Williams
95-A-6745
Attica Correctional Facility
P.O. Box 149
Attica, NY 14011

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

Dear Mr. Williams:

I have received your letter of May 11. You wrote that your requests for records to a police department and a court relating to your arrest have not been answered. In this regard, I offer the following comments.

First, it is noted that the Freedom of Information Law is applicable to agency records, and that §86(3) 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

Mr. K. Williams

June 14, 1999

Page -2-

designation of a records access officer or the right to appeal a denial) would not ordinarily be applicable. It is suggested that you direct a request for court records to the clerk of the court, citing an applicable provision of law as the basis for the request.

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

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

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

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

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

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 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 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

Mr. K. Williams
June 14, 1999
Page -6-

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



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DEPARTMENT OF STATE
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FOIL-AU-11521

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June 14, 1999

Executive Director

Robert J. Freeman

Mr. Anthony Hooker
95-A-2605
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. Hooker:

I have received your letter of May 11. As I understand your inquiry, you have asked whether you have the right to gain access to a "cooperation agreement" between a prosecutor and a witness who testified against you. In this regard, I offer the following comments.

First, it is emphasized that the Freedom of Information Law pertains to existing records. If no written record of an agreement was prepared, the Freedom of Information Law would not apply.

Second, if such a record exists, I believe that it likely could 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 view, two of the grounds for denial would be pertinent.

Section 87(2)(e)(iii) authorizes and agency to withhold records compiled for law enforcement purposes when release of such records would "identify a confidential source or disclose confidential information relating to a criminal investigation." Additionally, §87(2)(f) permits an agency to withhold records when disclosure would "endanger the life or safety of any person."

Based on either of the exceptions cited above, it appears that a cooperation agreement, if it exists as a record, might properly be withheld.

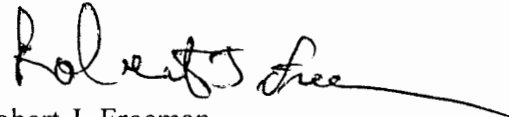
Mr. Anthony Hooker

June 14, 1999

Page -2-

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

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
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June 16, 1999

Executive Director

Robert J. Freeman

Mr. Harry A. Lathrop



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

Dear Mr. Lathrop:

I have received your letter of May 17. If I understand your questions correctly, you have asked whether an agency in receipt of your request made under the Freedom of Information Law has the right to send the request to another agency. Similarly, you questioned whether a representative of the second agency has the right to offer an opinion concerning your request.

In this regard, there is nothing in the Freedom of Information Law or any other provision of which I am aware that would generally prohibit one agency from transmitting a request for records to another agency. Further, it is common for a representative of the second agency to provide an opinion relating to the request to the first. Frequently, staff of the second agency has expertise in a particular area, or knowledge of facts or the impact of disclosure that may not be known to the first. In short, it is not uncommon or inappropriate in my view for the staff of one agency to confer with the staff of another in order to deal effectively with a request for records. I note, too, that many agencies have sent copies of requests to this office for the purpose of seeking advice and guidance.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm



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COMMITTEE ON OPEN GOVERNMENT

PPPL - AO - 250
FOIL - AO - 11523

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June 16, 1999

Executive Director

Robert J. Freeman

Ms. Lynne Nayman



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

Dear Ms. Nayman:

As you are aware, I have received your letter of May 19. In brief, you questioned certain practices of Child Protective Services, a unit of the New York State Office of Children and Family Services, in relation to the disclosure of records and the collection of certain records, particularly social security cards and birth certificates.

In this regard, I offer the following comments.

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

Relevant to your commentary 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."

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.

In short, the Freedom of Information Law does not govern access to the records to which you referred; rather, the ability to gain access and the time within which they may be disclosed is governed by statutes found in the Social Services Law.

Second, with respect to the collection of social security cards or numbers, pertinent is the federal Privacy Act (5 USC §552a). While that Act pertains generally to records maintained by federal agencies, provisions within the Act dealing with social security numbers apply to entities of state and local government as well. Section 7 of the Act states that:

"(a)(1) [I]t shall be unlawful for any Federal, State or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security number.

(2) the provision of paragraph (a) of this subsection shall not apply with respect to --

(A) any disclosure which is required by Federal Statute, or

(B) the disclosure of a social security number to any Federal, State, or local agency maintaining a system of records in existence and operating before January 1, 1975, if such disclosure was required under statute or regulation adopted prior to such date to verify the identity of an individual

(b) Any Federal, State, or local government agency which requests an individual to disclose his social security account number shall inform that individual whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it."

The quoted provision places limitations upon the collection and use of social security numbers by government, and unless "grandfathered in" under the Privacy Act, agencies cannot require the

Ms. Lynne Nayman

June 16, 1999

Page -3-

submission of social security numbers, except in conjunction with social security or other statutorily authorized purposes.

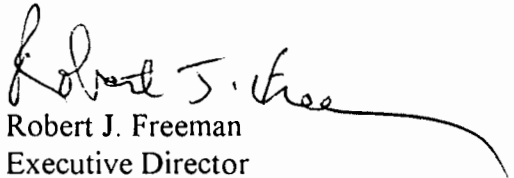
With regard to the collection of birth records, §94(1)(a) of the Personal Privacy Protection Law states that a state agency that maintains a system of records shall:

“...except when a data subject provides an agency with unsolicited personal information, maintain in its records only such personal information which is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or executive order, or to implement a program specifically authorized by law...”

As such, Child Protective Services may require the submission of birth records only if the acquisition of those records is “relevant and necessary” to accomplish a program authorized by law.

I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:jm

cc: James D. Cotter, Records Access Officer



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AU-11524

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June 16, 1999

Executive Director

Robert J. Freeman

Mr. Richard Linen
94-A-2328
Riverview Correctional Facility
P.O. Box 247
Ogdensburg, NY 13669

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

Dear Mr. Linen:

I have received your letter of May 13. You complained that Brunswick Toxicology, Inc. has failed to respond to your request for a toxicology report that it prepared.

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

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

Based on the foregoing, as a general matter, agencies are entities of state or local government. A private corporation would not be an "agency" or required to comply with the Freedom of Information Law.

Nevertheless, if the report was prepared for an agency, such as the Division of Parole or a law enforcement agency, I believe that it would constitute an agency record that falls within the coverage of the Freedom of Information Law. Section 86(4) of that statute defines the term "record" 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,

Mr. Richard Linen
June 16, 1999
Page -2-

including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

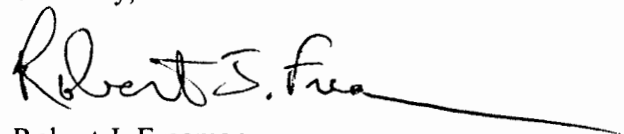
Based upon the language quoted above, documents need not be in the physical possession of an agency to constitute agency records; so long as they are produced, kept or filed for an agency, the courts have held they constitute "agency records", even if they are maintained apart from an agency's premises.

In a decision rendered by the Court of Appeals, the state's highest court, it was found that materials maintained by a not-for-profit corporation providing services for a branch of the State University that were kept on behalf of the University constituted "records" falling within 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 records sought are maintained for an agency, I believe that the agency would be required to direct the custodian of the records (i.e., Brunswick Toxicology, Inc.) 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. It is suggested, therefore, that you direct a request to the records access officer at the agency for which the report was prepared.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and extends across the width of the page.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AU-11525

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June 16, 1999

Executive Director

Robert J. Freeman

Mr. Harry A. Lathrop



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

Dear Mr. Lathrop:

I have received your correspondence of May 18. For reasons discussed in response to an earlier communication, I do not believe that it was improper for the Village of Marcellus to send a copy of your request for records to the Onondaga County Department of Personnel. However, in addition to that issue, the Village Clerk indicated that the fee for copies would include a charge of \$22.30 per hour for labor costs.

From my perspective, unless a statute, an act of the State Legislature, authorizes an agency to charge a fee for labor or personnel time, searching for records or charging more than twenty-five cents per photocopy for records up to nine by fourteen inches, no such fees may be assessed. In this instance, I know of no statute that would authorize the Village to do so.

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

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

Mr. Harry A. Lathrop

June 16, 1999

Page -2-

in situations in which an act of the State Legislature, a statute, so specifies."

As such, prior to October 15, 1982, a local law, an ordinance, or a regulation for instance, establishing a search fee or a fee in excess of twenty-five cents per photocopy or higher than the actual cost of reproduction was valid. However, under the amendment, only an act of the State Legislature, a statute, would in my view permit the assessment of a fee higher than twenty-five cents per photocopy, a fee that exceeds the actual cost of reproducing records that cannot be photocopied, or any other fee, such as a fee for search. In addition, it has been confirmed judicially that fees inconsistent with the Freedom of Information Law may be validly charged only when the authority to do so is conferred by a statute [see Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)].

The specific language of the Freedom of Information Law and the regulations promulgated by the Committee on Open Government indicate that, absent statutory authority, an agency may charge fees only for the reproduction of records. Section 87(1)(b) of the Freedom of Information Law states:

"Each agency shall promulgate rules and regulations in conformance with this article...and pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the availability of records and procedures to be followed, including, but not limited to...

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

The regulations promulgated by the Committee states in relevant part that:

"Except when a different fee is otherwise prescribed by statute:

(a) There shall be no fee charged for the following:

(1) inspection of records;

(2) search for records; or

(3) any certification pursuant to this Part" (21 NYCRR section 1401.8).

As such, the Committee's regulations specify that no fee may be charged for labor or personnel time, for inspection of or search for records, except as otherwise prescribed by statute.

Mr. Harry A. Lathrop

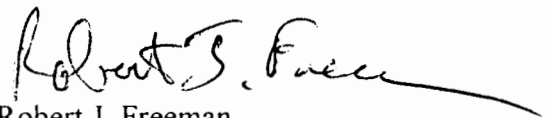
June 16, 1999

Page -3-

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

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and extends to the right with a long horizontal flourish.

Robert J. Freeman
Executive Director

RJF:jm

cc: Gary L. March, Village Clerk and Records Access Officer



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FJDL-AD-11526

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

June 16, 1999

Executive Director

Robert J. Freeman

Mr. Orlando Guaba
98-R-2190
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. Guaba:

I have received your letter of May 16. In brief, you complained with respect to delay in response to your request for a record 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 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,

Mr. Orlando Guaba
June 16, 1999
Page -2-

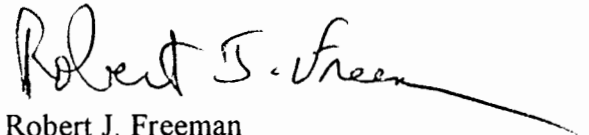
who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

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

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and extends to the right with a long horizontal stroke.

Robert J. Freeman
Executive Director

RJF:jm

cc: Sgt. Richard Evangelista, Records Access Officer

FOIL-AO-11527

From: Robert Freeman
To: [REDACTED]
Date: Wed, Jun 16, 1999 4:50 PM
Subject: Dear Mr. Noto:

Dear Mr. Noto:

I have received your email messages concerning the Freedom of Information Law.

In response to the first question, an agency is not required, in my opinion, to accept a "standing request." Technically, since the law pertains to existing records, an agency can neither grant nor deny access to what doesn't yet exist. If an agency wants to accept a prospective request, it may do so. Nevertheless, again, I do not believe that it would be required to do so. If an agency chooses not to honor an ongoing request, the applicant could simply submit requests periodically.

With respect to the second, the criminal history database is maintained by the Division of Criminal Justice Services, and it has been found judicially to be exempt from disclosure by statute and, therefore, beyond the scope of rights conferred by the Freedom of Information Law. As such, there is no publicly available central source of conviction records in New York.

To obtain more information on the subject, there is a discussion of the issue in the latest annual report of the Committee on Open Government. Also, you might review advisory opinions accessible through the index to FOI opinions under "criminal history records." The higher the number of the opinion, the more recent it is.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518 - Phone
(518) 474-1927 - Fax
Website - www.dos.state.ny.us/coog/coogwww.html



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11528

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Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

June 17, 1999

Executive Director

Robert J. Freeman

Mr. Jerry King
92-B-0370
Southport Correctional Facility
P.O. Box 2000
Pine City, NY 14871

Dear Mr. King:

I have received your letter of June 9 in which you requested certain records from this office.

In this regard, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee does not maintain custody or control of records generally. In short, I cannot provide the records of your interest, because this office does not possess them.

To seek records under the Freedom of Information Law, a request should be directed to the "records access officer" at the agency that maintains the records. The records access officer has the duty of coordinating the agency's response to requests. Since the records sought would appear to be maintained at a correctional facility, I note that the regulations of the Department of Correctional Services indicate that requests for records kept at a facility should be made to the facility superintendent or his designee. I point out, too, that §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, a request should contain sufficient detail to enable agency staff to locate and identify the records.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11529

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Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

June 17, 1999

Executive Director

Robert J. Freeman

Mr. Ross Corbett
98-R-8421
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. Corbett:

I have received your letter of May 7 in which you indicated that the Public Defender in Schenectady County has "ignored" your requests for records.

In this regard, I offer the following comments.

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

"any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental 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.

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.

Mr. Ross Corbett

June 17, 1999

Page -2-

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.

Second, if the office in question in question is an agency required to comply with the Freedom of Information Law, I note that that statute provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

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

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

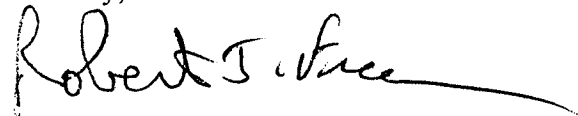
In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge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

Lastly, the Freedom of Information Law is silent with respect to the waiver of fees, and it has been held that an agency may charge its established fees for copies of records, even when the applicant is an indigent inmate [see Whitehead v. Morgenthau, 552 NYS2d 518 (1990)].

Mr. Ross Corbett
June 17, 1999
Page -3-

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink that reads "Robert J. Freeman". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FULL-AD - 11530

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Alexander F. Treadwell

June 21, 1999

Executive Director

Robert J. Freeman

Mr. Gennaro Cesaro
96-R-8076
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. Cesaro:

I have received a copy of your request for a copy of your pre-sentence report from the Mid-State Correctional Facility. For the following reason, I do not believe that the facility would ordinarily be required to disclose that record to you.

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

Mr. Gennaro Cesaro
June 21, 1999
Page -2-

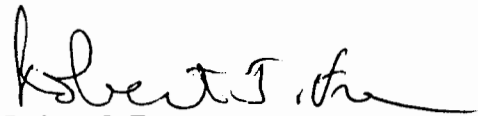
private agency receiving such material must retain it under the same conditions of confidentiality as apply to the probation department that made it available."

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,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman".

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11531

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

June 21, 1999

Executive Director

Robert J. Freeman

Mr. Laszlo Polyak



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

Dear Mr. Polyak:

I have received your letter of May 24, as well as the materials related to it. The issue involves the authority of the Village of Ravena to limit the time during which you may inspect Village records.

In this regard, based upon the regulations issued by the Committee on Open Government and an appellate court decision, you have the right to inspect the records during the entirety of the Village's regular business hours, unless the records are being used by Village officers or employees..

In this regard, by way of background, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee to promulgate regulations concerning the procedural implementation of the Law (see 21 NYCRR Part 1401). In turn, §87(1) requires agencies to adopt rules and regulations consistent with the Law and the Committee's regulations.

Section 1401.2 of the regulations, provides in relevant part that:

"(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so..."

Mr. Laszlo Polyak
June 21, 1999
Page -2-

Section 1401.4 of the regulations, entitled "Hours for public inspection", states that:

"(a) Each agency shall accept requests for public access to records and produce records during all hours they are regularly open for business."

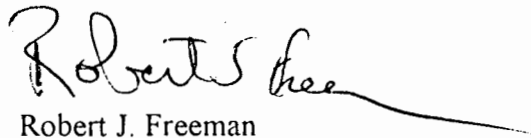
Relevant to your inquiry and the foregoing is a decision rendered by the Appellate Division. Among the issues was the validity of a one hour per day limitation regarding the time permitted to inspect records established by a village pursuant to regulation. The Court held that the village was required 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].

Based on the foregoing, once again, unless records are in use by Village officials, I believe that a member of the public may inspect records during regular business hours.

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

Omb - AO - 3038
FOI - AO - 11532

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June 21, 1999

Executive Director

Robert J. Freeman

Mr. Sam Pratt

[REDACTED]

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

Dear Mr. Pratt:

I have received your letter of May 25 in which you sought an opinion concerning two matters involving the City of Hudson.

First, it is your contention that the Common Council frequently conducts executive sessions without stating a reason, or by citing "personnel matters" as the basis for excluding the public from a meeting.

In this regard, as a general matter, the Open Meetings Law is based upon a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, unless there is a basis for entry into executive session. Moreover, the Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

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

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed, and the motion must be carried by majority vote of a public body's total membership before such a session may validly be held. The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session.

Although it is used frequently, the term "personnel" appears nowhere in the Open Meetings Law. 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 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 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)]

Next, you wrote that when you sought copies of minutes of meetings, reference was made to only one of many motions to enter into executive session, and the City Clerk indicated that "she is not present to keep minutes of the Council's 'informal meetings', explaining that if the Council enters executive session from an informal meeting, no record is made of the motion to do so."

Here I point out that the definition of "meeting" [see Open Meetings Law, §102(1)] has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be

characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. It is noted that the decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that so-called "work sessions", "agenda sessions" and similar gatherings held for the purpose of discussion, but without an intent to take action, fell outside the scope of the Open Meetings Law.

With respect to minutes of "informal meetings", as well as other meetings, the Open Meetings Law contains what might be viewed as minimum requirements concerning the contents of minutes. Specifically, §106 of the Open Meetings Law states that:

"1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.

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

3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

Based upon the foregoing, it is clear in my view that minutes need not consist of a verbatim account of what was said at a meeting; similarly, there is no requirement that minutes refer to every topic discussed or identify those who may have spoken. Nevertheless, one of the items that must be included in minutes of meetings is a motion, and I believe that motions for entry into executive session, including the votes of the members on those motions, must be recorded. When a public body discusses a matter in executive session but takes no action, there is no requirement that minutes of the executive session be prepared.

Lastly, you wrote that:

"The Mayor of Hudson, Richard Scalera, recently made tape recordings from his home of phone conversations with members of the board of the Hudson Development Corporation, of which he is also a member. These tapes were made without their knowledge. The tapes were played for the Common Council during an executive session; the Council then voted to let the public hear the tapes, though only

portions thereof were played. The Mayor has states that he made the tapes 'for personal use.'"

You have asked whether the tapes are "records" that must be made available under the Freedom of Information Law.

As you may be aware, §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)].

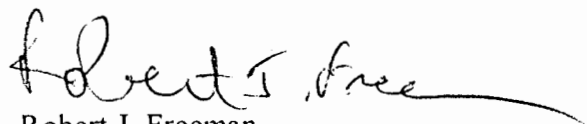
Based on the foregoing, I believe that the tape recordings at issue constitute "records" that fall within the coverage of the Freedom of Information Law.

Without knowledge of the contents of the tapes, I cannot advise as to the extent to which they must be disclosed. I note, however, 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 an effort to enhance compliance with and understanding of the Open Meetings and Freedom of Information Laws, copies of this opinion will be forwarded to the Common Council.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Common Council



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AU-11533

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June 17, 1999

Executive Director

Robert J. Freeman

Mr. John Wesley Folsom
97-B-0694
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. Folsom:

I have received your letter of May 18. You have asked whether the public defender who represented you must disclose a report about you to you 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.

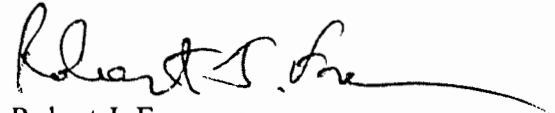
Section 716 of the County Law states in part that the "board of supervisors of any county may create an office of public defender, or may authorize a contract between its county and one or more other such counties to create an office of public defender to serve such counties." Therefore, a county office 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.

Mr. John Wesley Folsom
June 17, 1999
Page -2-

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.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AD-11534

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June 21, 1999

Executive Director

Robert J. Freeman

Mr. Robert Gagne



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

Dear Mr. Gagne:

I have received your letter of May 20. At the top of that correspondence, you referred to "Photos, audio tapes, CD-Roms, computer disks diskettes, tapes, etc." and asked a variety of questions in relation to those information storage media.

You asked initially whether an individual has the "right personally to inspect or listen to the originals of these" (emphasis yours). From my perspective, although an agency may offer an original document to an applicant for inspection and or copying, there may be no obligation to do so. In many instances, there are issues involving the custody, security and integrity of original documents, and in those circumstances, I believe that an agency could provide a copy. In that event, an applicant could seek a certification pursuant to §89(3) of the Freedom of Information Law in which the agency asserts that the copy made available is a true copy of the agency's record.

For similar reasons, an applicant may be permitted to make a copy of a record; however, an agency could in many situations determine to make the copy *via* its own staff or resources. I note that there is a judicial decision involving a request by an applicant to use his own photocopier. Since the agency was a small village with limited space and staff resources, the Court determined that the agency's rule prohibiting the use of photocopiers was reasonable [see Murtha v. Leonard, 620 NYS 2d 101 (1994), 210 Ad 2d 411]. If the facts were different, if the agency has adequate space and resources to permit the use of personal photocopiers, I would contend that a blanket ban on those devices by rule or practice would be unreasonable.

With respect to the use of software such as IBM Via Voice or Dragon Software, I believe that the issue would involve whether the agency has adequate space to an enable an individual to use the software in a way that is not disruptive to others.

Next, you asked whether an applicant has "the right to examine the agency's records showing what analyses, studies, or other writings detailing how it decided how much to charge for copies of the above" (emphasis yours). The only potential ground for denial with respect to the documentation in question would appear to be §87(2)(g). That provision permits an agency to withhold records that:

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

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

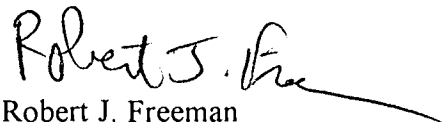
It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. If written documentation used to determine the charge for copies was developed outside a government agency, §87(2)(g) would not apply.

Lastly, while an agency may accept an oral request for a record, pursuant to §89(3) of the Freedom of Information Law, I believe that it may require that a request be made in writing, even if the request involves the agency's subject matter list.

I note that agencies generally are subject to schedules indicating minimum retention periods for various classes of records (see e.g., Arts and Cultural Affairs Law, §57.25 pertaining to local governments other than New York City). Since those schedules are generally more expansive than a subject matter list, it has been suggested that agencies adopt the retention schedules as their subject matter lists.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director



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COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11535

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June 22, 1999

Executive Director

Robert J. Freeman

E-Mail

TO: Susan L. Keitel, Executive Director, New York Library Association

RJF

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. Keitel:

I have received your e-mail concerning a request that appears to have been sent to numerous libraries in New York and elsewhere. In brief, the request involves complaints about "patrons accessing pornographic or sexually explicit material" on the Internet.

In this regard, while many "public libraries" are subject to the Freedom of Information Law, others so characterized may fall beyond the coverage of that statute.

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.

Based on §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

Ms. Susan L. Keitel

June 22, 1999

Page -2-

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, in French v. Board of Education, in which 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

Ms. Susan L. Keitel

June 22, 1999

Page -3-

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.

If a library is not subject to the Freedom of Information Law, there would be no obligation to disclose. On the other hand, if a library is "public" and a governmental entity, it would be obligated to respond to a request for 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.

Pertinent with respect to materials identifying patrons is §87(2)(a), which relates to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §4509 of the Civil Practice Law and Rules, which states that:

"Library records, which contain names or other personally identifying details regarding the users of public, free association, school, college and university libraries and library systems of this state, including but not limited to records related to the circulation of library materials, computer database searches, interlibrary loan transaction, reference queries, requests for photocopies of library materials, title reserve requests, or the use of audio-visual materials, films or records, shall be confidential and shall not be disclosed except that such records may be disclosed to the extent necessary for the proper operation of such library and shall be disclosed upon request or consent of the user or pursuant to subpoena, court order or where otherwise required by statute."

Based on the foregoing, insofar as library records identifying a user of a library's services, I believe that the record must be withheld.

Ms. Susan L. Keitel

June 22, 1999

Page -4-

Similarly, in a variety of contexts it has been held that identifying details pertaining to those who transmit complaints to government agencies may be withheld or deleted on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)]. When an agency receives a complaint, the identity of the complainant is largely irrelevant to the agency; what is relevant is whether or the extent to which the complaint has merit. Consequently, in most situations, identifying details pertaining to patrons or complainants, for example, would be deleted to protect those persons' privacy, while the substance of the complaints would be available.

Lastly, I point out that the Freedom of Information Law does not distinguish among applicants for records. Whether a person seeking records is a resident of New York or elsewhere is irrelevant to rights of access.

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

I hope that I have been of assistance.

RJF:jm



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FOIL-AO-11536

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June 23, 1999

Executive Director

Robert J. Freeman

Ms. Polly B. Nann

[REDACTED]

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

Dear Ms. Nann:

I have received your letter of May 26, as well as the materials attached to it. You have questioned "the extent to which individual education programs (IEP'S) must be disclosed under FOIL."

As I understand the matter, IEP's are prepared by school districts or BOCES regarding students with disabilities or who have a need for a specialized educational program. To provide information concerning the contents of typical IEP's, you enclosed copies prepared by several educational institutions. In one, the student's name, date of birth, address, telephone number and the name of his or her guardian were deleted; the remainder of the document was disclosed. In others, similar information was deleted, such as the names of the parents of the students. In one of IEP's, virtually all of the information, other than the form prior to being completed, was deleted.

From my perspective, only the personally identifiable information pertaining to a student may justifiably be withheld or deleted. In this regard, I offer the following comments.

First, 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."

Based on the foregoing, IEP's and related documentation maintained by a school district or BOCES would clearly constitute agency "records" that fall 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. 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.

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 the context of your inquiry, insofar as disclosure of the records in question would identify a student, 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 direction provided by FERPA and the regulations that define "personally identifiable information", 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.

Ms. Polly B. Nann

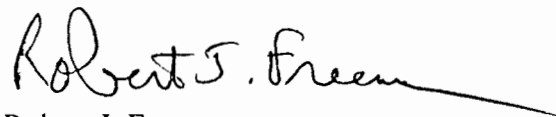
June 23, 1999

Page -3-

Having reviewed the samples of IEP's that you enclosed, it is my view that the deletion of unique identifiers, such as the names of students, their parents or guardians, dates of birth, addresses and home telephone numbers would be adequate to protect the students' privacy. I believe that the IEP from which all information, other than printed items on the form itself, was deleted represents a failure to comply with the Freedom of Information Law. In short, following the deletion of the kinds of unique identifiers described above, i.e., "personally identifiable information", the remainder of the completed form must, in my opinion, be disclosed.

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

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and has a long, thin horizontal line extending to the right from the end of the name.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3041
FOIL-AO-11537

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June 23, 1999

Executive Director

Robert J. Freeman

Ms. Robin Smith



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

Dear Ms. Smith:

As you may be aware, I have received your letter of June 16 and attempted without success to telephone you in an effort to offer clarification.

In brief, as I understand the matter, you and others have attempted to offer support to a teacher in the Liverpool School District who was suspended. You indicated that letters have been sent to the Board of Education with a request that they be read at open meetings. The Board has refused to do so and has failed to honor requests for the letters. Further, at a recent meeting, the Board, according to your letter, "informed the attendees that they, as a board in a public meeting, have the right to refuse to accept public comment during that time or at any time in the future, and also have the right to refuse to read letters specifically requested to be read 'in open session'."

In this regard, I offer the following comments.

First, there is nothing in any law of which I am aware that would require a public body, such as the Board of Education, to read letters aloud at an open meeting, even if the writer asks that a letter be read.

Second, 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

Ms. Robin Smith

June 23, 1999

Page -2-

answer questions and permit public participation, and many do so. When a public body does permit the public to speak, I believe that it should do so based upon reasonable rules that treat members of the public equally.

While public bodies have the right to adopt rules to govern their own proceedings (see e.g., Education Law, §1709), the courts have found in a variety of contexts that such rules must be reasonable. For example, although a board of education may "adopt by laws and rules for its government and operations", in a case in which a board's rule prohibited the use of tape recorders at its meetings, the Appellate Division found that the rule was unreasonable, stating that the authority to adopt rules "is not unbridled" and that "unreasonable rules will not be sanctioned" [see Mitchell v. Garden City Union Free School District, 113 AD 2d 924, 925 (1985)]. Similarly, if by rule, a public body chose to permit certain citizens to address it for ten minutes while permitting others to address it for three, or not at all, such a rule, in my view, would be unreasonable.

Lastly, with respect to the letters sent to the Board, I direct your attention to the Freedom of Information Law. That statute pertains to agency records, and §86(4) defines the term "record" expansively to mean:

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

In view of the foregoing, records sent to the District clearly constitute "records" that fall within the scope of the Freedom of Information Law.

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

Ordinarily, I believe that names or other personally identifying details relating to those who send letters to a school district in the kind of situation that you described could be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" pursuant to §87(2)(b) of the Freedom of Information Law. Similarly, the federal Family Educational Rights and Privacy Act (20 UCS §1232g) prohibits a school district from disclosing information identifiable to a student without the consent of a parent of the student. However, if the author of a letter, whether a parent or otherwise, consents to disclosure or asks that the letter be read or disclosed during a public forum, I do not believe that there would be a basis for withholding the letter when it is sought under the Freedom of Information Law.

Ms. Robin Smith

June 23, 1999

Page -3-

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

Sincerely,

A handwritten signature in black ink that reads "Robert J. Freeman". The signature is written in a cursive style with a long horizontal line extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FODL-A - 11538

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June 23, 1999

Executive Director

Robert J. Freeman

Ms. Mary K. Howe



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

Dear Ms. Howe:

I have received your letter of May 22, as well as the materials attached to it. You have sought guidance concerning a request for records of the Town of Brookhaven. Although the receipt of the request was acknowledged on March 31, the Town had neither granted nor denied your request as of the date of your letter to this office.

From my perspective, although the Town 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.

Ms. Mary K. Howe

June 23, 1999

Page -2-

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)."

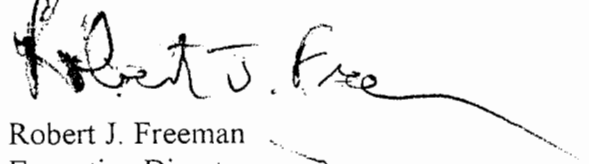
Based on the foregoing, I believe that your requests have been constructively denied and that you may appeal the denial to Stanley Allan pursuant to §89(4)(a). That provision states in relevant part that:

"...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."

Ms. Mary K. Howe
June 23, 1999
Page -3-

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink that reads "Robert J. Freeman". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Kathleen D. Longo
Stanley Allan



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-A) 11539

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Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

June 24, 1999

Executive Director

Robert J. Freeman

Mr. Daniel E. Boyer
94-A-7753
Hudson Correctional Facility
P.O. Box 576
Hudson, NY 12534-0576

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

Dear Mr. Boyer:

I have received your letter of May 24 in which you questioned the propriety of a denial of your request to the Division of Parole for a copy of a recommendation sent to that agency by the Rensselaer County District Attorney.

From my perspective, the denial was proper. In this regard, I offer the following comments.

First, several of the decisions that you cited pertain to the pre-sentence reports and related materials that are subject to §390.50 of the Criminal Procedure Law. Those records are exempted from disclosure to the public [see Freedom of Information Law, §87(2)(a) and can only be made available by the sentencing court.

Second, the principles expressed in the case of Mingo v. NYS Division of Parole [244 AD2d 781 (1997)] are applicable in the context of your request. The letter sent by the District Attorney to the Division of Parole constitutes "inter-agency material" that falls within the coverage of §87(2)(g) of the Freedom of Information Law. That provision permits an agency to withhold records that:

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

- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations; or

Mr. Daniel E. Boyer

June 24, 1999

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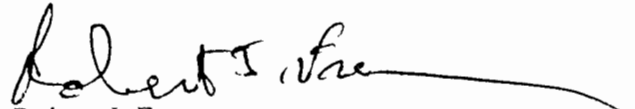
iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those 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, a recommendation transmitted by an official of one agency to an official of another falls within the scope of the exception cited above.

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

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: David Molik

From: Robert Freeman
To: Jayne Hessel
Date: 6/24/99 11:28AM
Subject: Re: Redaction question (police records)

Dear Ms. Hessel:

My guess is that the many of the deletions were inappropriately made. While the identities of witnesses in the kind of situation that you described might generally be withheld as an unwarranted invasion of privacy [see NY Freedom of Information Law, section 87(2)(b)] or because disclosure would endanger life or safety [section 87(2)(f)]. Nevertheless, the event occurred nearly 70 years ago, and the ability of the Department to meet the burden of proof in the event of a judicial challenge would be questionable.

There would be nothing personal about the name of the business owned by the deceased; in my view, that item would clearly be public.

With respect to the name of the garage where he was last seen, arguably, that kind of information might be withheld in relation to a current investigation on the ground that disclosure would interfere with the investigation [see section 87(2)(e)]. Nevertheless, again, I would conjecture that meeting the burden of defending a denial of access 70 years after the fact would be nearly impossible.

Lastly, by law, agencies can destroy or dispose of records based on schedules indicating minimum periods of retention. If the retention period was reached, the records could properly have been destroyed. In New York City, the schedules are developed by the Department of Records and Information Services pursuant to the City Charter.

If I can be of further assistance, please feel free to contact me.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY
(518) 474-2518 - Phone
(518) 474-1927 - Fax
Website - www.dos.state.ny.us/coog/coogwww.html



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COMMITTEE ON OPEN GOVERNMENT

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

June 29, 1999

Executive Director

Robert J. Freeman

Mr. Jim Martin

[REDACTED]

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

Dear Mr. Martin:

I have received your letter of May 26 and the materials attached to it. You have sought assistance in "resolving {a} conflict" relating to your efforts in obtaining information from your employer, Onondaga Community College.

Since you did not include a copy of your original request with the documentation that you forwarded, I am unaware of the exact terms of your request. Nevertheless, for purposes of clarification, it is important to note that the title of the Freedom of Information Law is somewhat misleading, for it does not deal with information *per se*, but rather with records. Similarly, it does not require that agencies furnish information in response to questions. In short, the Freedom of Information Law pertains to existing records, and §89(3) of the Law specifies that an agency is not required to create a record a record in response to a request.

One aspect of your request involved "how public funds are used", and I do not believe that such an attempt to elicit information would constitute a request made in accordance with the Freedom of Information Law. Rather than essentially asking a question, it is suggested that, in the future, you seek records (i.e., "I request records that include the current salaries of the following employees...").

Another involved "policies and procedures for the temporary appointment, promotion, transfer line, and title change for management positions". If I understand the correspondence correctly, the President of the College indicated on May 24 that no such documents exist. If that is so, there would be no records to which access could be granted or denied, and the Freedom of Information Law would not apply. As indicated in the correspondence, because a community college is a public institution, it must abide by applicable provisions of the Civil Service Law and rules promulgated by the Department of Civil Service. I would conjecture that a review of those provisions would enable you to learn of the procedures followed by and obligations imposed upon the College in relation to the areas of your concern

Mr. Jim Martin

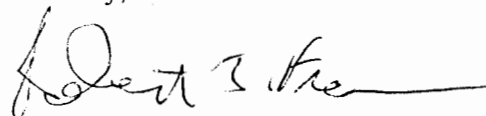
June 29, 1999

Page -2-

Lastly, you requested records indicating the "highest academic degree earned" by persons holding certain position. While the extent to which those items were disclosed is not entirely clear, insofar as they appear in records maintained by the College, I believe that they must be made available. In brief, it has been held that portions of records describing an individual's educational background are available, for that information is not so intimate that disclosure would constitute an "unwarranted invasion of personal privacy as envisioned by §87(2)(b) of the Freedom of Information Law [see Ruberti, Girvin & Ferlazzo v. NYS Division of State Police, 218 Ad2d 494 (1996)].

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Dr. Neal Raisman
Robert Jokajtys



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11542

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Joseph J. Seymour
Alexander F. Treadwell

June 29, 1999

Executive Director

Robert J. Freeman

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

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

Dear Mr. Sheehan:

I have received your letter of May 27 and the materials attached to it. You have questioned the validity of a fee of ten dollars established by local law by the Town of Cheektowaga for copies of "computer-generated police and accident reports." The Deputy Town Attorney indicated that the fee in question was adopted because "these documents are 'computer-generated' and not merely photocopies, [and] the Town Board established fees above \$0.25 per page for same."

From my perspective, it is likely that the local law authorizing the fee in question is inconsistent with the Freedom of Information Law. 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 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 AD2d 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 the reports in question 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.

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

Mr. John J. Sheehan

June 29, 1999

Page -3-

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,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman", followed by a long horizontal line extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Kevin G. Schenk



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-Ap-11543

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

June 29, 1999

Executive Director

Robert J. Freeman

Ms. Christine Brown

[REDACTED]

The staff of the Committee 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. Brown:

I have received your letter of May 27, as well as a variety of materials relating to the efforts of yourself and others concerning a construction project in the Greece Central School District.

One of the issues involves delays in the disclosure of records. In this regard, the Freedom of Information Law provides direction pertaining to the time and manner in which an agency must respond to requests. Specifically, §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 a case that described an experience that may be somewhat similar to yours, the court cited §89(3) of the Freedom of Information Law and wrote that:

Ms. Christine Brown

June 29, 1999

Page -2-

"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, it appears that some aspects of your request have been constructively denied and that you may appeal the denial 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."

The second issue involves the contention by the District that certain requests involve the analysis of information and the creation of new records. While I agree with that contention in some instances, it does not appear to be applicable in others. By way of background, as you are likely aware, 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 for information. Similarly, an agency is not required to provide "information" in response to questions; its obligation is to provide access to existing records to the extent required by law. Therefore, if, for instance, if a request is

made for the "total cost" of a certain function or project, and if the District does not maintain a record that contains a "total", it would not be obliged to review its records and compile a series of figures to prepare a total on behalf of an applicant. In one request made to the District, the applicant asked whether "all schools, teachers, and all children have the textbooks they need to meet our educational expectations." In my view, that kind of inquiry would not constitute a request for records under the Freedom of Information Law.

In a request that you made, you sought "Documents containing the cost of renovation thus far to the administrative floor and breakdown including but not limited to carpeting, drywall, painting, windows, ceiling, lights, electric." The District's appeals officer wrote that "[t]o obtain this information would require the district to analyze information, make the necessary calculations and create a new record." In short, I disagree with that response. You requested "documents"; you did not seek information in the nature of a total figure or attempt to elicit information by raising a question. If indeed there are "documents" containing information reflective of certain costs, the District would be required to disclose them; you could prepare totals on your own initiative.

Part of the issue may relate the requirement imposed by §89(3) of the Freedom of Information Law that an applicant must "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)].

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.

Ms. Christine Brown

June 29, 1999

Page -4-

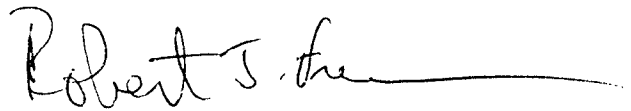
While I am unfamiliar with the recordkeeping systems of the District, to the extent that the records sought can be located with reasonable effort, I believe that the request would have met the requirement of reasonably describing the records. If the construction project is ongoing or recently completed, I would conjecture that one or more contractors were engaged to perform certain tasks, i.e., painting, supplying and installing flooring or windows, electrical work and the like. Assuming that District staff has the ability to locate records reflective of those expenditures, while it would not be required to prepare a total, I believe that it would be required to retrieve and disclose those records. Again, once in receipt of the records you could perform your own analysis or compilations.

In sum, insofar as your requests involve "documents" and District staff has the capacity to locate those records, staff, in my opinion, would be required to do so and disclose them in accordance with rights of access conferred by 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,

A handwritten signature in black ink that reads "Robert J. Freeman". The signature is written in a cursive style and is followed by a long horizontal line.

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Donald O. Nadolinski
Ruth Ranzenbach



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11544

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Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

June 30, 1999

Executive Director

Robert J. Freeman

Mr. Hernando Sandino
93-A-5430
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. Sandino:

I have received your letter of May 27 in which you referred to two requests for records, one to the Office of the Suffolk County District Attorney, and the other to the Suffolk County Police Department. Although the receipt of the former was acknowledged, you were informed that a response "may be delayed appreciably"; no approximate date of response was given. There was no response with respect to the latter.

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

Mr. Hernando Sandino

June 30, 1999

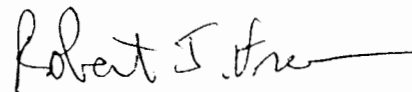
Page -2-

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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: Marion Tang, Assistant District Attorney
Records Access Officer, Suffolk County Police Department



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AJ - 11545

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Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

June 30, 1999

Executive Director

Robert J. Freeman

Mr. William Pitt
98-R-6473
Oneida Correctional Facility
P.O. Box 4580
Rome, NY 13442-4580

Dear Mr. Pitt:

I have received your letter June 17, which reached this office on June 29. Please note that the address of this office has changed. You have appealed a denial of access to a record by the Division of Parole.

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee is not empowered to determine appeals or compel an agency to grant or deny access to records. The provision pertaining to the right to appeal is §89(4)(a) of the Freedom of Information Law, which states in relevant part that:

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

For your information, the person designated by the Division to determine appeals is Terrence X. Tracy, Counsel to the Division.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AU-11546

Committee Members

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Walter Grunfeld
Robert L. King
Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

June 30, 1999

Executive Director

Robert J. Freeman

Mr. James McCoy
96-A-3717
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. McCoy:

I have received your letter of May 26. You have sought assistance in obtaining records relating to your representation under the assigned counsel program.

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; it would not apply to a private organization.

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

Mr. James McCoy

June 30, 1999

Page -2-

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 or private organization 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.

A county bar association is not, in my opinion, an "agency" subject to the Freedom of Information Law. However, if, for example, a bar association maintains records for a county, I believe that they would constitute county records. The Freedom of Information Law pertains to all agency records, and §86(4) of that statute defines the term "record" expansively to include:

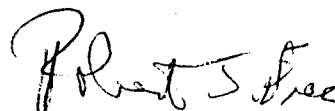
"any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings,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

Based upon the language quoted above, 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.

In sum, insofar as the records sought 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 you to the extent required by law.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AD 115411

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June 29, 1999

Executive Director

Robert J. Freeman

Mr. Jim Martin

[REDACTED]

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

Dear Mr. Martin:

I have received your letter of May 26 and the materials attached to it. You have sought assistance in "resolving {a} conflict" relating to your efforts in obtaining information from your employer, Onondaga Community College.

Since you did not include a copy of your original request with the documentation that you forwarded, I am unaware of the exact terms of your request. Nevertheless, for purposes of clarification, it is important to note that the title of the Freedom of Information Law is somewhat misleading, for it does not deal with information *per se*, but rather with records. Similarly, it does not require that agencies furnish information in response to questions. In short, the Freedom of Information Law pertains to existing records, and §89(3) of the Law specifies that an agency is not required to create a record a record in response to a request.

One aspect of your request involved "how public funds are used", and I do not believe that such an attempt to elicit information would constitute a request made in accordance with the Freedom of Information Law. Rather than essentially asking a question, it is suggested that, in the future, you seek records (i.e., "I request records that include the current salaries of the following employees...").

Another involved "policies and procedures for the temporary appointment, promotion, transfer line, and title change for management positions". If I understand the correspondence correctly, the President of the College indicated on May 24 that no such documents exist. If that is so, there would be no records to which access could be granted or denied, and the Freedom of Information Law would not apply. As indicated in the correspondence, because a community college is a public institution, it must abide by applicable provisions of the Civil Service Law and rules promulgated by the Department of Civil Service. I would conjecture that a review of those provisions would enable you to learn of the procedures followed by and obligations imposed upon the College in relation to the areas of your concern

Mr. Jim Martin

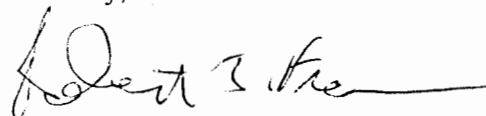
June 29, 1999

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Lastly, you requested records indicating the "highest academic degree earned" by persons holding certain position. While the extent to which those items were disclosed is not entirely clear, insofar as they appear in records maintained by the College, I believe that they must be made available. In brief, it has been held that portions of records describing an individual's educational background are available, for that information is not so intimate that disclosure would constitute an "unwarranted invasion of personal privacy as envisioned by §87(2)(b) of the Freedom of Information Law [see Ruberti, Girvin & Ferlazzo v. NYS Division of State Police, 218 Ad2d 494 (1996)].

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Dr. Neal Raisman
Robert Jokajtys



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11542

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David A. Schulz
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Alexander F. Treadwell

June 29, 1999

Executive Director

Robert J. Freeman

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

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

Dear Mr. Sheehan:

I have received your letter of May 27 and the materials attached to it. You have questioned the validity of a fee of ten dollars established by local law by the Town of Cheektowaga for copies of "computer-generated police and accident reports." The Deputy Town Attorney indicated that the fee in question was adopted because "these documents are 'computer-generated' and not merely photocopies, [and] the Town Board established fees above \$0.25 per page for same."

From my perspective, it is likely that the local law authorizing the fee in question is inconsistent with the Freedom of Information Law. 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 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 AD2d 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 the reports in question 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.

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

Mr. John J. Sheehan

June 29, 1999

Page -3-

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,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Kevin G. Schenk



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-Ap-11543

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Alexander F. Treadwell

June 29, 1999

Executive Director

Robert J. Freeman

Ms. Christine Brown

[Redacted]

The staff of the Committee 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. Brown:

I have received your letter of May 27, as well as a variety of materials relating to the efforts of yourself and others concerning a construction project in the Greece Central School District.

One of the issues involves delays in the disclosure of records. In this regard, the Freedom of Information Law provides direction pertaining to the time and manner in which an agency must respond to requests. Specifically, §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 a case that described an experience that may be somewhat similar to yours, the court cited §89(3) of the Freedom of Information Law and wrote that:

Ms. Christine Brown

June 29, 1999

Page -2-

"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, it appears that some aspects of your request have been constructively denied and that you may appeal the denial 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."

The second issue involves the contention by the District that certain requests involve the analysis of information and the creation of new records. While I agree with that contention in some instances, it does not appear to be applicable in others. By way of background, as you are likely aware, 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 for information. Similarly, an agency is not required to provide "information" in response to questions; its obligation is to provide access to existing records to the extent required by law. Therefore, if, for instance, if a request is

made for the "total cost" of a certain function or project, and if the District does not maintain a record that contains a "total", it would not be obliged to review its records and compile a series of figures to prepare a total on behalf of an applicant. In one request made to the District, the applicant asked whether "all schools, teachers, and all children have the textbooks they need to meet our educational expectations." In my view, that kind of inquiry would not constitute a request for records under the Freedom of Information Law.

In a request that you made, you sought "Documents containing the cost of renovation thus far to the administrative floor and breakdown including but not limited to carpeting, drywall, painting, windows, ceiling, lights, electric." The District's appeals officer wrote that "[t]o obtain this information would require the district to analyze information, make the necessary calculations and create a new record." In short, I disagree with that response. You requested "documents"; you did not seek information in the nature of a total figure or attempt to elicit information by raising a question. If indeed there are "documents" containing information reflective of certain costs, the District would be required to disclose them; you could prepare totals on your own initiative.

Part of the issue may relate the requirement imposed by §89(3) of the Freedom of Information Law that an applicant must "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)].

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.

Ms. Christine Brown

June 29, 1999

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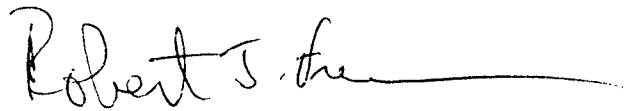
While I am unfamiliar with the recordkeeping systems of the District, to the extent that the records sought can be located with reasonable effort, I believe that the request would have met the requirement of reasonably describing the records. If the construction project is ongoing or recently completed, I would conjecture that one or more contractors were engaged to perform certain tasks, i.e., painting, supplying and installing flooring or windows, electrical work and the like. Assuming that District staff has the ability to locate records reflective of those expenditures, while it would not be required to prepare a total, I believe that it would be required to retrieve and disclose those records. Again, once in receipt of the records you could perform your own analysis or compilations.

In sum, insofar as your requests involve "documents" and District staff has the capacity to locate those records, staff, in my opinion, would be required to do so and disclose them in accordance with rights of access conferred by 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,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and extends across the width of the page.

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Donald O. Nadolinski
Ruth Ranzenbach



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11544

Committee Members

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

June 30, 1999

Executive Director

Robert J. Freeman

Mr. Hernando Sandino
93-A-5430
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. Sandino:

I have received your letter of May 27 in which you referred to two requests for records, one to the Office of the Suffolk County District Attorney, and the other to the Suffolk County Police Department. Although the receipt of the former was acknowledged, you were informed that a response "may be delayed appreciably"; no approximate date of response was given. There was no response with respect to the latter.

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

Mr. Hernando Sandino

June 30, 1999

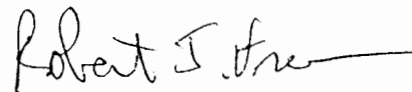
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"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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: Marion Tang, Assistant District Attorney
Records Access Officer, Suffolk County Police Department



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AJ - 11545

Committee Members

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Alexander F. Treadwell

June 30, 1999

Executive Director

Robert J. Freeman

Mr. William Pitt
98-R-6473
Oneida Correctional Facility
P.O. Box 4580
Rome, NY 13442-4580

Dear Mr. Pitt:

I have received your letter June 17, which reached this office on June 29. Please note that the address of this office has changed. You have appealed a denial of access to a record by the Division of Parole.

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee is not empowered to determine appeals or compel an agency to grant or deny access to records. The provision pertaining to the right to appeal is §89(4)(a) of the Freedom of Information Law, which states in relevant part that:

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

For your information, the person designated by the Division to determine appeals is Terrence X. Tracy, Counsel to the Division.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AU-11546

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June 30, 1999

Executive Director

Robert J. Freeman

Mr. James McCoy
96-A-3717
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. McCoy:

I have received your letter of May 26. You have sought assistance in obtaining records relating to your representation under the assigned counsel program.

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; it would not apply to a private organization.

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

Mr. James McCoy

June 30, 1999

Page -2-

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 or private organization 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.

A county bar association is not, in my opinion, an "agency" subject to the Freedom of Information Law. However, if, for example, a bar association maintains records for a county, I believe that they would constitute county records. The Freedom of Information Law pertains to all agency records, and §86(4) of that statute defines the term "record" expansively to include:

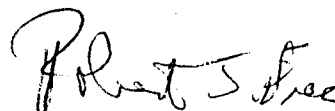
"any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings,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

Based upon the language quoted above, 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.

In sum, insofar as the records sought 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 you to the extent required by law.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL AD - 11547

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

July 1, 1999

Executive Director

Robert J. Freeman

Mr. David Cruz
96-R-1005
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. Cruz:

I have received your letter of May 27 in which you raised questions relating to the Freedom of Information Law.

You asked first whether "the Federal FOIA/PA [can] be used for State Agency, if the documentation in their possession is Federal in nature." In my view, the federal Freedom of Information and Privacy Acts pertain only to records maintained by federal agencies; records maintained by entities of state and local government in New York are subject to the New York Freedom of Information Law, irrespective of their origin and even if they are maintained pursuant to federal law [see Citizens for Alternatives to Animal Labs, Inc. v. Board of Trustees of the State University of New York, 92 NY2d 357 (1998)].

Second, unlike the federal Freedom of Information Act, there is no provision in the New York equivalent that pertains to fee waivers. Further, it has been held that an agency may charge its established fees, even when a request is made by indigent inmate [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-11548

Committee Members

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July 1, 1999

Executive Director

Robert J. Freeman

Mr. Melvin Bailey
93-A-2736
Greene Correctional Facility
P.O. Box 975
Coxsackie, NY 12051

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

Dear Mr. Bailey:

I have received your letter of June 1 in which you asked that this office "compel" the Rockland County District Attorney to provide you with free copies of various records that you consider to be germane to a federal court proceeding. It is your belief that the decision rendered by the Court of Appeals in Gould v. New York City Police Department [89 NY2d 267 (1996)] requires the disclosure of the records in question.

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. The Committee is not empowered to enforce that statute or to "compel" an agency to grant or deny access to records.

Second, the Freedom of Information Law is silent with respect to the waiver or reduction of fees for copies of records. It has been held that when records are requested under that statute, 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)].

Next, while the decision to which you referred rejected the contention by the New York City Police Department that certain records, "DD5's", which are also known as "complaint follow up reports", could be withheld in their entirety on the ground that they consist of "intra-agency" materials pursuant to §87(2)(g) of the Freedom of Information Law.

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.

The Court in Gould focused on the ground for denial cited by the Police Department. That provision enables an agency to withhold records that:

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

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

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

In its analysis of the matter, the decision states that:

"...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87(2)(g)]. 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)..."

"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 (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.

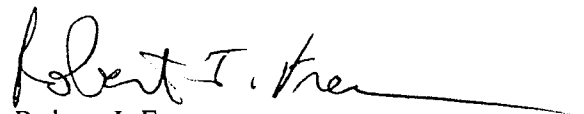
However, in the same decision, it was also found that:

"...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: Records Access Officer, Office of the Rockland County District Attorney



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-A-11549

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

July 2, 1999

Executive Director

Robert J. Freeman

Mr. Steven J. Romer
92-A-0519/9-2-16
Tappan 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. Romer:

I have received your letter of May 28 in which you questioned the propriety of a response to a request for records of the Office of the New York County District Attorney. The request involves communications transmitted by employees of that agency to the New York State Department of Correctional Services, the Division of Parole or the Board of Parole.

While I am unaware of the contents of the records sought, the provision cited by the Records Access Officer for the District Attorney is pertinent. 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 cited in the denial of your request, §87(2)(g), involves communications between agencies, such as the Office of the District Attorney and the state agencies to which you referred. 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

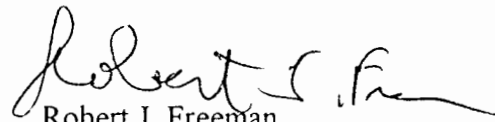
Mr. Steven J. Romer
July 2, 1999
Page -2-

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

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

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

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman".

Robert J. Freeman
Executive Director

RJF:jm

cc: Gary J. Galperin
Carmen A. Morales



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11550

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Alexander F. Treadwell

July 2, 1999

Executive Director

Robert J. Freeman

Mr. David Braxton
87-A-7832
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. Braxton:

I have received your letter of May 29 in which you sought guidance "on how [you] may obtain information contained, without discrimination, on 'The Five Percenters' within the Department of Correctional System, etc."

In this regard, it is unclear whether your interest involves obtaining records pertaining to particular individuals or those pertaining to the Five Percenters as a group. Nevertheless, in an effort to assist you I offer the following comments.

First, §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.

Second, 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. A request for records maintained at the Department's central offices in Albany may be directed to Mr. Mark Shepard, Records Access Officer.

Third, 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.

If you are seeking records concerning specific individuals, it is likely that such a request could be denied on the ground that disclosure would result in "an unwarranted invasion of personal privacy" in accordance with §87(2)(b) of the Freedom of Information Law.

If you are seeking records concerning the Five Percenters generally, several provisions may be relevant.

Section 87(2)(g) pertains to communications between and among government officials and enables an agency to deny access to records that:

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

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

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

Of possible significance is §87(2)(e), which authorizes an agency to withhold records that:

"are compiled for law enforcement purposes and which, if disclosed, would:

- i. interfere with law enforcement investigations or judicial proceedings;
- ii. deprive a person of a right to a fair trial or impartial adjudication;
- iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
- iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

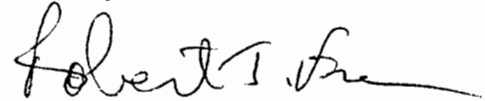
Only to the extent that the harmful effects of disclosure described in paragraphs in (i) through (iv) could §87(2)(e) properly be asserted.

Also potentially relevant is §87(2)(f), which permits an agency to withhold records insofar as disclosure "would endanger the life or safety of any person."

Mr. David Braxton
July 2, 1999
Page -3-

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman". The signature is fluid and cursive, with a long horizontal stroke at the end.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11551

Committee Members

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Alexander F. Treadwell

July 2, 1999

Executive Director

Robert J. Freeman

Mr. James Cruz
#03584-036
P.O. Box 1000
Lewisburg, PA 17837

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

Dear Mr. Cruz:

I have received your undated letter, which reached this office on June 3. You referred to an unanswered request for records maintained at the Rikers Island Correctional Facility and asked that this office obtain them for you.

In this regard, 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 obtain records on behalf of an individual or to compel an agency to grant or deny access to records.

Second, I note that each agency is required to designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests, and requests should generally be made to that person. While I believe that the person in receipt of your request should have responded in a manner consistent with law or forwarded the request to the records access officer, it is suggested that you resubmit your request to Thomas Antenen, Records Access Officer, Department of Correction, 60 Hudson Street, 6th Floor, New York, NY 10013.

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

Mr. James Cruz

July 2, 1999

Page -2-

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

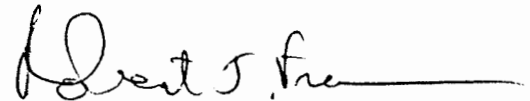
If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively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

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

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

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Thomas Antenen



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL - AD - 11552

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Alexander F. Treadwell

July 2, 1999

Executive Director

Robert J. Freeman

[REDACTED]
[REDACTED]
Mid-Hudson Forensic Psychiatric Center
P.O. Box 158
New Hampton, NY 10958

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

Dear Mr. Vallen:

I have received your letter of May 28 in which you raised a series of questions concerning the Freedom of Information Law and access to certain records.

First, you asked whether New York is a "class A state", and whether a failure by an agency to respond to a request would enable you "take them to court of claims in A tort action." I am unfamiliar with the term "class A state." However, a failure to respond to a request would not give you the ability to initiate an action in the Court of Claims. However, I note that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests for records. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

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

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

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

Second, you asked whether newspapers are "exempt from FOIA". The Freedom of Information Law pertains to agencies, and §86(3) of that statute defines the term "agency" to mean:

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

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

However, §33.16 of the Mental Hygiene Law pertains specifically to access to mental health records by the subjects of the records. Under that statute, a patient may direct a request for inspection or copies of his or her mental health records to the "facility", as that term is defined in the Mental Hygiene Law, which maintains the records.

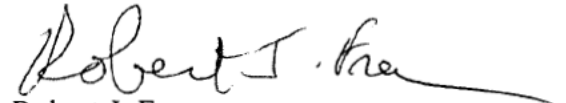
It is my understanding that mental health "satellite units" that operate within state correctional facilities are such "facilities" and are operated by the New York State Office of Mental Health. Further, I have been advised that requests by inmates for records of such "satellite units" pertaining to themselves may be directed to the Director of Sentenced Services, Bureau of Forensic Services, Office of Mental Health, 44 Holland Avenue, Albany, NY 12229. It is noted that under §33.16, there are certain limitations on rights of access.

[REDACTED]
July 2, 1999

Page -3-

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and has a long, sweeping horizontal line extending to the right.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FUEL-AO-11553

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Alexander F. Treadwell

July 2, 1999

Executive Director

Robert J. Freeman

Mr. Paul Hynard
97-A-0015
Watertown Correctional Facility
F-2 Building
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. Hynard:

I have received your letter of May 29. You referred to a response of May 18 to your earlier inquiry and suggested that my interpretation of the matter was inaccurate and indicated that the records of your interest do not involve the conduct of correction officers. Rather, you wrote that you would like to gain access to an incident or similar report detailing injuries that you incurred when you were assaulted by inmates on separate occasions in 1996.

If your description of the records is accurate, two provisions of the Freedom of Information Law would appear to be pertinent.

As you may be aware, 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.

A report prepared by an agency employee would fall within §87(2)(g), which permits an agency to withhold records that:

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

- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;

Mr. Paul Hynard

July 2, 1999

Page -2-

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

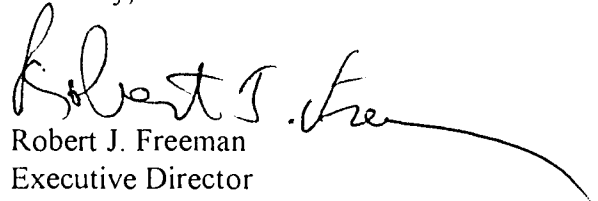
It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those 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, opinions or recommendations made by an agency employee could be withheld, but factual information contained within any such report would be available, unless a different ground for denial could be invoked.

The other ground for denial of possible significance, §87(2)(b), authorizes an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." While those portions of a report pertaining to you could not be withheld on that basis, details pertaining to persons other than yourself, such as medical information, might justifiably be denied.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Derrick J. Robinson



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AD-11554

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Alan Jay Gerson
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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

July 2, 1999

Executive Director

Robert J. Freeman

Ms. Theresa D'Antonio Krumm
c/o Orangetown
26 Orangeburg road
Orangeburg, NY 10962

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

Dear Ms. Krumm:

I have received your letter of June 3 in which you questioned the "legality of charging fees for copies of documents pursuant to FOIL which is discriminatory." You wrote that the Town of Orangetown "does not charge fees for certain individuals and there is no written policy or resolution exempting anyone from paying the fee."

In this regard, as a general matter, the Freedom of Information Law does not distinguish among applicants for records, and it has been held that when records are accessible under the Freedom of Information Law, they should be made equally available to any person, without regard to one's status or interest [see Burke v. Yudelson, 51 AD2d 673 (1976)]. Therefore, I do not believe that an agency may ordinarily charge different fees to different people for copies of records sought under the Freedom of Information Law.

Notwithstanding the foregoing, I believe that it would be reasonable in some instances to essentially waive the fee for copying. For example, if a member of the news media is given a copy of a record for the purpose of disseminating information in a newspaper to the public, it may be in the public interest make the record available to that person in order to enhance the ability of the public to be informed. In that kind of situation, providing a copy of a record may be beneficial to the municipality and its residents.

Having discussed the matter with the Town Clerk, I was informed that records may be made available at no charge to the news media, not pursuant to or in conjunction with a request made under the Freedom of Information Law, but rather for the purpose of disseminating information to the public in a quick and efficient manner. In my view, making records available at no charge in that kind of context is reasonable.

Ms. Theresa D'Antonio Krumm
July 2, 1999
Page -2-

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal line extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Charlotte Madigan, Town Clerk



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

707C-10-11555

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July 6, 1999

Executive Director

Robert J. Freeman

Ms. Elena Ruth Sassower
Center for Judicial Accountability, Inc.
P.O. Box 69
Gedney Station
White Plains, NY 10605-0069

The staff of the Committee 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. Sassower:

I have received a copy of your letter of June 2 addressed to the Commission on Judicial Conduct in which you raised issues concerning the extent to which the Commission must comply with the Freedom of Information Law, particularly with respect to the preparation of a "subject matter list" pursuant to 87(3)(c) of that statute. At the end of that letter, you indicated that a copy was being sent to me in which you asked that this office:

"...ensure that the Commission's current 'subject matter list', as well as its promulgated rules, 22 NYCRR §7001.1 *et seq.*, are in conformity with Article 6 of the Public Officers Law and its own Rule 1401.6 and, additionally, that the Committee render an advisory opinion as to whether the aforementioned 'records', to the extent they are maintained by the Commission, should, as [you] believe, be categorized by it in a 'subject matter list' conforming to the requirements of Article 6 and Rule 1401.6."

In this regard, first, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law; the Committee has no power to "ensure" that an agency complies with law.

Second, as you are aware, §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.

Since the receipt of your correspondence, I have received a copies of a letter addressed to you on June 8 by Gerald Stern, Administrator and Counsel to the Commission on Judicial Conduct, and the Commission's "Index of Files". Based on my understanding of the Commissions's functions, the Index of Files appears to serve as an adequate subject matter list that fulfills the requirements of §87(3) of the Freedom of Information Law.

While Mr. Stern, acting on behalf of the Commission, appears to have taken action in a manner consistent with the spirit of the Freedom of Information Law, I emphasize that rights of access conferred by that statute do not, in my opinion, extend to records of the Commission. As suggested in an opinion addressed to you on May 24, 1995, pertinent to the Commission's records is §87(2)(a) of the Freedom of Information Law concerning records that "are specifically exempted from disclosure by state or federal statute." Section 45 of the Judiciary Law pertains to the Commission on Judicial Conduct and provides in relevant part that "...all complaints, correspondence, commission proceedings and transcripts thereof, other papers and data and records of the Commission shall be confidential and shall not be made available to any person except pursuant to article forty-four of this article." Due to the breadth of the language of §45, any rights of access to the Commission's records would be conferred by §44 of the Judiciary Law rather than the Freedom of Information Law. As such, although Mr. Stern has prepared a subject matter list in a manner consistent with the Freedom of Information Law, determining the extent to which the Commission's records must be disclosed involves the interpretation of §44 of the Judiciary Law and is outside the jurisdiction of this office.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Gerald Stern



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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Alexander F. Treadwell

Executive Director

Robert J. Freeman

July 7, 1999

Ms. Margaret L. Meadows

[REDACTED]

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

Dear Ms. Meadows:

I have received your letter of June 5 in which you sought assistance in attempting to engage in "genealogical research" concerning your grandfather, who died in Brooklyn in 1968. You indicated that your grandfather's family is now deceased, with the exception of your mother and her children.

In this regard, although the Freedom of Information Law generally governs rights of access to government records, in this instance, a different statute determines those rights. Specifically, §4174(1)(a) of the Public Health Law, which pertains to access to death records, states that such records are available:

"(1) when a documented medical need has been demonstrated, (2) when a documented need to establish a legal right or claim has been demonstrated, (3) when needed for medical or scientific research approved by the commissioner, (4) when needed for statistical or epidemiological purposes approved by the commissioner, (5) upon specific request by municipal, state or federal agencies for statistical or official purposes, (6) upon specific request of the spouse, children, or parents of the deceased or the lawful representative of such persons, or (7) pursuant to the order of a court of competent jurisdiction on a showing of necessity; except no certified copy or certified transcript of a death record shall be subject to disclosure under article six of the public officers law..."

Article six of the Public Officers Law is the Freedom of Information Law. As such, based upon the provision quoted above, death records, when accessible, are available only under the circumstances

Ms. Margaret L. Meadows

July 7, 1999

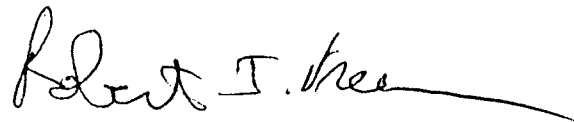
Page - 2 -

prescribed in the Public Health Law. One of those circumstances pertains to a specific request by the children of a deceased. As such, I believe that your mother, the child of the deceased, would have the right to gain access to the death record at issue.

Since Brooklyn is part of New York City, a request for the record of your interest should be directed to the Bureau of Vital Records, New York City Health Department, 125 Worth Street, New York, NY 10013. Any such request should include proof of the relationship with the deceased. In addition, having contacted that office on your behalf, I was informed that the fee for a copy is fifteen dollars.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:tt



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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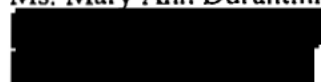
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Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

July 7, 1999

Ms. Mary Ann Durantini



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

Dear Ms. Durantini:

I have received your letter of June 2, as well as the materials attached to it. You have sought an opinion concerning various events and practices relating to the implementation of the Open Meetings Law by the Board of Education and Superintendent of the East Syracuse-Minoa Central School District.

You referred initially to "an unposted meeting [held] solely to go into Executive Session and discuss the case of a Board member accused of threatening a coach." In this regard, even if the only topic to be considered could validly have been discussed during an executive session, I believe that the Board was required to provide notice in accordance with §104 of the Open Meetings Law. That provision states that:

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

Stated differently, if a meeting is scheduled at least a week in advance, notice of the time and place must be given to the news media and to the public by means of posting in one or more designated public locations, not less than seventy-two hours prior to the meeting. If a meeting is scheduled less than a week in advance, again, notice of the time and place must be given to the news media and posted in the same manner as described above, "to the extent practicable", at a reasonable time prior to the meeting. 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.

It is unclear on the basis of the materials whether the Board voted during the executive session referenced above. Here I point out that, as general rule, a public body may take action during a properly convened executive session [see Open Meetings Law, §105(1)]. In the case of most public bodies, if action is taken during an executive session, minutes reflective of the action, the date and the vote must be recorded in minutes pursuant to §106(2) of the Law. If no action is taken, there is no requirement that minutes of the executive session be prepared. Various interpretations of the Education Law, §1708(3), however, indicate that, except in situations in which action during a closed session is permitted or required by statute, a school board cannot take action during an executive session [see United Teachers of Northport v. Northport Union Free School District, 50 AD 2d 897 (1975); Kursch et al. v. Board of Education, Union Free School District #1, Town of North Hempstead, Nassau County, 7 AD 2d 922 (1959); Sanna v. Lindenhurst, 107 Misc. 2d 267, modified 85 AD 2d 157, aff'd 58 NY 2d 626 (1982)]. Stated differently, based upon judicial interpretations of the Education Law, a school board generally cannot vote during an executive session, except in rare circumstances in which a statute permits or requires such a vote. In my view, based on its nature, the action should have been taken in public.

I note that in an "administrative memorandum" including agenda items for a meeting, an executive session was scheduled to discuss "personnel." As you may be aware, the phrase "executive session" is defined in §102(3) of the Open Meetings Law to mean a portion of an open meeting during which the public may be excluded. As such, an executive session is not separate and distinct from a meeting, but rather is a portion of an open meeting. The Law also contains a procedure that must be accomplished during an open meeting before an executive session may be held. Specifically, §105(1) states in relevant part that:

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

Based on the foregoing, it has been consistently advised that a public body, in a technical sense, cannot schedule or conduct an executive session in advance of a meeting, because a vote to enter into an executive session must be taken at an open meeting during which the executive session is held. In a decision involving the propriety of scheduling executive sessions prior to meetings, it was held that:

"The respondent Board prepared an agenda for each of the five designated regularly scheduled meetings in advance of the time that those meetings were to be held. Each agenda listed 'executive session' as an item of business to be undertaken at the meeting. The petitioner claims that this procedure violates the Open Meetings Law because under the provisions of Public Officers Law section 100[1] provides that a public body cannot schedule an executive session in advance of the open meeting. Section 100[1] provides that a public body may conduct an executive session only for certain enumerated purposes after a majority vote of the total membership taken at an open meeting has approved a motion to enter into such a session. Based upon this, it is apparent that petitioner is technically correct in asserting that the respondent cannot decide to enter into an executive session or schedule such a session in advance of a proper vote for the same at an open meeting" [Doolittle, Matter of v. Board of Education, Sup. Cty., Chemung Cty., July 21, 1981; note: the Open Meetings Law has been renumbered and §100 is now §105].

For the reasons expressed in the preceding commentary, a public body cannot in my view schedule an executive session in advance of a meeting. In short, because a vote to enter into an executive session must be made and carried by a majority vote of the total membership during an open meeting, technically, it cannot be known in advance of that vote that the motion will indeed be approved. However, as an alternative method of achieving the desired result that would comply with the letter of the law, rather than scheduling an executive session, the Superintendent or the Board on its agenda or notice of a meeting could refer to or schedule a motion to enter into executive session to discuss certain subjects.

Further, throughout the materials and your comments, the term "personnel" is used or cited frequently. In this regard, the term "personnel" does not appear in the Open Meetings Law, and that law does not forbid a public body from discussing personnel issues in public. Moreover, there are many personnel related issues that must be discussed in public. In short, I believe that the term is overused and misleading.

By way of background, the language of the so-called "personnel" exception, §105(1)(f) of the Open Meetings Law, is limited and precise. In terms of legislative history, as originally enacted, the provision in question permitted a public body to enter into an executive session to discuss:

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

Under the language quoted above, public bodies often convened executive sessions to discuss matters that dealt with "personnel" generally, tangentially, or in relation to policy concerns. However, the

Committee consistently advised that the provision was intended largely to protect privacy and not to shield matters of policy under the guise of privacy.

To attempt to clarify the Law, the Committee recommended a series of amendments to the Open Meetings Law, several of which became effective on October 1, 1979. The recommendation made by the Committee regarding §105(1)(f) was enacted and states that a public body may enter into an executive session to discuss:

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

Due to the insertion of the term "particular" in §105(1)(f), I believe that a discussion of "personnel" may be considered in an executive session only when the subject involves a particular person or persons, and only when at least one of the topics listed in §105(1)(f) is considered.

When issues involve the budget, it is possible that "personnel" may be impacted. However, those issues typically involve resources, needs and the allocation of public monies, rather than the performance of a particular employee. When that is so, even though the issue might involve personnel, there would be no basis for entry into executive session. If the issue pertains to the creation, retention or elimination of a position, again, the matter should be discussed in public, for it would not involve a particular person in terms of his or her performance, but rather the need or ability to carry out a certain function or meet a certain need.

Similarly, discussions regarding the election of officers generally do not fall within any of the grounds for entry into executive session. 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 be applicable in conjunction with deliberations involving the selection of school board officers. In short, while "matters leading to" certain actions relating to specific persons may be discussed during executive sessions, matters leading to the election of officers is not ordinarily among them.

Because the use of the term "personnel" is imprecise, 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.

Further, 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)]

It is emphasized that there is no provision of law that generally requires personnel records be kept confidential or that discussions involving personnel be considered only in executive session or kept private. 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, the state's highest court, 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)].

Even when information might have been obtained during an executive session properly held or from records marked "confidential", I note that the term "confidential" in my view has a narrow and precise technical meaning. For records or information to be validly characterized as confidential, I believe that such a claim must be based upon a statute that specifically confers or requires confidentiality.

For instance, if a discussion by a board of education concerns a record pertaining to a particular student (i.e., in the case of consideration of disciplinary action, an educational program, an award, etc.), the discussion would have to occur in private and the record would have to be withheld insofar as public discussion or disclosure would identify the student. As you may be aware, the Family Educational Rights and Privacy Act (20 USC §1232g) generally prohibits an educational agency from disclosing education records or information derived from those records that are identifiable to a student, unless the parents of the student consent to disclosure. In the context of the Open Meetings Law, a discussion concerning a student would constitute a matter made confidential by federal law and would be exempted from the coverage of that statute [see Open Meetings Law, §108(3)]. In the context of the Freedom of Information Law, an education record would be specifically exempted from disclosure by statute in accordance with §87(2)(a). In both contexts, I believe that a board of education, its members and school district employees would be prohibited from disclosing, because a statute requires confidentiality. Again, however, no statute of which I am aware would confer or require confidentiality with respect to the matters described in your correspondence.

In a case in which the issue was whether discussions occurring during an executive session held by a school board could be considered "privileged", it was held that "there is no statutory provision that describes the matter dealt with at such a session as confidential or which in any way restricts the participants from disclosing what took place" (Runyon v. Board of Education, West Hempstead Union Free School District No. 27, Supreme Court, Nassau County, January 29, 1987).

While there may be no prohibition against disclosure of the information acquired during executive sessions or records that could be withheld, the foregoing is not intended to suggest such disclosures would be uniformly appropriate or ethical. Obviously, the purpose of an executive session is to enable members of public bodies to deliberate, to speak freely and to develop strategies in situations in which some degree of secrecy is permitted. Similarly, the grounds for withholding records under the Freedom of Information Law relate in most instances to the ability to prevent some sort of harm. In both cases, inappropriate disclosures could work against the interests of a public body as a whole and the public generally.

Also on the subject of "personnel", you wrote that the Superintendent:

"...refused to let residents speak or ask questions regarding the recent budget vote and Board member election. He, however, stood up to defend a Board member by name who sent out re-election campaign material to the parents of Special Education students in the district (see enclosed). Following the completion of the Board's regular business, the Board went into executive session to discuss 'personnel' issues that only certain Board members were previously informed of. During the executive session, Dr. Afton made Board members leave the session if any of the topics discussed involved that particular Board member or a spouse. This pertained to three Board members that night and the members have not been informed of what took place or was decided in their absence."

In conjunction with the foregoing, first, §105(2) of the Open Meetings Law states that:

"Attendance at an executive session shall be permitted to any member of the public body and any other persons authorized by the public body."

Based on the foregoing, the Superintendent would have had no authority to have "made Board members leave the session"; on the contrary, every member of the Board has the right to attend every executive session.

Second, while 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 public participation. Consequently, by means of example, if a public body does not want to answer questions or permit the public to speak or otherwise participate at its meetings, I do not believe that it would be obliged to do so. On the other hand, a public body may choose to answer questions and permit public participation, and many do so. When a public body does permit the public to speak, I believe that it should do so based upon reasonable rules that treat members of the public equally.

Although public bodies have the right to adopt rules to govern their own proceedings (see e.g., Education Law, §1709), the courts have found in a variety of contexts that such rules must be reasonable. For example, although a board of education may "adopt by laws and rules for its government and operations", in a case in which a board's rule prohibited the use of tape recorders at its meetings, the Appellate Division found that the rule was unreasonable, stating that the authority to adopt rules "is not unbridled" and that "unreasonable rules will not be sanctioned" [see Mitchell v. Garden City Union Free School District, 113 AD 2d 924, 925 (1985)]. Similarly, if by rule, a public body chose to permit certain citizens to address it for ten minutes while permitting others to address it for three, or not at all, such a rule, in my view, would be unreasonable.

With regard to the information that you offered, there are federal court decisions indicating that if commentary is permitted within a certain subject area, negative commentary in the same area cannot be prohibited.

Ms. Mary Ann Durantini

July 7, 1999

Page - 8 -

It has been held by the United States Supreme Court that a school board meeting in which the public may speak is a "limited" public forum, and that limited public fora involve "public property which the State has opened for use by the public as a place for expressive activity" [Perry Education Association v. Perry Local Educators' Association, 460 US 37, 103. S.Ct. 954 (1939); also see Baca v. Moreno Valley Unified School District, 936 F. Supp. 719 (1996)]. In Baca, a federal court invalidated a bylaw that "allows expression of two points of view (laudatory and neutral) while prohibiting a different point of view (negatively critical) on a particular subject matter (District employees' conduct or performance)" (id., 730). That prohibition "engenders discussion artificially geared toward praising (and maintaining) the status quo, thereby foreclosing meaningful public dialogue and ultimately, dynamic political change" [Leventhal v. Vista Unified School District, 973 F.Supp. 951, 960 (1997)]. In a decision rendered by the United States District Court, Eastern District of New York (1997 WL588876 E.D.N.Y.), Schuloff, v. Murphy, it was stated that:

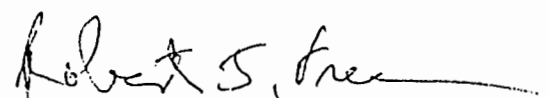
"In a traditional public forum, like a street or park, the government may enforce a content-based exclusion only if it is necessary to serve a compelling state interest and is narrowly drawn to achieve that end. Perry Educ. Ass'n., 460 U.S. at 45. A designated or 'limited' public forum is public property 'that the state has opened for use by the public as a place for expressive activity.' Id. So long as the government retains the facility open for speech, it is bound by the same standards that apply to a traditional public forum. Thus, any content-based prohibition must be narrowly drawn to effectuate a compelling state interest. Id. at 46."

The court in Schuloff determined that a "compelling state interest" involved the ability to protect students' privacy in an effort to comply with the Family Educational Rights Privacy Act, and that expressions of opinions concerning "the shortcomings" of a law school professor could not be restrained.

In short, if the Superintendent "defends" a Board member or employee during an open meeting, based on the decisions cited above, I do not believe that there can be a valid restriction on comments, whether neutral, positive or negative, regarding the same or other Board members or employees.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education

Dennis Afton



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL AC-11559

Committee Members

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Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

July 7, 1999

Mr. Tom Kackmeister

[REDACTED]

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

Dear Mr. Kackmeister:

I have received your letter of June 7 and the materials attached to it. You have sought guidance concerning your efforts in obtaining information from the Greece Central School District.

Having reviewed your requests, it appears that you misunderstand the Freedom of Information Law. I point out that the title of that statute may be somewhat misleading, for it is not a vehicle that requires agencies to provide information per se; rather, it requires agencies to disclose records to the extent provided by law. As such, while agency officials may choose to answer questions or to provide information by responding to questions, those steps would represent actions beyond the scope of the requirements of the Freedom of Information Law. Moreover, the Freedom of Information pertains to existing records. Section 89(3) of that statute states in part that an agency need not create a record in response to a request.

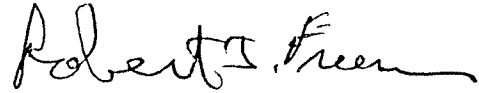
Therefore, District officials in my view would not be obliged to provide the information sought by answering questions or preparing new records in an effort to be responsive. For example, instead of asking "What's the total cost to renovate the board room", because there may be no record indicating a total cost, you might request records reflective of expenses incurred to renovate the board room.

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

Mr. Tom Kackmeister
July 7, 1999
Page - 2 -

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

Sincerely,

A handwritten signature in black ink that reads "Robert J. Freeman". The signature is written in a cursive style with a long horizontal flourish at the end.

Robert J. Freeman
Executive Director

RJF:tt

cc: Steve Walts
Don Nadolinski
Ruth Ranzenbach
Joe Doran



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

7070-AO-11560

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Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

July 9, 1999

Executive Director

Robert J. Freeman

Ms. Victoria Szerko

[REDACTED]

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

Dear Ms. Szerko:

I have received your letter of June 9 in which you sought guidance concerning resistance on the part of the Village of Fleischmanns in making records available to you for inspection and copying.

The record at issue is the book containing assessment information, and you expressed interest in having copies of several pages. The Mayor indicated that you could not use the copy machine that is available to the Village, "because it does not take large pages." When you indicated that you "could copy each page in sections and then tape them together", the Mayor prohibited you from doing so, because, in your words, he said that you "might drop and tear the book in the process." You wrote further that "if [you] wanted a photocopy of the book then [you] could pay the village \$375 to have the book sent out via bonded messenger to a facility that had photocopy equipment for copying large pages." You indicated that you would not pay that amount, but it was agreed that you could photograph the records. Nevertheless, you expressed concern that the Village would limit the use of photographic equipment and frustrate your efforts.

From my perspective, the Village is required to make photocopies on the machine that it generally uses and permit you to tape them together. In this regard, I offer the following comments.

First, the Freedom of Information Law includes a broad statement of legislative intent (§84) in which the State Legislature declared that "it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible." Access to the assessment roll is critical to many citizens, for review of its contents enables them to attempt to ascertain whether a government agency has treated them fairly in relationship to the value, and therefore, the taxation of their real property. Consequently, an agency is obliged by the Freedom of Information Law to make the contents of the assessment book readily accessible.

Second, §87(2) of the Freedom of Information Law requires that records accessible to the public as of right must be made available for inspection and copying, and §89(3) requires that an agency make copies of those records upon payment of the requisite fee. In my view, since the Village enjoys the use of a photocopier, if you ask that the book be copied in a manner that enables you to tape the pages together, the Village would be required to do so upon payment of the appropriate fee, which cannot exceed twenty-five cents per photocopy [see §87(1)(b)(iii)].

I note that the Freedom of Information Law, based on its language, its intent and its judicial interpretation, has been construed to require agencies to produce accessible information in the format of the applicant's choice, so long as the agency is able to do so and the applicant pays the requisite fee.

Illustrative of that principle is a case in which an applicant sought a database in a particular format, and even though the agency had the ability to generate the information in that format, it refused to make the database available in the format requested and offered to make available a printout. In holding that the agency was required to make the data available in the format requested and upon payment of a fee in accordance with §87(1)(b)(iii), the Court in Brownstone Publishers, Inc. v. New York City Department of Buildings unanimously held that:

"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 short, assuming that the records sought are available under the Freedom of Information Law, that they can be made available in the format in which an applicant requests it, and that the applicant is willing to pay the proper fee, I believe that an agency would be obliged to do so. In this instance, the issue does not involve advanced technology, but rather the capacity of the Village to make the records available by making more than one photocopy of a large sheet. Since it has the ability to do so, I believe that it is required to do so under the conditions specified in the preceding commentary.

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

Ms. Victoria Szerko
July 9, 1999
Page -3-

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Donald E. Kearney
Lorraine DeMarfeo, Clerk



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-190-11561

Committee Members

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Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

July 12, 1999

Mr. Robert McKeown
96-R-7281
Collins Correctional Facility
P.O. Box 340
Collins, NY 14034-0340

Dear Mr. McKeown:

I have received your letter of July 6 in which you requested a variety of information relating to drug and alcohol treatment programs from this office pursuant to 5 USC 552.

In this regard, first, the statute to which you referred is the federal Freedom of Information Act, which applies only to records of federal agencies. The statute that generally governs rights of access to records of units of state and local government in New York is the Freedom of Information Law.

Second, 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 this instance, I cannot make the information of your interest available, because this office does not maintain it.

Third, and perhaps most importantly, 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 for information. Similarly, that statute does not require that agencies engage in legal research. By requesting the titles of federal acts that authorized grants of federal funds, you did not seek records, but rather asked that judgements be made concerning the applicability of certain laws to a particular issue. In my view, that would not be a request for records as envisioned by the Freedom of Information Law. Similarly, since you requested "totals" of federal funds granted to New York during certain fiscal years, if no totals exist, an agency would not be required to prepare new records containing totals on your behalf.

In the future, it is suggested that you request existing records in a manner consistent with the Freedom of Information Law. I note, too, that §89(3) of the Law also states that an applicant must "reasonably describe" the records sought. Therefore, a request should include sufficient detail to enable agency staff to locate and identify the records.

Mr. Robert McKeown

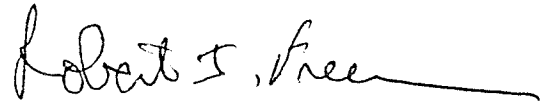
July 12, 1999

Page 2-

Lastly, while I have no information concerning the extent to which records containing the information sought exist, it is suggested that you might contact the Office of Alcoholism and Substance Abuse, 1450 Western Avenue, Albany, NY 12203.

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

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and extends across the width of the text block below it.

Robert J. Freeman
Executive Director

RJF:tt



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

70TL-90-11562

Committee Members

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

July 12, 1999

Mr. Shelton Crosland
96-R-7777
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. Crosland:

I have received your letter of June 6, as well as the materials attached to it. As I understand the matter, the Division of Criminal Justice Services reviewed its records and determined that records pertaining to a certain indictment relating to you had been improperly sealed. As such, you were informed that the information associated with the indictment was unsealed by the court. You have questioned the constitutionality of the unsealing of the records at issue and sought assistance in obtaining the court order to unseal the records from the Division of Criminal Justice Services and the Office of the Kings County District Attorney.

In this regard, the Committee on Open Government is authorized to offer advice concerning public rights of access to records under the Freedom of Information Law. As such, this office has neither the jurisdiction nor the expertise to comment with respect to the constitutionality of the activities that you described, and my remarks will be limited to the issue of access to the court order.

In short, if either the Division of Criminal Justice Services or the Office of the District Attorney maintains a copy of the court order to unseal the records associated with the indictment, I believe that either, assuming that the record can be found, would be available. 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. From my perspective, none of the grounds for denial would serve to enable either agency to deny access to a copy of the order.

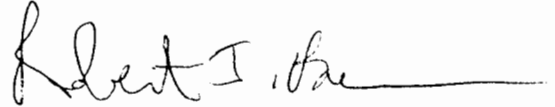
Mr. Shelton Crosland
July 12, 1999
Page - 2 -

It is possible, however, that either or both of the agencies might have received information or documentation indicating that an order had been issued to unseal the record, but not the order itself. In that event, the record sought would not be maintained by an agency, and the agency would not be obliged to obtain the record on your behalf.

Lastly, although the Freedom of Information Law excludes the courts from its coverage, clerks of courts are generally required by other provisions of law to make available records in their possession (see e.g., Judiciary Law, §255). Consequently, it is suggested that you seek a copy of the order from the clerk of the court in which the order was issued, citing an applicable provision of law as the basis for your request.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman", followed by a long horizontal line extending to the right.

Robert J. Freeman
Executive Director

RJF:tt

cc: James W. Stanco
Joyce Slevin



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

7076-AO-11563

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Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

July 12, 1999

Ms. Evelyn Cris

[REDACTED]

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

Dear Ms. Cris:

I have received your letter of June 2 and the materials attached to it. You have raised questions concerning a petition seeking the dissolution of the Village of New Hyde Park and a request for a copy of a judicial decision rejected by the Village Clerk on the ground that "the document you request is not a public document on file in this office."

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning public access to government records, primarily under the Freedom of Information Law. Consequently, the following comments will be limited to matters involving access to the record that you requested.

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

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

Based upon the language quoted above, 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.

Ms. Evelyn Cris

July 12, 1999

Page - 2 -

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).

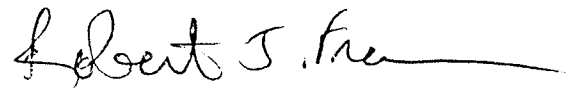
Additionally, in a decision rendered by the Court of Appeals, the state's highest court, it was found that materials received by a corporation providing services for a branch of the State University that were kept on behalf of the University constituted "records" falling within the coverage of the Freedom 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 Village, by its attorney, for example, at his offices, I believe that the Village is 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.

Second, in the alternative, although the Freedom of Information Law excludes the courts from its coverage, you may request the record in question from the clerk of the court pursuant to §255 of the Judiciary Law. That statute generally requires that clerks of courts search for and make available records in their possession.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Trustees
Roy J.E. Biehayn
S. Orbon



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

7071-90-11564

Committee Members

Mary O. Donohue
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Walter Grunfeld
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July 12, 1999

Ms. CherylAnn Armeno, Secretary
Coalition for Junkyard Enforcement
P.O. Box 354
Fleischmanns, NY 12430

The staff of the Committee 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. Armeno:

I have received your letter of June 7 in which you referred to a suggestion by the Mayor of the Village of Fleischmanns that a policy could be adopted "limiting [y]our requests to two or three documents at a time and [you] would have to make multiple requests to get all the information that is needed."

In this regard, there is nothing in the Freedom of Information Law that enables an agency to limit the volume of a valid request for records. To make a valid request, an applicant may be required to seek records in writing and "reasonably describe" the records sought in accordance with §89(3) of the Law. In considering that standard, the State's highest court has found that requested records need not be "specifically designated", that to meet the standard, the terms of a request must be adequate to enable the agency to locate the records, and that an agency must "establish that 'the descriptions were insufficient for purposes of locating and identifying the documents sought'...before denying a FOIL request for reasons of overbreadth" [*Konigsberg v. Coughlin*, 68 NY 2d 245, 249 (1986)]. In *Konigsberg*, the request involved some 2,300 pages of material.

Similarly, in a case in which the court invalidated a rule established by a village, the matter involved the validity of a limitation regarding the time permitted to inspect records established 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

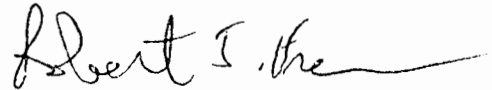
Ms. CherylAnn Armeno
July 12, 1999
Page - 2 -

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, while a unit of government has the ability to adopt rules and procedures, they must be reasonable and consistent with law. As indicated in other correspondence with the Village, the Freedom of Information Law includes a broad statement of legislative intent, which indicates in part that agencies are required to make records available "wherever and whenever feasible" (see §84). In my view, limiting the ability of the public to a small number of records that could be requested at any one time would be unreasonable and inconsistent with the language of the Freedom of Information Law and its judicial interpretation.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman".

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Donald Kearney, Mayor



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL 90-11565

Committee Members

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Robert L. King
Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

July 12, 1999

Mr. Steven Marshall
95-a-8248
Coxsackie Correctional Facility
P.O. Box 999
Coxsackie, NY 12051-0999

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

Dear Mr. Marshall:

I have received your letter of June 2 in which you sought an advisory opinion concerning the applicability of the Freedom of Information Law to "agencys [sic] such as the Legal Aid Society, Criminal Defense Division."

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."

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.

Mr. Steven Marshall

July 12, 1999

Page - 2 -

I am not fully familiar with the specific status of the Legal Aid Society in question. However, I believe that if it is a corporate entity separate and distinct from government, it would not be an "agency" subject to the Freedom of Information Law. It is suggested, however, that you attempt to ascertain whether the entity in question is private or governmental in nature.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and extends to the right with a long, thin horizontal stroke.

Robert J. Freeman
Executive Director

RJF:tt



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI-AO-11506

Committee Members

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Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

July 13, 1999

Executive Director

Robert J. Freeman

Mr. Carlos Davila
88-A-0096
Collins Correctional Facility
P.O. Box 340
Collins, NY 14034

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

Dear Mr. Davila:

I have received your letter of June 7 in which you asked that I review your requests for records and advise as to their adequacy.

In this regard, first, two of the statutes that you cited throughout the correspondence, 5 USC 552 and 552a, are, respectively, the federal Freedom of Information and Privacy Acts. Both apply only to federal agencies; neither would apply to the agencies to which your requests were directed.

It is also noted that while the federal Freedom of Information Act includes provisions concerning fee waivers, there are no similar provisions in the New York Freedom of Information Law. Moreover, it has been held that an agency may charge its established fee even if the applicant is an indigent inmate [see Whitehead v. Morgenthau, 552 NYS2d 518 (1990)].

Second, 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 to one of your requests is §87(2)(a), which provides that an agency may deny access to records or portions thereof that:

"are specifically exempted from disclosure by state or federal statute..."

Section 422 of the Social Services Law is a statute which pertains specifically to the statewide central register of child abuse and maltreatment and all reports and records included in the register. Subdivision (4)(A) of §422 states that reports of child abuse as well as information concerning those reports are confidential, and may be disclosed only under specified circumstances listed in that statute. Further, subdivision (7) of §422 states that:

"At any time, a subject of a report and other persons named in the report may receive, upon request, a copy of all information contained in the central register; provided, however, that the commissioner is authorized to prohibit the release of data that would identify the person who made the report or who cooperated in a subsequent investigation, or the agency, institution, organization, program or other entity where such person is employed or with which he is associated, which he reasonably finds will be detrimental to the safety or interests of such person."

Based on the foregoing, I believe that rights of access to the information contained in the child abuse register are governed by §422 of the Social Services Law rather than the Freedom of Information Law. Further, based upon §422(7), the Commissioner of the Department of Social Services or its successor agency may prohibit the disclosure of information that would identify a person who alleged that child abuse had occurred.

Third, 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 or prepare a record in response to a request. If, for example, there is no "list of agencies" that requested certain information, the Office of Children and Family Services would not be obliged to prepare a list on your behalf to comply with the Freedom of Information Law.

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

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

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

Mr. Carlos Davila

July 13, 1999

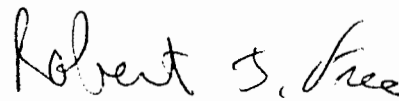
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"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting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

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



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11567

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

July 14, 1999

Mr. Cliff Jones
98-A-6387
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. Jones:

I have received your letter of June 9. As I understand the situation, you have sought assistance in relation to your conviction in 1998 involving a matter that was dismissed in 1991.

In this regard, the Committee on Open Government is authorized to provide advice concerning public access to government records. The Committee cannot investigate, obtain records on behalf of an individual or represent that person in a proceeding. Nevertheless, I offer the following comments.

It appears that you may want to obtain the records relating to the 1991 dismissal in order to demonstrate that the conviction in 1998 may have been inconsistent with law. If that is so, the Freedom of Information Law would not govern your right to gain access to the records, and I believe that you would need a court order.

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.

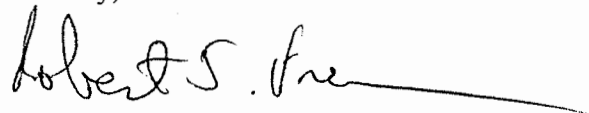
Relevant to the matter is the first ground for denial, §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §160.50 of the Criminal Procedure Law. In brief, under that provision, when charges against an accused are dismissed in his favor, an order is made to seal the records. While you may have the ability to gain access to those records under subdivision (1)(d) of §160.50, I believe that you would need a court

Mr. Cliff Jones
July 14, 1999
Page - 2 -

order to unseal the records. Under the circumstances, it is suggested that you confer with your attorney.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and extends to the right with a long horizontal stroke.

Robert J. Freeman
Executive Director

RJF:tt



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 11568

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

July 14, 1999

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 June 3, and a later undated letter that reached this office on July 6. Both deal with unanswered requests made under the Freedom of Information Law to the court clerk in Orange County.

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

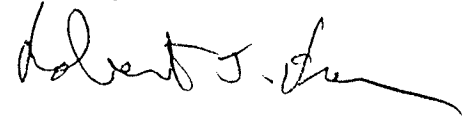
Mr. Dana Sydnor
July 14, 1999
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designation of a records access officer or the right to appeal a denial) would not ordinarily be applicable.

It is suggested that you resubmit your request to clerk of the court that maintains that records of your interest, citing an applicable provision of law as the basis for the request.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long, sweeping underline.

Robert J. Freeman
Executive Director

RJF:tt



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMC-120 - 3047
FOIL-120 - 11569

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Joseph J. Seymour
Alexander F. Treadwell

July 14, 1999

Executive Director

Robert J. Freeman

Mr. William J. Kemble
Daily Freeman
675 Blue Mountain Road
Saugerties, NY 12477

Mr. Thomas Lambert
Daily Sentinel
333 W. Dominick Street
Rome, NY 13440

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

Dear Messrs: Kemble and Lambert:

I have received your letter of June 4, as well as the materials attached to it. You have sought an advisory opinion "on whether the Griffiss Local Development Corporation is required to conform with the Open Meetings and Freedom of Information laws." You wrote that the issue has arisen due to "the contention by GLDC Executive Director Steve DiMeo and GLDC board Chairman Ralph Eannace, who is also Oneida County Executive, that the board is not subject to the law because is a not-for-profit corporation."

By way of background, according to its Certificate of Incorporation, the Griffiss Local Development Corporation (hereafter "GLDC"):

"...is a not-for-profit local development corporation organized under Section 1411 of the Not-for-Profit Corporation Law and operated exclusively for the charitable and public/quasi-public purposes of participating in the development and implementation of a comprehensive strategy to maintain, strengthen and expand the uses and viability of the former Griffiss Air Force Base..."

Mr. William J. Kemble
Mr. Thomas Lambert
July 14, 1999
Page -2-

You indicated that the Board of the GLDC consists of fifteen members, five of whom are appointed by the Governor, three by the Oneida County Legislature, three by the Mayor of the City of Rome, two by the Speaker of the Assembly and two by the Senate Majority Leader. In short, all of the members of the Board are designated by officials of state or local government.

In this regard, while I know of no judicial decision concerning the status of a local development corporation under the Open Meetings Law, the State's highest court has considered the matter under the Freedom of Information Law.

The Freedom of Information Law pertains to agencies, and §86(3) of that statute defines the term "agency" to mean:

"any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office of other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature" [§86(3)].

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

"it is hereby found, determined and declared that in carrying out said purposes and in exercising the powers conferred by paragraph (b) such corporations will be performing an essential governmental function."

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

Relevant to your inquiry is a decision rendered by the Court of Appeals in which it was held that a particular not-for-profit local development corporation is an "agency" required to comply with the Freedom of Information Law [Buffalo News v. Buffalo Enterprise Development Corporation, 84 NY 2d 488 (1994)]. In so holding, the Court found that:

"The BEDC seeks to squeeze itself out of that broad multipurposed definition by relying principally on Federal precedents interpreting FOIL's counterpart, the Freedom of Information Act (5 U.S.C. §552). The BEDC principally pegs its argument for nondisclosure on the feature that an entity qualifies as an 'agency' only if there is substantial governmental control over its daily operations...The Buffalo News counters by arguing that the City of Buffalo is 'inextricably involved in the core planning and execution of the agency's [BEDC] program';

Mr. William J. Kemble
Mr. Thomas Lambert
July 14, 1999
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thus the BEDC is a 'governmental entity' performing a governmental function of the City of Buffalo, within the statutory definition.

"The BEDC's purpose is undeniably governmental. It was created exclusively by and for the City of Buffalo to attract investment and stimulate growth in Buffalo's downtown and neighborhoods. As a city development agency, it is required to publicly disclose its annual budget. The budget is subject to a public hearing and is submitted with its annual audited financial statements to the City of Buffalo for review. Moreover, the BEDC describes itself in its financial reports and public brochure as an 'agent' of the City of Buffalo. In sum, the constricted construction urged by appellant BEDC would contradict the expansive public policy dictates underpinning FOIL. Thus, we reject appellant's arguments" (id., 492-493).

Since the entire membership of the GLDC Board is designated by government officials, it is clear in my view that there is "substantial governmental control" over GLDC's operations and, based on the decision rendered by the Court of Appeals, that it is an "agency" required to comply with the Freedom of Information Law.

If the GLDC is an agency that falls within the scope of the Freedom of Information Law, I believe that its board would also constitute a "public body" for purposes of the Open Meetings Law. Section 102(2) defines that phrase to mean:

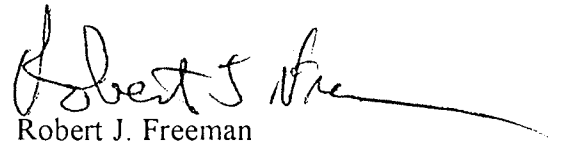
"...any entity for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

By breaking the definition into its components, I believe that each condition necessary to a finding that the board of the GLDC is a "public body" may be met. It is an entity for which a quorum is required pursuant to the provisions of the Not-for-Profit Corporation Law. It consists of more than two members. Further, based upon the language of § 1411(a) of the Not-for-Profit Corporation Law, which was quoted in part earlier, and the degree of governmental control exercised over the GLDC, I believe that it conducts public business and performs a governmental function for the state and several public corporations, in this instance, i.e., Oneida County, the Cities of Rome and Utica, and the Oneida County Industrial Development Agency.

Mr. William J. Kemble
Mr. Thomas Lambert
July 14, 1999
Page -4-

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Ralph Eannace
Steve DiMeo



STATE OF NEW YORK
DEPARTMENT OF STATE
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FOIL-AO-11570

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

July 14, 1999

Executive Director

Robert J. Freeman

Dear

As you are aware, I have received a variety of materials concerning a finding by the Committee on Professional Standards of the Third Judicial Department that you “failed to personally review documents compiled by another in order to respond to a FOIL request”, and that “[t]he steps taken by you were not adequate under the circumstances considering the sensitive nature of the information which could have been released.” The finding is part of a “formal letter of caution” issued pursuant to the rules of the Appellate Division, Third Department, and “constitutes an official finding of misconduct.” In conjunction with your right to seek reconsideration of the determination, you have sought my views on the matter.

By way of background, an inmate at the Clinton Correctional Facility submitted a request to an agency pursuant to the Freedom of Information Law for copies of records “which would show or tend to show the full names, titles, and salaries of each and every employee of your agency who is assigned to work at the Clinton Correctional Facility”, as well as “any licenses, certificates, registrations and/or other similar documents relating to each of the employees employed at the Clinton Correctional Facility.” When your opinion was sought concerning the duty to disclose the information sought, you advised, and properly so in my view, that it must be disclosed. However, soon thereafter, you were informed by a staff person at the facility that “some of the licenses and certificates (*i.e.*, physician, nurse, social worker, psychologist) had the home addresses of the registrants”, and it was suggested that disclosure of the home addresses could “endanger the life and safety of staff.” Since you were unaware that the materials included home addresses, you asked that they be sent to you for review prior to any disclosure. Later, a representative of a public employee union contacted you and suggested that disclosure of the information in question, particularly home addresses, would constitute “a breach of confidentiality.” Following your examination of the records, you “preliminarily determined that it was appropriate to resolve any doubts in favor of denying access to certain information which could be used to identify staff (*i.e.*, names, home addresses, certificate/license numbers, etc.)...” You then wrote to the applicant that “titles held by unnamed individuals” and an “indication of the licensure held and educational and professional training received by these unidentified persons” would be forwarded to him upon payment of the requisite fee. The applicant has apparently never responded, and no disclosure of any of the materials has been made.

From my perspective, much of the information sought would be accessible under the Freedom of Information Law to any person, and disclosure would not have represented a “breach of

July 14, 1999

Page -2-

confidentiality", for there would have been no statutory bar to disclosure. Moreover, based upon the description of the records given to you, there would have been no need to personally inspect the records. Only after additional information was supplied would there have been any indication that the records would not be accessible 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.

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 twenty years 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)].

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)].

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 status of the applicant and the intended use of the records are generally irrelevant.

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

In short, I do not believe that the home addresses could be characterized as "confidential" or that there is any statute that would forbid an agency from disclosing the home addresses of its employees.

The foregoing is not intended to suggest that an agency must disclose its employees' home addresses. On the contrary, I believe that the home addresses *may* be withheld, but that there is no legal obligation to do so. Section 89(7) of the Freedom of Information Law states in relevant part that "Nothing in this article shall require the disclosure of the home address of an officer or employee, former officer or employee, or of a retiree of a public employees' retirement system..." Similarly, §87(3)(b) pertains to a requirement that each agency maintain a payroll record that identifies every employee by name, *public office address*, title and salary. The place of one's public employment is public; a home address need not be disclosed..

Third, 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 a 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)]. In Buffalo Teachers' Federation v. Board of Education [156 AD2d 1027 (1990)], it was determined that an agency had the ability to disclose the home addresses of its employees, even though it could have

July 14, 1999

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withheld them. Again, unless a statute forbids disclosure, an agency is not obliged to withhold records, even though it may have the authority to do so.

I point out that there are numerous situations in which home addresses are available by statute. If a person is registered to vote, voter registration records must be disclosed to any person, even though they include residents' addresses (see Election Law, §§3-220 and 5-602). Similarly, assessment rolls have long been available under the Real Property Tax Law (see §516). They include the names of owners and the location of their property, which in many instances involve peoples' names and home addresses. Section 400.00 of the Penal Law specifies that names and addresses of those licensed to possess firearms are public. In those cases, home addresses of members of the public, some of whom may be public employees, are disclosed pursuant to statute.

Having contacted the Office of Counsel at the State Education Department, the agency that licenses the employees who are the subjects of the records at issue, I was informed that the address that appears on the licenses or similar documentation is characterized as the "address of record." The address of record may be a home address, a business address or even a post office box. Consequently, the address of record may be but is not necessarily a residence address. I was also informed that the State Education Department places names of licensees on the Internet with the town and state that appears on the license in the "address of record."

In short, there are numerous opportunities for ascertaining either the residence addresses or the municipality of residence of public employees, licensees, and members of the public generally. In my opinion, those addresses could hardly be characterized as "confidential."

It has consistently been advised that licenses and similar, related kinds of records are available to the public, even though they identify particular individuals. From an historical perspective, I believe that 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, or engaging in the professions of the licensees to which reference was made in the materials that you forwarded. Licenses and similar records are generally 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.

As you may be aware, §87(2)(b) of the Freedom of Information Law enables agencies to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." That standard 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.

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.”

Kwasnik was recently affirmed unanimously by the Appellate Division, Second Department (NYLJ, June 21, 1999).


July 14, 1999

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For the reasons described in the preceding paragraphs, I believe that much of the information requested would be available as of right to any person, including an inmate. While an agency has the authority to withhold home addresses of its public employees, it is clear in my view that there is no prohibition against disclosure of those items, nor would disclosure represent a "breach of confidentiality." As suggested earlier, based on the description of the records given to you, there was no reason to believe that the records were other than public and available to any person. In that circumstance, there would ordinarily be no need for a personal review of records by you or others. Further, in my view, by responding as you did upon receipt of the additional information given to you by staff and ensuring that personal details would be deleted prior to any disclosure of the records, you acted in a manner consistent with the requirements of the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman", with a long horizontal line extending to the right.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11571

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Alexander F. Treadwell

Executive Director

Robert J. Freeman

July 14, 1999

Hon. Shirley Murray
Town Clerk
Town of Wilton
22 Traver Road
Gansevoort, NY 12831-9127

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

Dear Ms. Murray:

I have received your letter of June 14 in which you raised a series of questions concerning access to the Town's list of building permit applications.

In this regard, I offer the following comments.

First, as you are aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. In my view, a building permit application or a permit should ordinarily be disclosed, for none of the grounds for denial would apply.

Second, as a general matter, when records are accessible under the Freedom of Information Law, it has been held that they should be made equally available to any person, regardless of one's status, interest or the intended use of the records [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Moreover, the Court of Appeals, the State's highest court, has held that:

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

person making the request" [Farbman v. New York City Health and Hospitals Corporation, 62 NY 2d 75, 80 (1984)].

The only exception to the principles described above involves one provision pertaining to 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." I note that the exception pertains to items relation to natural persons, as opposed to business entities, for example. As such, if the exception is asserted, it would pertain to homeowners rather than commercial enterprises.

Pertinent is §89(2)(b), which 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 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)].

In a case involving a list of names and addresses in which the agency inquired as to the purpose for which the list was requested, it was found that an agency could make such an inquiry. Specifically, in Golbert v. Suffolk County Department of Consumer Affairs (Supreme Court, Suffolk County, September 5, 1980), the Court cited and apparently relied upon an opinion rendered by this office in which it was advised that an agency may appropriately require that an applicant for a list of names and addresses provide an assurance that a list of names and addresses will not be used for commercial or fund-raising purposes. In that decision, it was stated that:

"The Court agrees with petitioner's attorney that nowhere in the record does it appear that petitioner intends to use the information sought for commercial or fund-raising purposes. However, the reason for that deficiency in the record is that all efforts by respondents to receive petitioner's assurance that the information sought would not be so used apparently were unsuccessful. Without that assurance the respondents could reasonably infer that petitioner did want to use the information for commercial or fund-raising purposes."

In addition, it was held that:

"[U]nder the circumstances, the Court finds that it was not unreasonable for respondents to require petitioner to submit a

Hon. Shirley Murray
July 14, 1999
Page -3-

certification that the information sought would not be used for commercial purposes. Petitioner has failed to establish that the respondents denial or petitioner's request for information constituted an abuse of discretion as a matter of law, and the Court declines to substitute its judgement for that of the respondents" (id.).

Based on the foregoing, if it is determined that building permit applications pertaining to homeowners are requested for commercial purposes, it appears that you could withhold their names or other identifying details. I do not believe any aspect of the records concerning commercial applicants could be withheld.

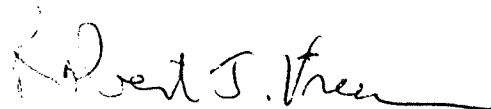
Lastly, it is emphasized that the Freedom of Information Law is permissive. Although an agency may withhold records or portions of records in appropriate circumstances, it is not required to do so. As stated by the Court of Appeals:

"while an agency is permitted to restrict access to those records falling which the statutory exemptions, the language of the exemption provision contains permissible rather than mandatory language, and it is within the agency's discretion to disclose such records, with or without identifying details, if it so chooses" [Capital Newspapers v. Burns, 67 NY 2d 562, 567 (1986)].

Therefore, while I believe that identifying details pertaining to individuals, i.e., homeowners who have submitted applications, may be withheld if a request is made for a commercial purpose, you would not be prohibited from disclosing the records in question in their entirety.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-40-11572

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Alexander F. Treadwell

Executive Director

July 19, 1999

Robert J. Freeman

Mr. Andrews Hernandez
97-R-3658
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. Hernandez:

I have received your letter of June 10. You referred to an opinion rendered by this office in which it was advised that records pertaining to an internal investigation of a police officer were exempt from disclosure. You cited a decision, however, in which it was held that a judge properly ordered disclosure of records involving prior alleged acts of misconduct on the part of a police officer, because those records might have had a bearing on the officer's credibility. You have sought my views on the matter.

In this regard, as indicated in the earlier correspondence, access to the records at issue is governed by §50-a of the Civil Rights Law. In brief, that statute states that personnel records pertaining to police officers that are used to evaluate performance toward continued employment or promotion "shall be considered confidential and not subject to inspection or review without the express written consent of such police officer....except as may be mandated by lawful court order." As such, the records in question are outside the scope of rights conferred by the Freedom of Information Law, for §87(2)(a) of that statute authorizes an agency to withhold records that "are specifically exempted from disclosure by state or federal statute."

To acquire the records in manner described in your letter and the decision to which you referred, again, there must be a court order issued in accordance with other provisions in §50-a. Those provisions state 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

Mr. Andrews Hernandez

July 19, 1999

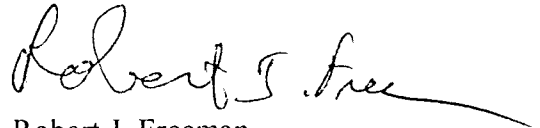
Page - 2 -

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 a 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 record found to be relevant and material available to the persons so requesting.”

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

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and extends across the width of the page.

Robert J. Freeman
Executive Director

RJF:tt



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AD-11573

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July 19, 1999

Mr. Philip Prescott
#10067-014
Unit C
P.O. Box 1000
Lewisburg, PA 17837

Dear Mr. Prescott:

I have received your letter of July 13 in which you appealed a denial of access to records by the Montgomery County 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 to compel an agency to grant or deny access to records.

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

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

I note that the correspondence attached to your letter indicates that your request was made pursuant to the Freedom of Information Law and the Personal Privacy Protection Law. I point out that the latter applies only to state agencies. For purposes of that statute, the term "agency" is defined to mean:

"any state board, bureau, committee, commission, council, department, public authority, public benefit corporation, division, office or any other governmental entity performing a governmental or

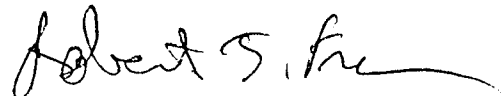
Mr. Philip Prescott
July 19, 1999
Page -2-

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" [§92(1)].

Based on the foregoing, units of local governments, such as counties, are excluded from the coverage of the Personal Privacy Protection Law.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11574

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Alexander F. Treadwell

July 19, 1999

Executive Director

Robert J. Freeman

Mr. Michael Spirles
97-B-1436
Southport Correctional Facility
P.O. Box 2000
Pine City, NY 14871

Dear Mr. Spirles:

I have received your letter of July 7, which is addressed to this agency, as well as several others. You requested a variety of materials pursuant to the federal Freedom of Information and Privacy Acts.

In this regard, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee does not maintain possession of records generally. In short, I cannot provide the records, because this agency does not maintain them.

I note that the statutes upon which your request is based are, respectively, the federal Freedom of Information and Privacy Acts, which pertain only to federal agencies. The applicable statute in this instance is the New York Freedom of Information Law.

In view of the breadth of your request, I point out that §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, a request should include sufficient detail to enable agency staff to locate and identify the records. It is likely that some aspects of your request may not meet the standard 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-11575

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Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

July 21, 1999

Executive Director

Robert J. Freeman

Ms. Janet Axelrod
General Counsel
National Education Association
of New York
217 Lark Street
Albany, NY 12210

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

Dear Ms. Axelrod:

I have received your letter of June 15. You have asked whether applications for charter schools submitted to a board of education, the Board of Trustees of the State University of New York (SUNY), or the Board of Regents pursuant to §2851 of the Education Law are "recoverable under FOIL."

From my perspective, with minor exceptions, the applications must be disclosed. In this regard, I offer the following comments.

First, as you are aware, subdivision (3) of §2851 indicates that applications must be submitted to a "charter entity for approval." A "charter entity" is described in that provision to include certain boards of education, the SUNY Board of Trustees and the Board of Regents. Each of those entities in my view clearly falls within the coverage of the Freedom of Information Law. That statute is applicable to agencies, and §86(3) defines the term "agency" to mean:

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

Since boards of education, SUNY and the Board of Regents are governmental entities performing governmental functions for either public corporations or the State, they constitute "agencies" required to comply with the Freedom of Information Law.

Second, that statute pertains to agency records, and §86(4) defines "record" expansively to include:

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

Based on the foregoing, when a charter entity receives documentation from an applicant, that documentation, i.e., an application, would constitute a "record" that falls within the scope of the Freedom of Information Law. Even if documentation is characterized as preliminary or perhaps draft, as soon as it comes into the possession of an agency, it is a record subject to rights of access conferred by the Freedom of Information Law.

And 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.

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 twenty years 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)].

Subdivision (2) of §2851 prescribes the information that must be included in an application, and in most instances, none of the grounds for denial would, in my view, be pertinent. The only aspects of the application that may contain information that might justifiably be withheld are described in paragraphs (c), (m) and potentially (x) of subdivision (2).

Paragraph (c) requires that an application include a "list of members of the initial board of trustees" and "a description of the qualifications, terms and method of appointment or election of trustees." Paragraph (m) requires the inclusion of "[i]dentification and background information on all applicants and proposed members of the board of trustees." Relevant 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) provides a series of examples of unwarranted invasions of personal privacy.

While the status of charter schools may be somewhat unclear (i.e., as to whether they may be governmental, not-for-profit, or profit-making entities), I believe that the Legislature clearly intended that they be accountable to the public in a manner analogous to public schools that are unquestionably governmental in nature, for subdivision (1)(e) of §2854 of the Education Law specifies that charter schools shall be subject to both the Freedom of Information Law and the Open Meetings Law. As such, although there may be something of an expectation of privacy in relation to the activities of those who serve or are employed by entities that are not clearly governmental in nature, those associated with charter schools are intended to comply with the same statutes requiring accountability and disclosure as those statutes applicable to public officers and employees associated with public schools and school districts.

In my opinion, the principles expressed in judicial interpretations of the Freedom of Information Law concerning public officers and employees should generally be applicable to information identifiable to individuals named in charter school applications. Based on those decisions, it is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that those individuals are required to be more accountable than others. The courts have found that, as a general rule, records that are relevant to the performance of the official duties of a public officer or employee are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that items are irrelevant to the performance of their official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977, dealing with membership in a union; Minerva v. Village of Valley

Stream, Sup. Ct., Nassau Cty., May 20, 1981, involving the back of a check payable to a municipal attorney that could indicate how that person spends his/her money; Seelig v. Sielaff, 200 AD 2d 298 (1994), concerning disclosure of social security numbers].

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 also 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.”

Kwasnik was recently affirmed unanimously by the Appellate Division, Second Department (NYLJ, June 21, 1999).

In the context of a charter school application, I believe that the qualifications of members of a board of trustees, i.e., those items indicating that they have met the criteria necessary to carry out their duties, would be accessible. Similarly, reference to one's public employment or membership on a governmental body would in my view be available. In addition, it has consistently been advised that licenses and similar, related kinds of records are available to the public, even though they identify particular individuals. From an historical perspective, I believe that 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, or engaging in the professions of the licensees to which reference was made in the materials that you forwarded. Licenses and similar records are generally 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.

Conversely, insofar as personal information contained in an application is not available from another governmental source (i.e., a licensing agency) or is irrelevant to the performance of one's duties, it might justifiably be withheld. Examples of items that might properly be withheld are social

Ms. Janet Axelrod
July 21, 1999
Page -5-

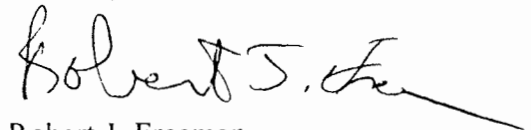
security numbers, home addresses, marital status, and private employment unrelated to one's duties on a board of trustees.

Paragraph (x) of §2851(2) involves the submission of "[a]ny other information relevant to the issuance of a charter required by the charter entity." While that "other information" would be presumptively available, it is possible, depending on its nature, that portions might be withheld in accordance with §87(2) of the Freedom of Information Law.

In sum, for the reasons expressed above, charter school applications are "records" that fall within the scope of the Freedom of Information Law when they come into the possession of a charter entity that must be disclosed, except to the extent that disclosure would result in an unwarranted invasion of personal privacy as discussed in the preceding commentary.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and extends to the right with a long horizontal stroke.

Robert J. Freeman
Executive Director

RJF:jm

cc: Kathy Ahearn, Counsel, State Education Department
Joyce Villa, Attorney-in-Charge, SUNY



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL A0-11576

Committee Members

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Alexander F. Treadwell

Executive Director

Robert J. Freeman

July 22, 1999

Mr. Marcel L. Lajoy, Esq.
1842 Western Avenue
Albany, NY 12203

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

Dear Mr. Lajoy:

I have received your letter of June 15, as well as the materials attached to it. As I understand the matter, you requested from Schenectady County an "Account Audit Trail" with a "description and reason" for expenditures in a format the same as equivalent records had been made available to you in the past. You were informed, however, that the format was changed, and you asked what new accounting system has been implemented. As of the date of your letter to this office, you had received no response to your inquiry. Further, you were not informed of the person to whom a denial of access to records may be appealed.

You have sought advice concerning the situation. In this regard, I offer the following comments.

First, the Freedom of Information Law generally pertains to existing records, and §89(3) of that statute provides in relevant part that an agency is not required to create a record in response to a request. In short, if the County no longer maintains the information of your interest in the format in which it once maintained that information, it would not be obliged alter its new format in an effort to accommodate you.

Second, however, information equivalent to that contained in the materials previously made available to you would, in my view, be equally accessible in whatever new format might be used. 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 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,

Mr. Marcel J. Lajoy, Esq.

July 22, 1999

Page - 2 -

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 foregoing, equivalent information maintained in a different format or a new database would constitute a "record" that falls within the scope of the Freedom of Information Law. Further, the Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, the information sought must be disclosed, irrespective of the format in which it is maintained, for none of the grounds for denial would be applicable.

Third, pursuant to the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), which govern the procedural aspects of the Freedom of Information Law, an agency's records access officer has the duty of ensuring that agency personnel assist a requester in identifying the records sought, if necessary. In the context of the situation that you described, I believe that the records access officer, either directly or through another County official, should have informed you of the nature of the new format in order that you could make an appropriate request. In an effort to encourage that action to be taken, a copy of this response will be sent to the records access officer. In addition, it is suggested that you request a sample sheet containing information in the new format to determine the extent to which it continues to be of interest.

Lastly, 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

Mr. Marcel J. Lajoy, Esq.
July 22, 1999
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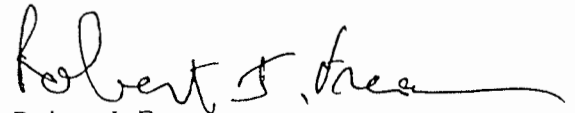
telephone number. The records access officer shall not be the appeals officer" (section 1401.7).

It is also noted that the state's highest court has held that a failure to inform a person denied access to records of the right to appeal enables that person to seek judicial review of a denial. Citing the Committee's regulations and the Freedom of Information Law, the Court of Appeals in Barrett v. Morgenthau held that:

"[i]nasmuch as the District Attorney failed to advise petitioner of the availability of an administrative appeal in the office (see, 21 NYCRR 1401.7[b]) and failed to demonstrate in the proceeding that the procedures for such an appeal had, in fact, even been established (see, Public Officers Law [section] 87[1][b], he cannot be heard to complain that petitioner failed to exhaust his administrative remedies" [74 NY 2d 907, 909 (1989)].

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt
cc: Hon. Joseph Parillo, Jr.



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI/AO-11577

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Alexander F. Treadwell

July 22, 1999

Executive Director

Robert J. Freeman

Mr. Chaka Zulu
74-B-395
Groveland Correctional Facility
P.O. Box 104
Sonyea, NY 14456-0001

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. Zulu:

I have received your letter of June 6, which reached this office on June 17. Please note that the address of the Committee is changed.

You have sought an advisory opinion concerning your ability to obtain information under the Freedom of Information Law in conjunction with 7 NYCRR §5.35(d)(4). That provision is part of the regulations promulgated by the Department of Correctional Services under the Freedom of Information Law and states that if a records access officer determines that "a record requested is in the department's custody, he shall...if agreeable to the person requesting the record, provide the information from the record rather than a copy of the record." While the meaning of the portion of the regulations to which you referred is not entirely clear, it is emphasized that the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that an agency is not required to create a record in response to a request. I would conjecture that there is no single record that contains each of the items in which you are interested. If that is so, the Department would not be obliged to prepare a new record on your behalf in an effort to make available the information that you are seeking.

If there is such a record, it would appear that much of the information sought would be available. In brief, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

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

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

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

I point out that a decision rendered in 1989 might have dealt with the kinds of records concerning transfers in which you are interested. In that case, it was stated that:

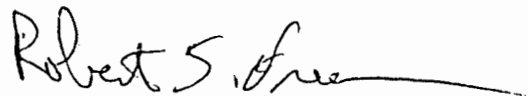
"The petitioner seeks disclosure of unredacted portions of five Program Security and Assessment Summary forms, prepared semi-annually or upon the transfer of an inmate from one facility to another, which contain information to assist the respondents in determining the placement of the inmate in the most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

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

Mr. Chaka Zulu
July 22, 1999
Page -3-

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink that reads "Robert J. Freeman". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

40LL-1A0-11578

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Alexander F. Treadwell

Executive Director

Robert J. Freeman

July 22, 1999

Mr. Michael Bethea
91-A-2950
Bare Hill Correctional Facility
Culler 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. Bethea:

I have received your letter of June 13. You have sought guidance concerning your right to obtain certain records relating to your arrest under the Freedom of Information Law..

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

Mr. Michael Bethea

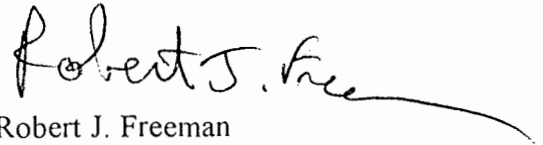
July 22, 1999

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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,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and has a long, sweeping horizontal line extending to the right from the end of the name.

Robert J. Freeman
Executive Director

RJF:tt



STATE OF NEW YORK
DEPARTMENT OF STATE
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FOI/AO - 11579

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July 22, 1999

Mr. Philip King
91-A-5926
Woodbourne Correctional Facility
Pouch No. 1
Woodbourne, NY 12788

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

Dear Mr. King:

I have received your undated note and related materials which reached this office on June 17. You have sought my views concerning your requests for certain records of the New York City Police Department.

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 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

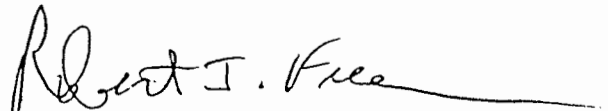
Mr. Philip King
July 22, 1999
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counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish another 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,

A handwritten signature in black ink that reads "Robert J. Freeman". The signature is written in a cursive style with a long horizontal line extending to the right.

Robert J. Freeman
Executive Director

RJF:tt



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

707C-A0-11580

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Executive Director

Robert J. Freeman

July 22, 1999

Mr. Ross Corbett
98-R-8421
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. Corbett:

I have received your letter of June 10 in which you complained with respect a delay in a response to your request for records by the City of Schenectady.

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

Mr. Ross Corbett

July 22, 1999

Page - 2 -

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

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



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

7070-10-11581

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July 22, 1999

Executive Director

Robert J. Freeman

Mr. Norman Roth
University Hill Realty, Ltd.
500 Westcott Street
Syracuse, NY 13210

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

Dear Mr. Roth:

I have received your letter of June 14, as well as the materials attached to it.

You referred to a request for records maintained by HUD and questioned its search fees and a certain redaction. In this regard, HUD, a federal agency, is subject to the federal Freedom of Information Act. This office has advisory jurisdiction concerning the New York Freedom of Information Law, and issues concerning involving HUD's compliance with the federal Act are beyond the scope of the jurisdiction or expertise of the Committee on Open Government. I do know, however, that federal agencies are empowered to assess search and review fees under the federal Act. Entities of state and local government subject to this state's Freedom of Information Law cannot ordinarily charge those kinds of fees.

Next, you referred to a request to the Division of Housing and Community Renewal sent on April 27 that had not been answered as of the date of your letter to this office. Having reviewed the request, I would conjecture that many aspects of it are inconsistent with 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 vehicle that requires the disclosure of existing records. Further, §89(3) of that statute provides in relevant part that an agency is not required to create a record in response to a request for information. Several aspects of your request would appear to involve an effort to obtain information rather than records. For instance, seeking a "total cost of land", the "average rental per room including and excluding utility services", and similar other areas of your request likely involve information that may not exist

Mr. Norman Roth
July 22, 1999
Page -2-

in the form of a record. In short, insofar as the information sought does not exist in the form of a record or records, the Division, in my view, would not be obliged to prepare new records on your behalf.

Lastly, when a valid request for records is made, the Freedom of Information Law provides direction concerning the time and manner in which an agency must respond to the request. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

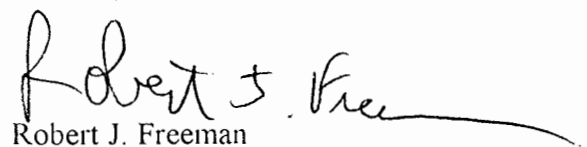
If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively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

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

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

I hope that 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: Donna Ackerman



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

707C-90-11582

Committee Members

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July 22, 1999

Executive Director

Robert J. Freeman

Ms. Susan Dandrow

[REDACTED]

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

Dear Ms. Dandrow:

I have received your undated letter, which reached this office on June 21. You referred to a situation in which a person was arrested on multiple misdemeanor and felony charges, all of which were dismissed, except for a rape charge upon which the individual was convicted. The records concerning the charges that were dismissed were sealed, and you questioned what procedure should be followed in terms of disclosure when, for example, the person convicted "applies for a job and the employer...requests the paperwork" concerning the charge that resulted in a conviction.

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

Pertinent to the matter is the first ground for denial, §87(2)(a), which states that an agency may withhold records that "are specifically exempted from disclosure by state or federal statute." As you are aware, one such statute is §160.50 of the Criminal Procedure Law, which provides that when charges against an accused are dismissed in his or her favor, the records pertaining to those charges are sealed. As such, I believe that reference to the charges that were dismissed in the situation that you described, as well as portions of records relating to them, would be beyond the scope of public rights of access. On the other hand, insofar as the records relate to the charge that was sustained and for which there was a conviction, the records would be subject to rights conferred by the Freedom of Information Law.

I note that another statute that may be relevant as well. Section 50-b of the Civil Rights Law prohibits the disclosure of records insofar as the identity of a victim of a sex offense would be made known.

Ms. Susan Dandrow

July 22, 1999


Page -2-

In conjunction with the foregoing, I believe that the kinds of records to which you referred should be reviewed, as in the case of any other request made under the Freedom of Information Law, for the purpose of determining which portions may properly be withheld and which others should be disclosed. I recognize that the process of reviewing the records and making the redactions may be somewhat time consuming. Nevertheless, that kind of review would, in my opinion, be necessary to comply with law.

Lastly, it is suggested that when a request is made for records in the kind of situation that you described, you might contact the court in which the proceeding was conducted for the purpose of ascertaining which court records are accessible to the public.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink that reads "Robert J. Freeman". The signature is written in a cursive style with a long horizontal flourish at the end.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

7011-A0-11583

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Joseph J. Seymour
Alexander F. Treadwell

July 22, 1999

Executive Director

Robert J. Freeman

Mr. Eugene Friend



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

Dear Mr. Friend:

I have received your letter of June 16 in which you expressed concern with respect to the manner in which the Town of Locke keeps its records. They are apparently kept in a variety of locations and it appears that the records are not filed in manner that enables Town officials or the public to locate them.

In this regard, the Freedom of Information Law does not deal with the maintenance or location of records. Relevant in my view is the "Local Government Records Law", Article 57-A of the Arts and Cultural Affairs Law, which pertains to 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 maintenance, 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

Mr. Eugene J. Friend

July 22, 1999

Page -2-

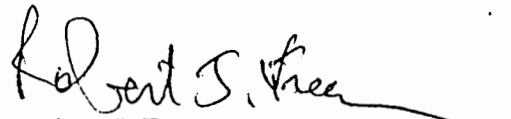
retain and have custody of such records for so long as the records are needed for the conduct of the business of the office; to adequately protect such records; to cooperate with the local government's records management officer on programs for the orderly and efficient management of records including 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..."

I note that the provisions relating to the maintenance, retention and disposal of records are carried out by a unit of the State Education Department, the State Archives and Records Administration. While I am unaware of whether that agency can help you directly, it is suggested that you express your concerns to the Regional Office of the State Archives and Records Administration's Records Advisory Service. The Town of Locke is located in Region 7, and the regional office is located in Rochester and may be reached by phone at (716) 241-2827 or 2828.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

Gail A. Fischer, Records Access Officer



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL 10-11584

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Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

July 26, 1999

Mr. Jesse J. Gwyn

[REDACTED]
[REDACTED]

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

Dear Mr. Gwyn:

I have received your letter of June 21 in which you sought guidance concerning the Freedom of Information Law. As I understand the matter, you requested a "vendor contract" form from the New York City Human Resources Administration, and that agency sent you "a 21 day notice of when they will respond to the request." You have asked whether the contract should be disclosed and questioned the "timeframes" applicable 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. From my perspective, the contract should be made available, for none of the grounds for denial would ordinarily serve to enable an agency to withhold a contract into which it has entered with a vendor.

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..."

Mr. Jesse J. Gwyn

July 26, 1999

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

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

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

Mr. Jesse J. Gwyn

July 26, 1999

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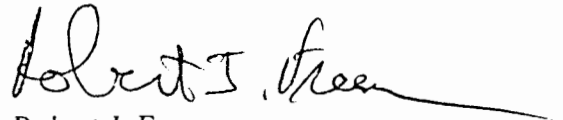
punctuates with explicitness what in any event is implicit"
[Westchester News v. Kimball, 50 NY 2d 575, 579 (1980)].

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).

Enclosed, as requested, 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

Enc.

cc: Records Access Officer, Human Resources Administration



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI L-190-11585

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Joseph J. Seymour
Alexander F. Treadwell

July 26, 1999

Executive Director

Robert J. Freeman

Mr. Michael W. Esslie

[REDACTED]

The staff of the Committee 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. Esslie:

As you are aware, I have received your letter of June 23. You have sought an opinion concerning your right to obtain a letter pertaining to you from the Committee on Character and Fitness of Applicants for Admission to the Bar of the Appellate Division, Third Department. You expressed the belief that "FOIL may apply to this situation."

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

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

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

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

As such, the Freedom of Information Law excludes the courts and court records from its coverage.

Mr. Michael W. Esslie

July 23, 1999

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Moreover, §90(10) of the Judiciary Law deals specifically with the issue that you raised and states that:

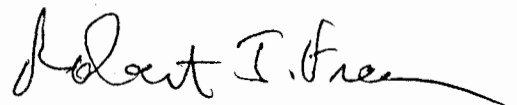
"Any statute or rule to the contrary notwithstanding, all papers, records and documents upon the application or examination of any person for admission as an attorney or counsellor at law and upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of an attorney or attorneys, shall be sealed and be deemed private and confidential. However, upon good cause being shown, the justices of the appellate division having jurisdiction are empowered, in their discretion, by written order, to permit to be divulged all or any part of such papers, records and documents. In the discretion of the presiding or acting presiding justice of said appellate division, such order may be made without notice to the persons or attorneys to be affected thereby or upon such notice to them as he may direct. In furtherance of the purpose of this subdivision, said justices are also empowered, in their discretion, from time to time to make such rules as they may deem necessary. Without regard to the foregoing, in the event that charges are sustained by the justices of the appellate division having jurisdiction in any complaint, investigation or proceeding relating to the conduct or discipline of any attorney, the records and documents in relation thereto shall be deemed public records."

Based on the foregoing, when records are subject to §90(10) of the Judiciary Law, I believe that they may be disclosed only in conjunction with that statute, and, again, that the Freedom of Information Law would be inapplicable.

In short, the record in which you are interested would, in my view, be available only pursuant to an order issued under §90(10).

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: Committee on Character and Fitness



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL 90-11586

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Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

July 22, 1999

Mr. Emilio Torres
92-b-0308
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. Torres:

I have received your undated letter, which reached this office on June 21. You have sought assistance in relation to difficulty in obtaining copies of transcripts of judicial proceedings from the office of the Oneida County District Attorney pursuant to 5 USC 552 and 552a.

In this regard, the statutes that you cited are, respectively, the federal Freedom of Information and Privacy Acts, which apply only to records maintained by federal agencies. They are inapplicable to records maintained by entities of state and local government in New York.

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

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

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

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

Mr. Emilio Torres

July 22, 1999

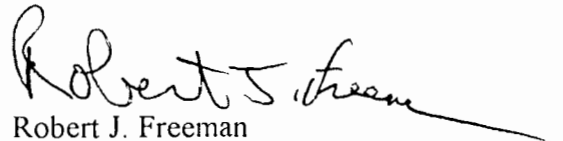
Page - 2 -

In view of the foregoing, the office of a district attorney constitutes an agency subject to the requirements of the Freedom of Information Law; the courts and court records, however, are not subject to that statute.

I direct your attention to Moore v. Santucci [151 AD 2d 677 (1989)], which specified that the respondent office of a district attorney "is not required to make available for inspection or copying any suppression hearing or trial transcripts of a witness' testimony in its possession, because the transcripts are court records, not agency records" (id. at 680). If the records you are seeking are court records, it is suggested that you seek them from the clerk of the court in which the proceeding was conducted. 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). Therefore, when seeking records from a court clerk, it is recommended that you cite an applicable provision of law as the basis for the request.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and extends to the right with a long horizontal flourish.

Robert J. Freeman
Executive Director

RJF:tt

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



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

707L-1A0-11587

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

July 26, 1999

Mr. Jean M. Belot
96-A-4617
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. Belot:

I have received your letter of June 20. You have alleged that the records made available to you by the Poughkeepsie Police Department are not duplicates of the original records, but rather are computer generated. You have questioned the propriety of that kind of disclosure as an alternative to providing a copy of an original document.

In this regard, I offer the following comments.

First, I am unaware of whether the agency maintains the records of your interest in their original form. If the records exist in their original form, I believe that you would have right to obtain photocopies of those records, for it has been held that an agency must make records available in the format of an applicant's choice, if the agency has the ability to do so and the applicant pays the appropriate fee for copying [Brownstone Publishers, Inc. v. New York City Department of Buildings 550 NYS 2d 564, aff'd 166 AD 2d 294 (1990), Samuel v. Mace and Penfield Central School District, Supreme Court, Monroe County, December 18, 1991]. If the records continue to exist in their original form, and photocopies are made available, you could then seek a certification pursuant to §89(3) of the Freedom of Information Law in which it is asserted that the copies are true copies of the originals.

Second, in view of the time that has passed since the creation of the records, it is possible that the originals were legally destroyed. I note in this regard that 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. That agency can provide a copy of the applicable schedule on request to enable you to ascertain the minimum time of retention of the records in question.

Lastly, even if the records must continue to be retained, there is no requirement that they be kept in their original form. Here I direct your attention to §57.29 of the Arts and Cultural Affairs Law, which states that:

Mr. Jean M. Belot

July 26, 1999

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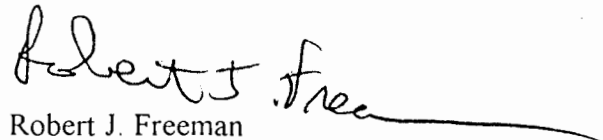
"Any local officer may reproduce any record in his custody by microphotography or other means that accurately and completely reproduces all the information in the record. Such official may then dispose of the original record even though it has not met the prescribed minimum legal retention period, provided that the process for reproduction and the provisions made for preserving and examining the copy meet requirements established by the commissioner of education. Such copy shall be deemed to be an original record for all purposes, including introduction as evidence in proceedings before all courts and administrative agencies."

Based on the foregoing, the disposal of the original record after it is duplicated, even in a different form, would be consistent with law.

If you remain interested in obtaining a copy of a retention schedule, you may write to the State Archives and Records Administration, Cultural Education Center, Empire State Plaza, Albany, NY 12230.

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

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and extends across the right side of the page.

Robert J. Freeman
Executive Director

RJF:tt

cc: Mr. Schuerman



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-140-11588

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

July 27, 1999

Mr. Richard W. Dunnigan
90-B-3027/9-2-58
Tappan 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. Dunnigan:

I have received your letter of June 21. You have questioned the propriety of a denial of your request for records relating to the discipline of a police officer by the City of Canandaigua.

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

The first ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §50-a of the Civil Rights Law. In brief, that statute provides that personnel records of police and correction officers that are used to evaluate performance toward continued employment or promotion are confidential. The Court of Appeals, the State's highest court, in reviewing the legislative history leading to its enactment, has held that 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 NY2d 562, 568 (1986)]. In another decision which dealt with unsubstantiated complaints against correction officers, the Court of Appeals held that the purpose of §50-a "was to prevent the release of sensitive personnel records that could be used in litigation for purposes of harassing or embarrassing correction officers" [Prisoners' Legal Services v. NYS Department of Correctional Services, 73 NY 2d 26, 538 NYS 2d 190, 191 (1988)]. The Court in an opinion rendered earlier this year reiterated its view of §50-a, citing that decision and stating that:

Mr. Richard Dunnigan

July 27, 1999

Page - 2 -

“...we recognized that the decisive factor in determining whether an officer’s personnel record was exempted from FOIL disclosure under Civil Rights Law § 50-a was the potential use of the information contained therein, not the specific purpose of the particular individual requesting access, nor whether the request was actually made in contemplation of litigation.

‘Documents pertaining to misconduct or rules violations by corrections officers – which could well be used in various ways against the officers – are the very sort of record which *** was intended to be kept confidential. *** The legislative purpose underlying section 50-a *** was *** to protect the officers from the use of records *** as a means for harassment and reprisals and for the purpose of cross-examination’ (73 NY2d, at 31 [emphasis supplied])” (Daily Gazette v. City of Schenectady, 93 NY2d 145, 156- 157 (1999)).

To acquire the records in manner described in your letter, there must be a court order issued in accordance with other provisions in §50-a. Those provisions state 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 a 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 record found to be relevant and material available to the persons so requesting.”

Lastly, it is unclear on the basis of the materials whether the police officer that is the subject of your request continues to serve as a police officer. If that person is no longer a police officer, in view of decisions rendered by the Court of Appeals and the intent of §50-a of the Civil Rights Law, I do not believe that §50-a would apply. In that event, the Freedom of Information Law would govern rights of access.

If the Freedom of Information Law is the governing statute, final determinations reflective of findings of misconduct would in my view be available. Pertinent to an analysis of rights of access would be two of the grounds for denial.

Mr. Richard Dunnigan

July 27, 1999

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Section 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].

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, in situations in which allegations or charges have resulted in the issuance of a written reprimand, disciplinary action,

Mr. Richard Dunnigan

July 27, 1999

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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 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, if the person who is the subject of your inquiry continues to serve as a police officer, I believe that §50-a of the Civil Rights Law would govern, and that a court order would be needed to obtain the records. If, however, he no longer serves as a police officer, the Freedom of Information Law would govern, and the records would be accessible to the extent described above.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Laura Kay Wharmby, City Clerk Treasurer
Lt. Jon. C. Wittenberg
Larry K. Preston, Chief



STATE OF NEW YORK
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7071-40-11589

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July 27, 1999

[REDACTED]
89-A-7171
P.O. Box 480
Gouverneur, NY 13642-0370

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

Dear [REDACTED]:

I have received your letter of June 20 and the correspondence attached to it. You wrote that you were interviewed by a psychiatrist in connection with an upcoming parole hearing and asked whether a report pertaining to the interview must be disclosed.

In this regard, I offer the following comments.

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

However, §33.16 of the Mental Hygiene Law pertains specifically to access to mental health records by the subjects of the records. Under that statute, a patient may direct a request for inspection or copies of his or her mental health records to a "facility", as that term is defined in the Mental Hygiene Law which maintains the records.

It is my understanding that mental health "satellite units" that operate within state correctional facilities are such "facilities" and are operated by the New York State Office of Mental Health. Further, I have been advised that requests by inmates for records of such "satellite units" pertaining to themselves may be directed to the Director of Sentenced Services, Bureau of Forensic Services, Office of Mental Health, 44 Holland Avenue, Albany, NY 12229. It is noted that under §33.16, there are certain limitations on rights of access.

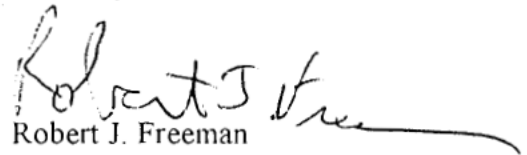
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Second, separate from statutes dealing with access to records are the regulations promulgated by the Division of Parole, which state in relevant part that you may obtain "those portions of the case record which will be considered by the board or authorized hearing officer or pursuant to an administrative appeal of a final decision of the board..." [9 NYCRR §8000.5(c)(2)(i)]. Among the exceptions described in the regulations are diagnostic opinions. Diagnostic opinions may generally be withheld under §87(2)(g) of the Freedom of Information Law. As such, it is possible that elements of a psychiatric report may be withheld by the Division of Parole in accordance with the Freedom of Information Law and its regulations, but that the same information may be available to you under §33.16 of the Mental Hygiene Law. It is suggested, therefore, that you might seek records from both the Division of Parole and the Office of Mental Health.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and extends to the right with a long horizontal flourish.

Robert J. Freeman
Executive Director

RJF:tt

cc: David Molik



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Executive Director

Robert J. Freeman

July 27, 1999

Mr. Richard A. Brinson



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

Dear Mr. Brinson:

I have received your letters of June 25 and June 29, as well as a variety of materials relating to them. You have sought an opinion concerning a denial of a request by the New York City Board of Education for a "market appraisal" pertaining to a certain building in the Bronx. It is your view that the denial is "without merit because a price has already been established", and the "lease rate" would be "somewhere between the \$30 the organization" that you represent has asked "and the \$15 [the Board's representative] quotes for the area."

As I understand the facts, it appears that the Board's denial of your request was generally 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. In my view, two of the grounds for denial are relevant to an analysis of rights of access.

Section 87(2)(c), as you know, permits an agency to withhold records to the extent that disclosure would "impair present or imminent contract awards or collective bargaining negotiations." As it relates to the impairment of "contract awards", §87(2)(c) is, in my opinion, generally cited and applicable in two types of circumstances.

One involves a situation in which an agency is involved in the process of seeking bids or proposals concerning the purchase of goods and services. If, for example, an agency seeking bids or proposals has received a number of bids, but the deadline for their submission has not been reached, premature disclosure for the bids to another possible submitter might provide that person or firm with an unfair advantage vis a vis those who already submitted bids. Further, disclosure of the identities

Mr. Richard A. Brinson

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of bidders or the number of bidders might enable another potential bidder to tailor his bid in a manner that provides him with an unfair advantage in the bidding process. In such a situation, harm or "impairment" would likely be the result, and the records could justifiably be denied. However, after the deadline for submission of bids or proposals are available after a contract has been awarded, and that, in view of the requirements of the Freedom of Information Law, "the successful bidder had no reasonable expectation of not having its bid open to the public" [Contracting Plumbers Cooperative Restoration Corp. v. Ameruso, 105 Misc. 2d 951, 430 NYS 2d 196, 198 (1980)].

The other situation in which §87(2)(c) has successfully been asserted to withhold records pertains to real property transactions where appraisals in possession of an agency were requested prior to the consummation of a transaction. Again, when premature disclosure would have enabled the public to know the prices the agency sought, thereby potentially precluding the agency from receiving an optimal price, an agency's denial was upheld [see Murray v. Troy Urban Renewal Agency, 56 NY 2d 888 (1982)].

In both of the kinds of the situations described above, there is an inequality of knowledge. More specifically, in the bid situation, the person who seeks bids prior to the deadline for their submission is presumably unaware of the content of the bids that have already been submitted; in the appraisal situation, the person seeking that record is unfamiliar with its contents. As suggested above, premature disclosure of bids would enable a potential bidder to gain knowledge in a manner unfair to other bidders and possibly to the detriment of an agency and, therefore, the public. Disclosure of an appraisal would provide knowledge to the recipient that might effectively prevent an agency from engaging in an agreement that is most beneficial to taxpayers.

When there is no inequality of knowledge between or among the parties to negotiations, or if records have been shared or exchanged by the parties, it is questionable and difficult to envision how disclosure would "impair present or imminent contract awards", (see Community Board 7 of Borough of Manhattan v. Schaffer, Supreme Court, New York County, NYLJ, March 20, 1991). Further, if an agreement has been reached or a lease or contract has been signed, presumably negotiations have ended, and any impairment that might have existed prior to the consummation of an agreement would essentially have disappeared.

In the context of the situation at issue, it appears that a range in acceptable price per square foot for a lease has been established. However, the range, between fifteen and thirty dollars, is, in my view, significant. If, for example, you knew that the opinion expressed in the appraisal indicated a value of twenty-nine dollars per square foot, you probably would not accept an offer of a price substantially less than that. Similarly, if you knew that the appraiser believes that the property is worth only sixteen dollars per square foot, you might accept an offer minimally higher. The point is that you do not know what the appraisal has established as a fair market value; if that information is disclosed to you, you may gain an unfair advantage at the negotiating table. If the foregoing represents a reasonably accurate representation of the facts, I believe that §87(2)(c) is pertinent and that it enables the Board to withhold those aspects of the record in question that would enable you to know the fair market value in the view of the appraiser..

Mr. Richard A. Brinson

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The other provision of relevance is §87(2)(g), which pertains to the authority to withhold "inter-agency or intra-agency materials." If an appraisal is prepared by or for agency officials, it could be characterized as "intra-agency material." I note, too, that the Court of Appeals has held that appraisals and other reports prepared by consultants retained by agencies may also be considered as intra-agency materials subject to the provisions of §87(2)(g) [see Xerox Corporation v. Town of Webster, 65 NY 2d 131 (1985)].

More specifically, §87(2)(g) states that an agency may withhold records that:

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

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

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

It has been held that factual information appearing in narrative form, as well as those portions appearing in numerical or tabular form, is available under §87(2)(g)(i). For instance, in Ingram v. Axelrod, the Appellate Division held that:

"Respondent, while admitting that the report contains factual data, contends that such data is so intertwined with subject analysis and opinion as to make the entire report exempt. After reviewing the report in camera and applying to it the above statutory and regulatory criteria, we find that Special Term correctly held pages 3-5 ('Chronology of Events' and 'Analysis of the Records') to be disclosable. These pages are clearly a 'collection of statements of objective information logically arranged and reflecting objective reality'. (10 NYCRR 50.2[b]). Additionally, pages 7-11 (ambulance records, list of interviews) should be disclosed as 'factual data'. They also contain factual information upon which the agency relies (Matter of Miracle Mile Assoc. v. Yudelson, 68 A2d 176, 181 not for lve to app den 48 NY2d 706). Respondents erroneously claim that an agency record necessarily is exempt if both factual data and opinion

Mr. Richard A. Brinson

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are intertwined in it; we have held that '[t]he mere fact that some of the data might be an estimate or a recommendation does not convert it into an expression of opinion' (Matter of Polansky v. Regan, 81 AD2d 102, 104; emphasis added). Regardless, in the instant situation, we find these pages to be strictly factual and thus clearly disclosable" [90 AD 2d 568, 569 (1982)].

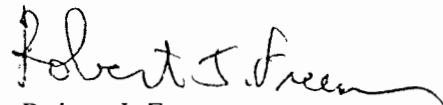
Similarly, the Court of Appeals has specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

"While the reports in principle may be exempt from disclosure, on this record - which contains only the barest description of them - we cannot determine whether the documents in fact fall wholly within the scope of FOIL's exemption for 'intra-agency materials' as claimed by respondents. To the extent the reports contain 'statistical or factual tabulations or data' (Public Officers Law section 87[2][g][i], or other material subject to production, they should be redacted and made available to the appellant" (*id.* at 133).

In short, even though statistical or factual information may be "intertwined" with opinions, the statistical or factual portions, if any, as well as any policy or determinations, would be available, unless a different ground for denial [i.e., §87(2)(c)] could properly be asserted. In the context of your inquiry, if an appraisal includes reference to comparable properties and their assessed value, that kind of material would, in my view, consist of statistical or factual information.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Patricia Zedalis
Cheri A. Lawson
Ron LeDonni
Chris Wright
Michael Valente



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FOI-100-11591

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Robert J. Freeman

July 27, 1999

Mr. Randy Cahill

[REDACTED]

The staff of the Committee 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. Cahill:

I have received your letter of June 20, as well as a variety of materials relating to it. As I understand the matter, you initiated a claim against New York City following flooding that damaged your property during a rainstorm that occurred in July of 1996. Following the storm and the initiation of numerous claims, reports were prepared and evidence was acquired by the Department of Environmental Protection ("DEP"), and you apparently requested those records under the Freedom of Information Law.

Having contacted Ms. Charlotte Abo-Comitini at the DEP on your behalf to learn more of the matter, I was informed that a report pertaining specifically to your property has been made available to you, but that another report and other materials prepared for the Comptroller in response to claims made following the storm have been withheld. If my understanding of the facts is accurate, it appears that a denial of access to those materials 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.

Relevant under the circumstances in my view is the first ground for denial, §87(2)(a), which pertains to the ability to withhold records that "are specifically exempted from disclosure by state or federal statute." Because the records were prepared following the initiation of claims against the City, it appears that the records would fall within the scope of subdivisions (c) and/or (d) of §3101 of the Civil Practice Law and Rules ("CPLR").

Mr. Randy Cahill

July 27, 1999

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Section §3101 pertains to disclosure in a context related to litigation, and subdivision (a) reflects the general principle that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action..." The Advisory Committee Notes pertaining to §3101 state that the intent is "to facilitate disclosure before trial of the facts bearing on a case while limiting the possibilities of abuse." The prevention of "abuse" is considered in the remaining provisions of §3101, which describe limitations on disclosure.

One of those limitations, §3101(c), states that "[t]he work product of an attorney shall not be obtainable", and §3101(d)(2) dealing with material prepared in anticipation of litigation states in relevant part that:

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

Both of those provisions are intended to shield from an adversary records that would result in a strategic advantage or disadvantage, as the case may be. 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 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

Mr. Randy Cahill
July 27, 1999
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A.D.2d 742, 477 N.Y.S.2d 210)" [Coastal Oil New York, Inc. v. Peck, [184 AD 2d 241 (1992)].


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

In sum, assuming that the records in question consist of the work product of an attorney or were prepared in anticipation of litigation, the denial of your request, in my opinion, was proper.

Lastly, I note that your request was made on the basis of 5 USC §552. That provision is the federal Freedom of Information Act, which applies only to records maintained by federal agencies. The statute that deals generally with public access to records of state and local government in New York, as suggested in the body of this opinion, is the New York Freedom of Information Law. Further, while federal agencies may be required to prepare an index identifying each record that has been withheld with a justification for the withholding, there is no such requirement in the New York 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: Charlotte Abo-Comitini



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Robert J. Freeman

July 28, 1999

Mr. Hugh Gershon

[REDACTED]

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

Dear Mr. Gershon:

I have received your letter of June 25. You have asked that I confirm your understanding that "once approved to review the information" sought under the Freedom of Information Law, "you are at the same time authorized to make and receive copies." As I understand the basis of your inquiry, you requested records from a village, the request was approved, and you reviewed them. However, when you requested copies, you were informed that copies would not be made until approval to do so could be given by the village clerk, and that you would have to return on a later date to obtain copies of the records.

In this regard, §87(2) of the Freedom of Information Law states that records accessible under the Law must be made available for inspection and copying. Further, §89(3) states that an agency must make available copies of such records upon payment of the fee prescribed by law. Therefore, if a record is available for your review, there is no question but that it must also be copied upon payment of the requisite fee. In my opinion, once it is established that a record is available to the public, it is inappropriate to engage in the additional step of requiring an approval prior to making a copy of a record. Moreover, unless it would be unduly burdensome to accomplish (i.e., due the volume of material to be copied, the inability to use a photocopier immediately, etc.), I believe that an agency must make copies of accessible records on request when the applicant requests that copies be made.

As you may be aware, the Committee on Open Government has promulgated general regulations concerning the procedural implementation of the Freedom of Information Law (21 NYCRR Part 1401). One element of the regulations involves the obligation of each agency to designate one or more persons as "records access officer." The records access officer has the duty of "coordinating agency response to public requests for access to records." If the village clerk is the records access officer, there is no obligation that she personally approve a request to inspect or copy records; rather, her duty is "coordinate" the village's response to requests. In this instance, since the

Mr. Hugh Gershon

July 28, 1999

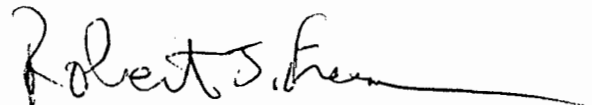
Page - 2 -

records sought were clearly public and your request was approved, again, I do not believe that the village could validly condition the preparation of copies on a second approval.

I note that §84 of the Freedom of Information Law expresses legislative intent and states in part that "it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible." In my view, unnecessarily delaying disclosure of records is inconsistent with the intent of the law.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and extends to the right with a long horizontal flourish.

Robert J. Freeman
Executive Director

RJF:tt



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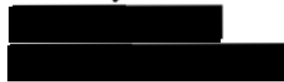
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Executive Director

July 28, 1999

Robert J. Freeman

Mr. Jerry Brixner



The staff of the Committee on Open 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 25, as well as the materials attached to it. You have raised questions concerning the status of a "working group" created by resolution of the Chili Town Board under the Open Meetings and Freedom of Information Laws. According to the Town Clerk, the working group was designated "to investigate, evaluate and make recommendations regarding further expansion of public water within the Town of Chili." She added that the working group "did not act as a 'Public Body' within the meaning of the Open Meetings Law. No quorum was required and no minutes were taken."

As I understand the matter, the working group would not be subject to the Open Meetings Law, and its designation as a "working group" rather than a "committee" would not alter its status. In this regard, I offer the following comments.

As you may be aware, the Open Meetings Law pertains to 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."

The last clause of the definition refers to any "committee or subcommittee or similar body of [a] public body." Based on that language and judicial decisions, when a public body, such as the Senate, the Assembly, a county legislature or a town board, creates or designates its own members to serve as a committee or subcommittee, the committee or subcommittee would constitute a public

Mr. Jerry Brixner
July 28, 1999
Page - 2 -

body subject to the requirements of the Open Meetings Law. Therefore, committees of legislative bodies consisting solely of their own members would have the same obligations regarding notice and openness, for example, as well as the same authority to conduct executive sessions, as the governing body [see Glens Falls Newspapers, Inc. v. Solid Waste and Recycling Committee of the Warren County Board of Supervisors, 195 AD2d 898 (1993)].

However, if an entity is advisory in nature and does not consist wholly of members of a public body, it has been held it would not constitute a public body. Judicial decisions indicate generally that ad hoc entities that include persons other than members of public bodies that have no power to take final action fall outside the scope of the Open Meetings Law. As stated in those decisions: "it has long been held that the mere giving of advice, even about governmental matters is not itself a governmental function" [Goodson-Todman Enterprises, Ltd. v. Town Board of Milan, 542 NYS 2d 373, 374, 151 AD 2d 642 (1989); Poughkeepsie Newspapers v. Mayor's Intergovernmental Task Force, 145 AD 2d 65, 67 (1989); see also New York Public Interest Research Group v. Governor's Advisory Commission, 507 NYS 2d 798, *aff'd* with no opinion, 135 AD 2d 1149, motion for leave to appeal denied, 71 NY 2d 964 (1988)]. In short, based on judicial determinations interpreting the Open Meetings Law, the working group would not constitute a "public body" and, as such, would be outside the coverage of the Open Meetings Law.

Notwithstanding the foregoing, I believe that any records prepared or acquired by the working group would be subject to the Freedom of Information Law, which is more extensive in its coverage than the Open Meetings Law. The former pertains to agency records, and §86(4) of that statute defines the term "record" expansively to mean:

"any information kept, held, filed, produces 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, folder, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes of discs, rules, regulations and codes."

Since the definition includes information in any physical form produced for an agency, such as a town, again, any records prepared or acquired by the working group would in my view constitute town records that fall within the coverage of the Freedom of Information Law. The extent to which any such records might exist is unknown to me.

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 Carol O'Connor, Town Clerk



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL AO 11594

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Robert J. Freeman

July 28, 1999

Ms. Emily E. Maute
Law Offices of Dupee & Dupee, P.C.
30 Matthews Street
P.O. Box 470
Goshen, NY 10924

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

Dear Ms. Maute:

As you are aware, I have received your letter of June 23, as well as the materials attached to it. You have sought my views concerning the propriety of a denial of a request for records maintained by the Division of State Police.

By way of background, you represent a client who has a claim for injuries against a physician relating to the death of a fetus carried by the client in the third trimester of her pregnancy. The incident was investigated by the Division of State Police, but the Orange County District Attorney chose not to prosecute. Your client, who has initiated a suit claiming malpractice against the physician, and the physician were represented by counsel in a civil action at the deposition of your client during which the District Attorney testified, and you enclosed a transcript of a portion of an exchange in which it was stated that "[i]t's been agreed between counsel after discussion that with respect to the various parties to this action that as far as questions pertaining to anything that was asked of or discussions with the district attorney between representatives of any of the parties, that no claim of privilege will be raised." It is your view that the stipulation quoted above and the holding in Mantica v. NYS Department of Health [679 NYS2d 469, 248 AD2d 30 (1998)] negate the ability of the Division to withhold the records at issue, which were denied on the ground that disclosure would constitute an unwarranted invasion of personal privacy.

In this regard, I offer the following comments.

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

Ms. Emily E. Maute

July 28, 1999

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As indicated in the response by the Division of State Police, one of the grounds for denial states that an agency may withhold records insofar as disclosure would result in "an unwarranted invasion of personal privacy" [§87(2)(b)]. Section 89(2) provides additional direction concerning the ability to protect against unwarranted invasions of personal privacy.

The decision to which you referred, Mantica, in my view reflects the principle that a person cannot invade his or her own privacy. In that case, the petitioners requested the file pertaining to the investigation of a complaint that they made in connection with care provided by a hospital to one of the petitioners. Both the Supreme Court and the Appellate Division rejected the agency's contention that there is a statutory prohibition against disclosure of patient information by a third party to the patient himself or herself, stating that "denying a patient disclosure of his or her own health care information is illogical and to condone such prohibition would be unreasonable" (id., 470). The Appellate Division found further that:

"In this case, the patient who initiated the inquiry, and was the subject of that inquiry, requested disclosure of, *inter alia*, materials related to his own medical history obtained by respondent during the resulting investigation. Thus, the patient's right to privacy and the confidentiality of his medical records are not of concern" (id., 471).

In terms of the Freedom of Information Law, §89(2)(c)(iii) states that, unless a different ground for denial can properly be asserted, "disclosure shall not be construed to constitute an unwarranted invasion of personal privacy...when upon presenting reasonable proof of identity a person seeks access to records pertain to him."

Based on the foregoing, I believe that the Division of State Police is required to disclose to you, representing your client as the subject of the records, any materials relating to her own medical history or otherwise pertaining her.

Second, with respect to the records not otherwise available to your client in conjunction with the preceding commentary, i.e., those pertaining to the physician, including his conduct, background and similar matters, the question, in my opinion, involves the extent to which disclosure would result in an unwarranted invasion of *his* privacy. In general, when a person is the subject of a complaint, a charge or an allegation that has not been proven, it has been advised that records relating to such complaint, charge or allegation may be withheld to protect that person's privacy. In my view, an unsubstantiated allegation may be withheld from the public so that the unproven claim does not result in detriment or unfair disadvantage to the subject of the claim.

The question, therefore, in my opinion involves the extent to which agreement between the parties in the presence of the District Attorney constitutes a waiver concerning the ability of the Division of State Police to withhold the records. Again, the agreement indicates that there would be "no claim of privilege" in relation to "questions pertaining to anything that was asked of or discussions with the district attorney between representatives of the parties."

Ms. Emily E. Maute

July 28, 1999

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From my perspective, the extent to which the foregoing could be construed to constitute a waiver by the physician regarding records pertaining to him is unclear. In a letter to the Division's Appeals Officer, your colleague with your firm wrote that "counsel for each of the parties has agreed that it would be appropriate, in this circumstance, to allow full disclosure of the sum and substance of each of the parties' interactions with the New York State Police via the Orange County District Attorney's Office" and that, "[t]herefore, the privileges or privacy issues that you are seeking to protect have already been waived." If that statement is accurate, I would agree that the ability of the Division to deny access in order to protect the privacy of the physician would have been eliminated. However, the language as it appears in the transcript is not as unequivocal, in my view, as your colleague's statement in the appeal.

Due to the lack of clarity of the statement in the transcript, I cannot advise with certainty as to the extent to which there has been a waiver regarding the disclosure of the records in question. If the scope of the waiver can be clearly established by the parties, such agreement would authorize disclosure of materials that might otherwise be deniable by the Division of State Police. It is suggested that you attempt to prepare such an agreement.

Lastly, notwithstanding the absence of a clear waiver, as suggested earlier, some aspects of the records would appear to pertain to your client and may be in the nature of medical information that should be disclosed. That being so, I believe that the denial of the request was overbroad. I note 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. 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:

Ms. Emily E. Maute

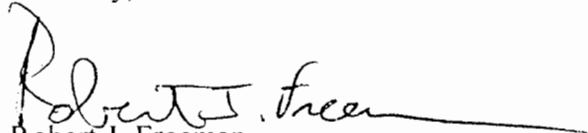
July 28, 1999

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"...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,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in dark ink and extends across the width of the page.

Robert J. Freeman
Executive Director

RJF:tt

cc: Lt. Col. Bruce Arnold

Lt. Laurie M. Wagner



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL AO - 11595

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Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

July 28, 1999

Mr. Thomas B. Fish
95-A-7132
Great Meadow Correctional Facility
P.O. Box 51
Comstock, NY 12821-0051

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

Dear Mr. Fish:

I have received your letter of June 23 in which you sought an opinion concerning your right to obtain police complaint reports and arrest reports concerning "the arrest of an individual that stabbed another individual..."

In this regard, since I am unaware of the status of the arrest or details relating to the matter, I cannot offer specific guidance. However, 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. From my perspective, several of the grounds for denial may be pertinent.

The first ground for denial, §87(2)(a), concerns records that "are specifically exempted from disclosure by state or federal statute." One such statute is §160.50 of the Criminal Procedure Law. If a person is arrested and charged with a crime, and the charges are later dismissed, the records relating to the event are sealed pursuant to that statute. When records are sealed, the Freedom of Information Law would not apply.

Assuming that the records have not been sealed, potentially relevant is a decision by the Court of Appeals concerning complaint reports 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:

Mr. Thomas B. Fish

July 28, 1999

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- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations; or
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those 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."

Mr. Thomas B. Fish

July 28, 1999

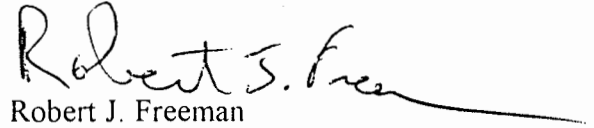
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In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in sub- paragraphs (i) through (iv) of §87(2)(e).

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,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and extends to the right with a long horizontal flourish.

Robert J. Freeman
Executive Director

RJF:tt



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11596

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Alexander F. Treadwell

Executive Director

Robert J. Freeman

July 28, 1999

Mr. Ronald Logan

[REDACTED]
[REDACTED]

Dear Mr. Logan:

I have received your letter of June 24, as well as a copy of an appeal made under the Freedom of Information Law to the Office of the Chemung County District Attorney. You also referred to a variety of other correspondence concerning other requests for records copies of which were sent to this office. In relation to those materials, you questioned why you "have not heard from [this] office."

Having reviewed those items of correspondence, you merely referred to requests or appeals and asked that they be filed. There was no request for any additional service or response. Consequently, your letters were filed and no further action was taken.

In conjunction with your most recent letter, you asked that this office "investigate [a] constructive denial and respond." In this regard, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee has neither the resources nor the staff to conduct investigations, and it is not empowered to enforce the law. Moreover, in no case have you forwarded information involving the nature of records that have been requested.

Notwithstanding the foregoing, since it appears that requests for records might not have been answered, I point out that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests 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..."

Mr. Ronald Logan

July 28, 1999

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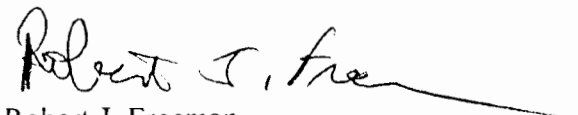
that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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: FOI Appeals Officer, Office of the Chemung County District Attorney



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

7071-AO-11597

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Executive Director

Robert J. Freeman

July 30, 1999

Mr. Patrick J. Amodeo

[REDACTED]
[REDACTED]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Amodeo:

I have received your letter of June 30 in which you sought an advisory opinion concerning a response to your request under the Freedom of Information Law for certain records of the City School District of Albany. Your request involved the following information pertaining to the Superintendent and Deputy Superintendents:

1. Copy of payroll records evidencing amount paid, amount of deductions for health insurance and other benefits.
2. Information on any moneys paid to the School District or directly to providers of health insurance benefits by either individual at any time during the specified period."

In response to the request, you were supplied with amounts regarding moneys paid to the District or health insurance providers by those holding the positions of your interest. However, the payroll records indicating amounts paid or deducted for health insurance and other benefits were found to be "confidential."

From my perspective, some of the information was properly withheld; other aspects of the records, however, should be disclosed. In this regard, I offer the following comments.

First, the Freedom of Information Law, in brief, is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Mr. Patrick J. Amodeo

July 30, 1999

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It is noted that there is nothing in the Freedom of Information Law that deals specifically with personnel records or personnel files. Further, the nature and content of so-called personnel files may differ from one agency to another, and from one employee to another. In any case, neither the characterization of documents as "personnel records" nor their placement in personnel files would necessarily render those documents "confidential" or deniable under the Freedom of Information Law (see Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980). On the contrary, the contents of those documents serve as the relevant factors in determining the extent to which they are available or deniable under the Freedom of Information Law.

The provision in the Freedom of Information Law of most significance concerning the information in question is, in my view, §87(2)(b). That provision permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy".

While the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public officers employees. It is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public officers and employees are required to be more accountable than others. Further, with regard to records pertaining to public officers and employees, the courts have found that, as a general rule, records that are relevant to the performance of a their official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, *supra*; Capital Newspapers v. Burns, 109 AD 2d 292 (1985) aff'd 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

It is noted that in Matter of Wool, the applicant requested a list of employees of a town "whose salaries were subject to deduction for union membership dues payable to Civil Service Employees Association...". In determining the issue, the Court held that:

"...the Legislature has established a scale to be used by a governmental body subject to the 'Freedom of Information Law' and to be utilized as well by the Court in reviewing the granting or denial of access to records of each governmental body. At one extreme lies records which are 'relevant or essential to the ordinary work of the agency or municipality' and in such event, regardless of their personal nature or contents, must be disclosed in toto. At the other extremity are those records which are not 'relevant or essential' - which contain personal matters wherein the right of the public to know must be delicately

balanced against the right of the individual to privacy and confidentiality.

"The facts before this Court clearly are weighted in favor of individual rights. Membership or non-membership of a municipal employee in the CSEA is hardly necessary or essential to the ordinary work of a municipality. 'Public employees have the right to form, join and participate in, or to refrain from forming, joining or participating in any employee organization of their choosing.' Membership in the CSEA has no relevance to an employee's on-the-job performance or to the functioning of his or her employer."

Consequently, it was held that portions of records indicating membership in a union could be withheld as an unwarranted invasion of personal privacy. Based on the Wool decision, it might be contended that whether a public employee is covered by a health insurance has no relevance to the performance of that person's official duties, and that, therefore, such information may be withheld.

From my perspective, such a conclusion would be overly restrictive. In Capital Newspapers v. Burns, supra, the issue involved records reflective of the days and dates of sick leave claimed by a particular police officer. The Appellate Division, as I interpret its decision, held that those records were clearly relevant to the performance of the officer's duties, for the Court found that:

"One of the most basic obligations of any employee is to appear for work when scheduled to do so. Concurrent with this is the rights of an employee to properly use sick leave available to him or her. In the instant case, intervenor had an obligation to report for work when scheduled along with a right to use sick leave in accordance with his collective bargaining agreement. The taxpayers have an interest in such use of sick leave for economic as well as safety reasons. Thus it can hardly be said that disclosure of the dates in February 1983 when intervenor made use of sick leave would constitute an unwarranted invasion of privacy. Further, the motives of petitioners or the means by which they will report the information is not determinative since all records of government agencies are presumptively available for inspection without regard to the status, need, good faith or purpose of the applicant requesting access..." [109 AD 2d 92, 94-95 (1985)].

Perhaps more importantly, in a statement concerning the intent and utility of the Freedom of Information Law, the Court of Appeals affirmed the holding of the Appellate Division and added that:

"The Freedom of Information Law expresses this State's strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies (see, Matter of Farbman & Sons v New York City Health and Hosps.

Corp., 62 NY 2d 75, 79). The statute, enacted in furtherance of the public's vested and inherent 'right to know', affords all citizens the means to obtain information concerning the day-to-day functioning of State and local government thus providing the electorate with sufficient information 'to make intelligent, informed choices with respect to both the direction and scope of governmental activities' and with an effective tool for exposing waste, negligence and abuse on the part of government officers" (Capital Newspapers v. Burns, supra, 565-566).

Based on the foregoing, it might appropriately be contended that the need to enable the public to make informed choices and provide a mechanism for exposing waste or abuse must be balanced against the possible infringement upon the privacy of a public officer or employee. The magnitude of an invasion of privacy is conjectural and must in many instances be determined subjectively. In the context of your request, if a court found the invasion of one's privacy to be substantial, it might be determined that the interest in protecting privacy outweighs the interest in identifying employees receiving coverage. It is possible, too, that a court could find that the identities of employees receiving coverage should be disclosed, but that the cost of coverage, by named employee, thereby indicating the nature of coverage (i.e., individual as opposed to family coverage) may be withheld, and that the cost of coverage should be disclosed generically. On the other hand, in conjunction with the direction provided by the Court of Appeals in the passage quoted earlier, it might be determined that the information sought should be disclosed in its entirety in view of the public's significant interest in knowing how public monies are being expended.

In consideration of the factors that have been discussed, it is my view that a disclosure indicating that a public officer or employee is covered by a health insurance plan at public expense would not represent or reveal an intimate detail of one's life. Arguably, the record reflective of the dates of sick leave claimed by a public employee found by the courts to be available represents a more intimate or personal invasion of privacy. However, if a disclosure of the cost of coverage for a particular employee indicates which plan that person has chosen or whether his or her plan involves individual or dependent coverage, such a disclosure may potentially result in the revelation of a number of details of a person's life and an unwarranted invasion of personal privacy. For instance, an indication of cost might reveal whether the coverage involves medical treatment routinely provided by a clinic, as opposed to a primary care physician; it also may indicate the nature of coverage, i.e., whether coverage is basic or includes catastrophic care. Again, the cost may also reveal whether coverage is for an employee alone or for that person's family or dependents.

Most appropriate in my opinion would be a disclosure of costs of health care coverage by category in terms of plans that are offered or available to officers or employees. However, in conjunction with the preceding commentary, I do not believe that the District would be required to disclose the type of coverage an officer or employee has chosen or which specific dependents are covered under the plan.

Other elements of the records sought reflective of benefits must in my opinion generally be disclosed. If, for example, the District pays for a life insurance policy, the use of a vehicle, a home

Mr. Patrick J. Amodeo

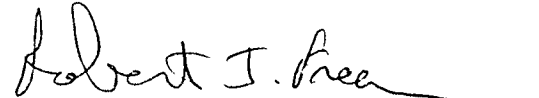
July 30, 1999

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computer or online service, home telephone, etc., those kinds of benefits, unlike the choice of health insurance coverage, would not represent a potentially intimate detail of one's life. For that reason, I believe that those kinds of details must be disclosed.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and extends to the right with a long horizontal flourish.

Robert J. Freeman
Executive Director

RJF:tt

cc: John J. Paolino



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

707 C-AO-11598

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Alexander F. Treadwell

Executive Director

Robert J. Freeman

July 30, 1999

Mr. Craig S. Rose
95-A-7042
Wyoming Correctional Facility
P.O. Box 501
Attica, NY 14011-0501

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Rose:

I have received your letter of June 25. You have raised questions concerning access to the confidentiality of records pertaining to a juvenile.

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 in my opinion is the initial ground for denial, §87 (2) (a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §784 of the Family Court Act, which states that:

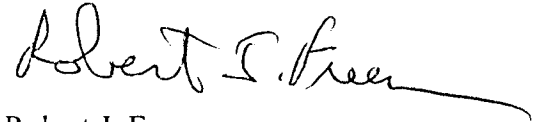
"All police records relating to the arrest and disposition of any person under this article shall be kept in files separate and apart from the arrest of adults and shall be withheld from public inspection, but such records shall be open to inspection upon good cause shown by the parent, guardian, next friend or attorney of that person upon the written order of a judge of the family court in the county in which the order was made or, if the person is subsequently convicted of a crime, of a judge of the court in which he was convicted."

Based on the foregoing, records concerning the arrest of juveniles cannot be disclosed, except pursuant to a court issued in accordance with §784 of the Family Court Act.

Mr. Craig S. Rose
July 30, 1999
Page - 2 -

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and has a long, sweeping underline that extends to the right.

Robert J. Freeman
Executive Director

RJF:tt



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Executive Director

Robert J. Freeman

July 30, 1999

Mr. Paul M. Zarvis
98-A-7173
Cape Vincent Correctional Facility
Route 12 E Box 739
Cape Vincent, NY 13618

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Zarvis:

I have received your letter of June 27 in which you sought assistance form and appealed to this office in relation to your requests for medical and mental health records maintained by the Albany County Jail. Your requests were made pursuant to the federal Freedom of Information and Privacy Acts, the New York Freedom of Information Law and §18 of the Public Health Law.

In this regard, I offer the following comments.

First, the federal Freedom of Information and Privacy Acts pertain only to records maintained by federal agencies. As such, they are inapplicable to records maintained by entities of state and local government. Further, while the federal Acts include provisions involving the waiver of fees, there are no analogous provisions in the New York Freedom of Information Law. I note, too, that it has been held that an agency may charge its established fees, even when a request is made by an indigent inmate [Whitehead v. Morgenthau, 552 NYS 2d 518 (1990)].

Second, the Committee on Open Government is authorized to offer advice concerning the Freedom of Information Law. The Committee is not empowered to determine appeals or compel an agency to grant or deny access to records. As you may be aware, the provision in the Freedom of Information Law concerning the right to appeal, §89 (4)(a), states that in relevant part that:

“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

Mr. Paul M. Zarvis

July 30, 1999

Page 2-

business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Third, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

With 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, §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

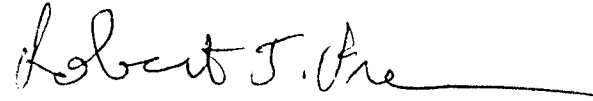
With respect to Mental Health records the first ground for denial, under the Freedom of Information Law, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute." One such statute is §33.13 of the Mental Hygiene Law, which generally requires that clinical records pertaining to persons receiving treatment in a mental hygiene facility be kept confidential.

However, §33.16 of the Mental Hygiene Law pertains specifically to access to mental health records by the subjects of the records. Under that statute, a patient may direct a request for inspection or copies of his or her mental health records to the "facility", as that term is defined in the Mental Hygiene Law, which maintains the records. If the County Jail or the Sheriff's Department is considered the facility and maintains the records, it would be required to give effect to §33.16.

Mr. Paul M. Zarvis
July 30, 1999
Page 3-

I hope that I have been of some assistance.

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and extends across the width of the page.

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. James Campbell, Sheriff



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Executive Director

Robert J. Freeman

July 30, 1999

Mr. David Hunt
83-A-4739
Woodbourne Correctional Facility
Pouch No. 1
Woodbourne, NY 12788

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Hunt:

I have received your letter of June 17, which reached this office on June 30. You have raised a variety of issues concerning access to information.

You referred initially to what you characterized as "privacy abuses" by government agencies, credit bureaus and banks." In this regard, I note that the statute within the advisory jurisdiction of the Committee on Open Government, the Freedom of Information Law, relates to government agencies, and that §86(3) of the Law defines the term "agency" to mean:

"any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, banks, credit bureaus and other private entities would not be subject to the Freedom of Information Law. They may be subject to other statutes designed to deal with "privacy abuses", such as the Fair Credit Reporting Act. However, any such provisions are beyond the jurisdiction or expertise of this office.

Next, you questioned the status of e-mail under the Freedom of Information Law, particularly e-mail communications between a district attorney, witnesses and others. In my view, e-mail constitutes an agency record, for §86(4) of the Freedom of Information Law defines the term "record" to mean:

Mr. David Hunt

July 30, 1999

Page - 2 -

“any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form what so ever including, but not limited to, reports, statements, 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, including e-mail stored in a computer, it would constitute a “record” subject to rights of access conferred by FOIL. Further, the definition of “record” includes specific reference to computer tapes and discs, and it was held nearly twenty 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, when it is available under FOIL 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.

This is not to suggest that all e-mail communications must be disclosed. While FOIL is based on a presumption of access, it includes exceptions to rights of access. Those exceptions, as well as rights of access, are the same, irrespective of the medium in which information is stored or maintained. Stated differently, if information printed on paper would be accessible under the Freedom of Information Law, the same information would be available if it was created through e-mail. Similarly, if printed materials could be withheld, the same material recorded by means of e-mail would be equally deniable.

Lastly, you wrote that “F.O.I.L. and Civil discovery seem to overlap. In this regard 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

Mr. David Hunt

July 30, 1999

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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.

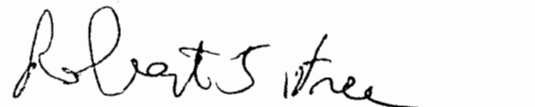
"CPLR article 31 proceeds under a different premise, and serves quite different concerns. While speaking also of 'full disclosure' article 31 is plainly more restrictive than FOIL. Access to records under CPLR depends on status and need. With goals of promoting both the ascertainment of truth at trial 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)].

In sum, I believe that the Freedom of Information Law imposes a duty to disclose records, as well as the capacity to withhold them, irrespective of the status or interest of the person requesting them. To be distinguished are other provisions of law that may require disclosure based upon one's status, e.g., as a defendant, and the nature of the records or their materiality to a proceeding.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt



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DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11601

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Alexander F. Treadwell

Executive Director

Robert J. Freeman

July 30, 1999

Mr. Jorge Codognotto
Wyoming Correctional Facility
P.O. Box 501
Attica, NY 10411-0501

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Codognotto:

I have received your letter of June 25 in which you sought assistance in obtaining records pertaining to your arrest and convictions.

In this regard, it is noted at the outset 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. When seeking court records, it is suggested that you refer to an applicable provision of law as the basis for the request.

Mr. Jorge Codognotto

July 30, 1999

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Both a police department and the office of a prosecutor would constitute agencies subject to the Freedom of Information Law. That statute, in general, is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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

Mr. Jorge Codognotto

July 30, 1999

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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).

Mr. Jorge Codognotto

July 30, 1999

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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).

Mr. Jorge Codognotto

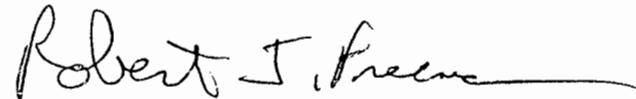
July 30, 1999

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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,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and extends across the width of the page.

Robert J. Freeman
Executive Director

RJF:tt

cc: Nancy Greenberg



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Executive Director

Robert J. Freeman

July 30, 1999

TO: Scott Sherwood <ssherwood@cgr.org>

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 Mr. Sherwood:

As you are aware, I have received your letter of June 30 in which you sought my opinion concerning the propriety of fees assessed by Erie County for copies of certain records.

Specifically, in response to your request for "parcel boundaries" in three towns and two villages, you wrote that the County's Real Property Director said that the fee would be three dollars per parcel. You added that:

"[You] don't know the exact parcel count for the municipalities in question but it would be safe to say it's several thousand parcels, probably around 5,000 - 7,000. This would put the cost of acquisition in the \$15 - 20,000 range for just these few municipalities. To get the entire county would cost over \$100,000 at least!"

From my perspective, it is unlikely that the fees assessed by the County are consistent with law. In this regard, I offer the following comments.

By way of background, until October of 1982, §87(1)(b)(iii) of the Freedom of Information Law stated that an agency could charge up to twenty-five cents per photocopy or the actual cost of reproduction unless a different fee was prescribed by "law". Chapter 73 of the Laws of 1982 replaced the word "law" with the term "statute". As described in the Committee's fourth annual report to the Governor and the Legislature of the Freedom of Information Law, which was submitted in December of 1981 and which recommended the amendment that is now law:

"The problem is that the term 'law' may include regulations, local laws, or ordinances, for example. As such, state agencies by means of

Mr. Scott Sherwood

July 30, 1999

Page - 2 -

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 administrative fee, a fee, excess of twenty-five cents per photocopy, or a fee 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)].

In a decision that focused specifically on the fee charged by a county for copying real property tax maps, it was held that the county's fee of \$4.00 per map established by a committee of the county legislature was improper. In brief, the Court referred to §87(1)(b)(iii) of the Freedom of Information Law, which, again, permits an agency to charge a fee based on the actual cost of reproduction when records are larger than nine by fourteen inches or cannot be photocopied. It was also determined that the action taken by a committee of the county legislature did not constitute a statute and therefore could not be inconsistent with the Freedom of Information Law. Further, in its analysis of the actual cost, the Court found that:

"The copying expenses claimed by the County, excluding map maintenance expense, total \$1.15 per tax map copy. Petitioner argues, however, that the actual cost of reproduction is \$.25 per map or less. He bases his estimate on economies of scale, citing retail prices ranging from \$1.40 for one map to an average of \$.64 per map for a quantity of 1,138 maps (Petition, appendix, p. 1). He argues that the actual cost is much less than even the retail prices.

"Actual reproduction cost is defined in 21 NYCRR § 1401.8(c)(3) as 'average unit cost for copying a record, excluding fixed costs of the agency such as operator salaries.' I interpret this phrase to require the agency to average out the copying costs for each type of record not covered by the \$.25 per page fee based on its experience over a period of time. Undoubtedly, where the number of copies per order increases for a particular record over a period of time, the economies of scale will result in a lower unit cost over that time period" [Szikszay v. Buelow, 436 NYS 2d 558, 561-562 (1981)].

Mr. Scott Sherwood

July 30, 1999

Page - 3 -

In this instance, it is assumed that the records in question are maintained and can be reproduced electronically. If that is so, rather than charging on a per parcel basis, compliance with the Freedom of Information Law would involve a fee based on the actual cost of reproduction. That fee would likely be based on the cost of computer time needed to generate the data, plus the cost of information storage media, such as computer tapes or disks.

In an effort to enhance compliance with and understanding the Freedom of Information Law, copies of this opinion will be forwarded to the Real Property Director and the County Attorney.

I hope that I have been of assistance.

RJF:tt

cc: Real Property Director
Kenneth Schoetz, County Attorney



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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FOIL-AO-11603

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Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

August 3, 1999

Mr. Jeffrey Shankman
J.M.J. Associates, Inc.
P.O. Box 3338
New York, NY 10163

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Shankman:

I have received your letters of June 28 addressed to the Secretary of State and myself. As indicated above, the staff of the Committee on Open Government is authorized to respond on behalf of the Committee in relation to matters within the advisory jurisdiction of this office.

In your letter to the Secretary of State, you contended that the Public Service Commission violated the State Administrative Procedure Act. In this regard, neither the Secretary, nor the Department of State or the Committee on Open Government determines or advises with respect to the kinds allegations that you offered concerning compliance with the State Administrative Procedure Act.

You referred in the same letter to a "one-Commissioner ruling" issued on June 16 that was later confirmed by the Public Service Commission at a regularly scheduled meeting held on June 24. You wrote that no minutes were taken in relation to the earlier event and contended that "this is a violation of the Open Meetings Law." From my perspective, the Open Meetings would not have applied and, consequently, there would have been no violation. That statute pertains to meetings of public bodies, and §102(2) provides that a "public body" is, in brief, an entity consisting of two or more members that conducts public business and performs a governmental function. While the Public Service Commission is a public body required to comply with the Open Meetings Law, when a function is carried out by a single member of the Commission, there is no public body involved, and the Open Meetings Law is inapplicable.

I point out that the kind of "ruling" or "order" to which you referred is interim in nature and is authorized by §11 of the Public Service Law. That provision states in relevant part that:

Mr. Jeffrey Shankman

August 3, 1999

Page - 2 -

“Any investigation, inquiry or hearing which the commission has power to undertake or to hold may be undertaken or held by or before the commission... All investigations, inquiries, hearings and decisions of a commissioner or specially authorized officer or employee shall be and be deemed to be the investigations, inquiries, hearings, and decisions of the commission and every order made by a commissioner, when approved and confirmed by the commission and ordered filed in its office, shall be and deemed to be the order of the commission.”

In the letter addressed to me, you referred to a determination of your appeal rendered by Chief Administrative Law Judge Judith A. Lee following a partial denial of access to records under the Freedom of Information Law. Although Judge Lee offered descriptions of the records that were withheld, you contended that you are “entitled to...either a copy of the original document redacted, or if a list is supplied, the dates of the memos and whom those memos were sent.” In this regard, under §87(2) of the Freedom of Information Law, an agency may withhold “records or portions thereof” that fall within the grounds for denial that follow. Therefore, unless a record may be withheld in its entirety, I believe that an agency would be required to disclose a copy of the record following the appropriate redactions or deletions and payment of the requisite fee for copies.

You also referred to a claim by Judge Lee that certain documents are subject to “the attorney work product privilege” and contend that you “are entitled to an Affidavit showing that the information was generated by an attorney for the purpose of litigation.” In short, there is nothing in the Freedom of Information Law that requires the preparation of such an affidavit. Further, a claim that records consist of the work product of an attorney may be asserted in my view concerning matters unrelated to litigation.

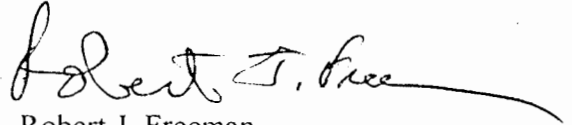
Next, you wrote that an exception to rights of access can not be based on an agency’s regulations and that only a statute can exempt records from disclosure. That issue was considered in the opinion addressed to you on May 17. I do not believe that reiterating the commentary offered then would serve any useful purpose.

Lastly, you wrote that documentation withheld was earlier “divulged by a Department employee either in a pleading or a response to a FOIL request.” In my opinion, if a disclosure made in a pleading or in response to a request made under the Freedom of Information Law was not inadvertent and was made “intelligently and voluntarily” [McGraw-Edison v. Williams, 509 NYS2d 285, 287 (1986)], an agency would have waived its right to withhold the same material sought later under the Freedom of Information Law. In Williams, among records inspected was a document that an agency believed was exempt from disclosure and should have been withheld, and the court held that an inadvertent disclosure of exempt records did not create a right of access to the records. Based on the foregoing, if indeed records may justifiably be withheld but were inadvertently made available, it appears that an agency may properly deny an ensuing request for the records.

Mr. Jeffrey Shankman
August 3, 1999
Page - 3 -

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:tt

Hon. Judith A. Lee
Steven Blow



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11604

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Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

August 5, 1999

Ms. Lillian F. Parsons



The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Parsons:

I have received your letter of June 30 in which you sought an opinion concerning your right to gain access to a certain record.

In brief, you wrote that the nephew of a friend was recently subject of a Parole Board hearing, and that the District Attorney who prosecuted that person wrote to the Parole Board and expressed opposition to his parole. A request for the letter was made and denied "because it was inter-agency correspondence." Despite the denial of the request, however, you indicated that "[t]he District Attorney had previously issued a statement to the local newspaper saying he was writing a letter opposing his parole. The paper even had some quoted lines from the letter!"

In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Second, as suggested above, a communication from a representative of one agency, the Office of the District Attorney, to another, the Parole Board, constitutes "inter-agency material." That kind of communication falls within the scope of §87 (2)(g), which permits an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;

Ms. Lillian F. Parsons

August 5, 1999

Page - 2 -

- iii. final agency policy or determinations; or
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

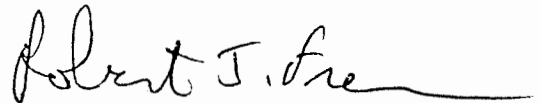
It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

On the basis of §87(2)(g), insofar the District Attorney offered an opinion or recommendation to the Parole Board, I believe that the letter could be withheld.

Lastly, notwithstanding the foregoing, if any portion of the record in question was purposefully disclosed to the news media or in response to a different request made under the Freedom of Information Law, I believe that the District Attorney would effectively have waived the ability to withhold those portions of the record from the public. A disclosure to the news media, who have no special rights of access, is essentially a disclosure to the public. Consequently, in my opinion, you (or any other member of the public) would have the right to obtain the record in question to the extent that the record was disclosed to the news media.

I hope that the foregoing serves to clarify the understanding of the matter and that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt



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DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMC-AO - 3052
FOI-AO-11605

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August 5, 1999

Ms. Karen Summerlin
Asst. Vice President for
Public Affairs
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.

Dear Ms. Summerlin:

I have received your letter of June 29 and appreciate your kind words.

You referred to my comments offered at the SUNY CUAD conference in which it was suggested, in your words, that you are "not required to go through all records in order to find specific documents." You related that point to "a request to view travel records of a specific individual during a period of several years" and added that "[a]lthough the records exist, they are retrievable only if I were to view and sort through all travel records made by all SUNY New Paltz employees during that period. (They are not computerized and cannot be located by name.)"

In this regard, 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.

Ms. Karen Summerlin

August 5, 1999

Page - 2 -

National Cable Tel. Assn. v. Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5USC 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).

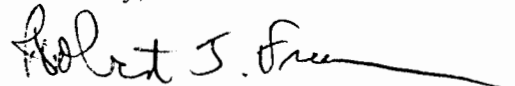
In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of the agency's filing or record-keeping system. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number.

To the extent that 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 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.

In the context of the request to which you referred, if, for instance, travel records are maintained chronologically, not by name, and locating the records sought would involve a page by page review of thousands of records, you would be justified, in my opinion, to reject the request on the ground that it does not meet the requirement of "reasonably describing" the 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:tt



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

7071-A0-11606

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Alexander F. Treadwell

Executive Director

Robert J. Freeman

August 5, 1999

Ms. Marjorie C. Gilligan



The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Gilligan:

I have received your letter of July 30 in which you requested "the list of absentee voters (and their addresses) who voted at the Delaware Valley Central School, Callicoon, New York on June 10, 1999." You indicated that you were able to obtain a list of those who applied for absentee ballots, "but not the list of those who actually voted." Further, you were informed that such a list is "sealed."

In this regard, first, the Committee on Open Government is authorized to provide advice and opinions concerning public access to government records, primarily under that state's Freedom of Information Law. The Committee does not have custody or control 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 available because this office does not possess them.

Second, requests for records should generally be made to the "records access officer" at the agency that you believe maintains the records of your interest. The records access officer, pursuant to regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), has the duty of coordinating an agency's response to requests.

And third, 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 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 §2610 of the Education Law. Subdivision (3) of §2610 states in relevant part that:

Ms. Marjorie C. Gilligan

August 5, 1999

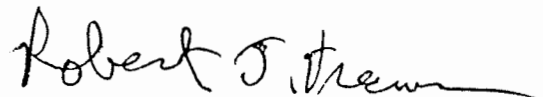
Page - 2 -

“After the ballots are counted and the statements have been made as required herein the ballots shall be replaced in the ballot box. Each box shall be securely locked and sealed and deposited by an inspector designated for the purpose with the clerk of the board of education.”

While I am not an expert on the Education Law, I believe that the ballots remain sealed, unless there is an order to the contrary issued by the Commissioner of Education or a court.

I hope that the foregoing serves to clarify your understanding of the matter and that I have been of assistance.

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and is positioned above the printed name and title.

Robert J. Freeman
Executive Director

RJF:tt

cc: Suzanne Spears
RAO, Delaware Valley Central School



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI AD-11607

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Alexander F. Treadwell

Executive Director

Robert J. Freeman

August 5, 1999

Mr. Michael Paulk
99-R-1086
Gouverneur Correctional Facility
P.O. Box 480
Gouverneur, NY 13642-0370

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Paulk:

I have received your letter of June 29 and the correspondence attached to it. In brief, you requested a copy of an indictment pertaining to yourself from the Office of Rensselaer County Attorney. As of the date of your letter to this office, you had received no response.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body,

Mr. Michael Paulk

August 5, 1999

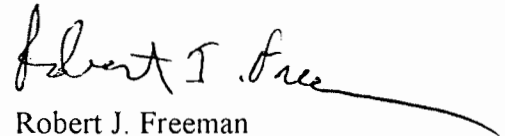
Page - 2 -

who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and has a long, sweeping horizontal line extending to the right from the end of the name.

Robert J. Freeman
Executive Director

RJF:tt



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI-AO-11608

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Alexander F. Treadwell

Executive Director

Robert J. Freeman

August 5, 1999

Mr. Dennis Rogha
91-A-7163
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. Rogha:

I have received your undated letter, which reached this office on July 8. You have questioned your ability to obtain medical records pertaining to your son.

In this regard, it is noted that the governing statute is not the Freedom of Information Law but rather §18 of the Public Health Law, which 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:

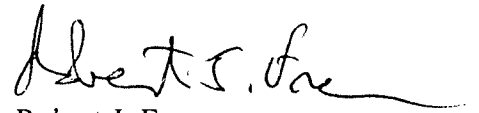
"any properly identified subject, committee for an incompetent appointed pursuant to article seventy-eight of the mental hygiene law, or a parent of an infant, a guardian of an infant appointed pursuant to article seventeen of the surrogate's court procedure act or other legally appointed guardian of 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.

Mr. Dennis Rogha
August 5, 1999
Page -2-

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman". The signature is written in dark ink and has a long, sweeping tail that extends to the right.

Robert J. Freeman
Executive Director

RJF:tt



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AC-11609

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

August 5, 1999

Mr. Leonard Mason
98-A-2434
Clinton Correctional Facility
P.O. Box 2001
Dannemora, NY 12929-02001

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Mason:

I have received your letter of July 2. You have questioned the propriety of a denial of your request to the office of a district attorney to inspect grand jury minutes.

From my perspective, those records fall beyond rights conferred by the Freedom of Information Law.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Relevant to the matter is 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."

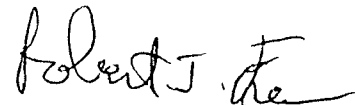
Based on the foregoing, grand jury minutes would be outside the scope of rights conferred by the Freedom of Information Law. Any disclosure of those records would be based upon a court order

Mr. Leonard Mason
August 5, 1999
Page -2 -

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,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman".

Robert J. Freeman
Executive Director

RJF:tt



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11610

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

August 5, 1999

Mr. Rodney Alford
94-A-7700
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. Alford:

I have received your letter of June 28 in which you sought guidance concerning your ability to obtain certain information. You wrote as follows:

- “1. How can I find out if and how much federal and/or state aid I received while I was in the care and custody of the Department of Social services of the City of New York (1990 through 1992) and my child received while he was in the care and custody of said agency (1992 through present)?
2. How can I obtain true copies of minutes to the New York State’s legislature’s debates, in regard to specific laws that I am curious to know the legal, moral and intended purposes behind them?; and
3. How can I obtain any and all statistics, reviews, and/or reports pertaining to New York State’s Department of Corrections Temporary Release Program, and New York State’s Executive Department Division of Parole?”

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 states in part that an entity is not required to create or prepare a record in response to a request. Therefore, if there are no records containing figures or tabulations indicating amounts of aid received, a social services agency would not be required to develop new

Mr. Rodney Alford

August 5, 1999

Page - 2 -

records containing such figures or tabulations on your behalf. Similarly, if a debate in the Legislature was not transcribed or if there are no minutes, there would be no obligation to prepare a transcript or minutes for you.

With respect to proceedings before the Senate and the Assembly, few debates or proceedings are transcribed. However, to the extent that such records exist, they may be obtainable through your facility librarian or by writing to the records access officer in the Senate and the Assembly.

When seeking records regarding a particular law or a category of records relating to temporary release, §89 (3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, any such request must include sufficient detail to enable staff to locate and identify the records of your interest.

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. As such, a request should ordinarily be directed to the records access officer at the agency that maintains the records of your interest, i.e., at the Department of Correctional Services or the Division of Parole.

Lastly, with respect to background information regarding legislation, memoranda in support of a bill and similar documentation is generally available from the State Library. I believe that those records may be obtained with the assistance of your facility librarian.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

7021-00-11611

Committee Members

Mary O. Donohue
Alan Jay Gerson
Walter Grunfeld
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August 6, 1999

Mr. Adam Militello
Mary Jane Books

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Militello:

As you are aware, I have received your letter of July 8, as well as a variety of additional correspondence relating to your efforts in gaining access to records of the State University (SUNY) at Albany.

You indicated that you frequently write to faculty members and request "their individual booklists", but that "more often than not, [y]our requests... are simply ignored." You have asked whether "faculty members [are] exempt from FOIL" and if you "can make requests directly to them."

In this regard, I offer the following comments.

First, I believe that booklists maintained by faculty members fall 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, when a faculty member prepares or maintains a booklist involving materials to be used in conjunction with his or her teaching duties at SUNY, I believe that it clearly would constitute a "record" subject to the Freedom of Information Law. I note that the state's highest court

Mr. Adam Militello
August 6, 1999
Page - 2 -

has held that curricular materials used by faculty in the SUNY system are "records" falling within the scope of that statute [Russo v. Nassau County Community College, 81 NY 2d 690 (1993)].

Second, as required by §89 (1) of the Freedom of Information Law, the Committee on Open Government has promulgated general rules and regulations concerning the procedural implementation of the Freedom of Information Law (21 NYCRR Part 1401). As the regulations relate to your inquiry, §1401.2 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, SUNY 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, including the duty to coordinate the agency's response to requests.

From my perspective, while in some instances it may be most efficient or effective to direct a request to an agency's records access officer, there is not a requirement that a member of the public do so. Based on my experience, thousands of requests for records made each year are directed to persons other than records access officers.

When a person other than the record access officer receives a request for records pursuant to the Freedom of Information Law, I believe that the recipient of the request must respond directly in a manner consistent with law, or forward the request promptly to the agency's records access officer.

Lastly, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

Mr. Adam Militello

August 6, 1999

Page - 3 -

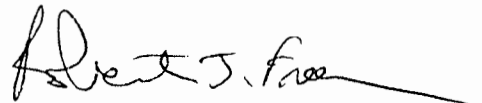
If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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: Martin T. Reid
Stephen J. Beditz



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOZC-RO-11612

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Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

August 6, 1999

Mr. Laszlo Polyak



The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Polyak:

I have received your letter of July 1, as well as the materials attached to it.

The first issue that you raised involves a request for a letter from the Town of Coeymans to its attorney concerning a particular subdivision. In short, the Town Supervisor indicated that no such document exists.

In this regard, it is emphasized that the Freedom of Information Law pertains to existing records. Further, §89 (3) of that statute states in relevant part that an agency is not required to create or prepare a record in response to a request. If, for example, information was exchanged verbally and no record was prepared, 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 certification.

A second issue relates to requests to the Town of Coeymans and the Village of Ravena for records indicating "the job duties and description" pertaining to their employees. If those records exist and are maintained by the Town or the Village, I believe they must be made available.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. While one of the grounds for denial relates to the records in question, due to its structure, it would, in my view, require disclosure.

Mr. Laszlo Polyak
August 6, 1999
Page - 2 -

Specifically, §87 (2)(g) of the Freedom of Information Law permits an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations; or
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

A description of the duties required to be performed by the holder of a certain position would in my opinion constitute factual information available under §87 (2)(g)(i) or reflect an agency's policy in relation to the duties inherent in a position that would be available under §87 (2)(g)(iii).

If the Town or Village does not maintain the records, it is suggested that you contact the County Department of Civil Service.

I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:tt

cc: Coeymans Town Board
Ravena Village Board of Trustees



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

707610-11613

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Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

August 6, 1999

Mr. Richard M. Weinberg
General Counsel & Director
The City of New York
Legal & Governmental Affairs Div.
75 Park Place, 5th Floor
New York, NY 10007

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence, unless otherwise indicated.

Dear Mr. Weinberg:

I have received your letters of July 1 and July 21, as well as a variety of related correspondence. In brief, you indicated that the New York City Council has responded in good faith, and in a manner consistent with law, to "numerous and duplicate" requests made under the Freedom of Information Law by Ms. Estelle Levy.

As you may be aware, I have communicated with Ms. Levy, both orally and in writing on numerous occasions. In the course of those communications, I have attempted to offer advice in accordance with the statutory charge of this office based on the terms of the Freedom of Information Law and its judicial interpretation. In an effort to assist you and to clarify the scope and utility of the Freedom of Information Law, I offer the following comments and will send this response to Ms. Levy.

First, the title of the Freedom of Information Law is somewhat misleading, for it is not a vehicle that involves the disclosure of information *per se*; rather, it pertains to existing records maintained by or for an agency. Further §89 (3) of the Freedom of Information Law states in relevant part that an agency is not required to create or prepare a new record in response to a request. Therefore, insofar as requests involve information that does not exist in a record or records maintained by the City Council, the Freedom of Information Law would not apply.

Mr. Richard M. Weinberg

August 6, 1999

Page - 2 -

In a related vein, because the Freedom of Information Law pertains to requests for existing records rather than information, it does not require that an agency provide information by answering questions. Certainly agency officials, as public servants, frequently answer questions. However, I know of no law that generally requires that they do so. Further, that step, answering questions, goes beyond the obligations imposed upon government agencies by the Freedom of Information Law. Members of the public have been advised on many occasions that they should not seek information under the Freedom of Information Law by attempting to elicit answers to questions. On the contrary, it consistently been advised that requests involve existing records maintained by or for an agency.

Second, with respect to duplicate requests, it has been held that if records had in the past been disclosed to an individual or to his or her representative (i.e., an attorney), an agency need not make the same records available in response to an ensuing request, unless it can be demonstrated that neither the individual nor his or her representative any longer possesses the records [Moore v. Santucci, 543 NYS 2d 103, 151 AD 2d 677 (1989)].

In situations in which information is sought by asking questions, in which the information sought does not exist or is not maintained by an agency, or in which requests repeatedly seek the same records, it has been suggested that an agency refer to the principles described in preceding paragraphs and inform an individual, in writing, to indicate that, from that time forward, it will respond only to requests for existing records that have not been the subjects of previous requests.

Lastly, when a valid request is made, I note that the Freedom of Information Law provides direction concerning the time and manner in which an agency must respond. Specifically §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

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.

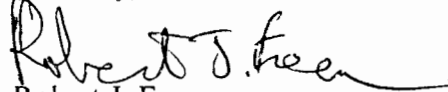
Mr. Richard M. Weinberg

August 6, 1999

Page - 3 -

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and is positioned above the printed name and title.

Robert J. Freeman
Executive Director

cc: Estelle Levy



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI C-DO - 11614

Committee Members

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David A. Schulz
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Alexander F. Treadwell

Executive Director

Robert J. Freeman

August 6, 1999

Mr. George R. Hubbard

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Hubbard:

I have received your letter of July 8 in which you asked that I review and comment in relation to your request made under the Freedom of Information Law to the Greece Central School District.

While I believe that your requests were appropriately expressed, the overriding principle is that the Freedom of Information Law pertains to existing records, and that §89 (3) of that statute provides in relevant part that an agency need not create or prepare a record in response to a request.

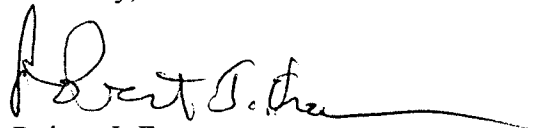
By means of example, in your first request, you referred to a statement indicating that "nearly all homeowners in Greece will see a decrease in their taxes." On the basis of that statement, you asked for records "that include or make reference to, a definition or meaning for the words 'nearly all homeowners in Greece...'" In my view, it is unlikely that the District would maintain any record that would define the phrase "nearly all." If that is so, no records falling within the request would exist, and the District would not be obliged to prepare a definition of that phrase in an effort to accommodate you. Rather than seeking a definition that is unlikely to exist, it might have been more effective to request records indicating or projecting the percentage or number of properties whose taxes might be reduced.

In short, in the future, it is suggested that you seek records that are likely to exist.

Mr. George R. Hubbard
August 6, 1999
Page - 2 -

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:tt
cc: Ruth Ranzenbach
Donald O. Nadolinski



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

7076-AO-11615

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

August 6, 1999

Mr. Dana Sydnor
97-A-4590 B2-32
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 July 5 and the document attached to it. That document is an appeal to the Office of the Orange County District Attorney concerning "the county court's denial" of a request that was apparently not answered.

I do not clearly understand the situation. If a request was made to County Court, the Freedom of Information Law would not have applied, for that statute excludes the courts from its coverage. Further, in the event of a denial of access to records by a court or a failure to respond, an appeal would not be made to the office of a district attorney. Because the Freedom of Information Law would not apply, there would be no administrative appeal analogous that involving appeals of agencies' denials of access that may be made pursuant to §89(4)(a) of the Freedom of Information Law.

If indeed you are seeking records from a court, while the Freedom of Information Law would not apply, other statutes confer broad access to court records (see e.g., Judiciary Law, §255). In that event, it is suggested that you resubmit your request to the clerk of the Court, citing an applicable provision of law as the basis for the request.

If the request involves records maintained by the Office of the District Attorney, and that agency failed to respond, it appears that you have validly appealed. In this regard, when the Freedom of Information Law is applicable, it provides discretion 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:

Mr. Dana Sydnor

August 6, 1999

Page - 2 -

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:


"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Lastly, insofar as the records were previously made available to you or your attorney, the District Attorney would not be required to disclose the records a second time, unless it can be demonstrated that neither you nor your attorney continues to possess the records [Moore v. Santucci, 543 NYS 2d 103, 151 AD 2d 677 (1989)].

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

FOI-190-11616

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Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

August 9, 1999

Executive Director

Robert J. Freeman

Mr. Duaut A. Duamutef
84-A-1026
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. Duamutef:

I have received your letter of July 6 concerning of a denial of request directed to the Commissioner of the Department of Correctional Services.

Based on your description of the request, two of the three elements of it did not involve an attempt to obtain a record. In this regard, I point out that the title of the Freedom of Information Law may be somewhat misleading, for it does not deal with information generally, but rather with 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 for information.

By means of example in the context of your request, you asked for "the way - whether by e-mail or facsimile, etc." information was "relayed" by the Department of Correctional Services to the INS. In short, as I understand the request, you sought information, an explanation of the means by which information was transmitted, rather than a record.

The remaining aspect of the request pertains to "the computer printout of this information that DOCS (Albany) has forwarded to INS in regard to [your] parole release for deportation only." If such a printout exists or can be generated, I believe that it would constitute a "record" [see §86(4)] that falls within the framework of the Freedom of Information Law.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Since I am unaware of the contents of the record in question, if it exists, I cannot advise as to the extent to which it would be accessible under the Law.

Mr. Duaut A. Duamutef

August 9, 1999

Page -2-

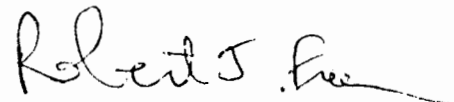
Lastly, when a request for records is denied, the person seeking the records may appeal in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"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."

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 the foregoing serves to clarify your understanding of the Freedom of Information Law and that I have been of assistance.

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in dark ink and is positioned above the printed name and title.

Robert J. Freeman
Executive Director

RJF:jm

cc: Anthony J. Annucci



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11617

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

August 9, 1999

Mr. Nyeem Adams
96-A-3290
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. Adams:

I have received your letter of July 6 in which you referred to a request made under the Freedom of Information Law to the Office of the Bronx County District Attorney nearly two years ago. It appears that the records access officer is unable to locate the records.

In this regard, I offer the following comments.

First, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

Mr. Nyeem Adams
August 9, 1999
Page - 2 -

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

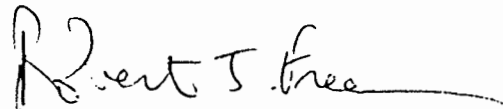
In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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)].

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Assistant District Attorney Wanderman



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

701-190-11618

Committee Members

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Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

August 9, 1999

Executive Director

Robert J. Freeman

Mr. Alan Kinney
#48565-053 B-3
P.O. Box 819
Coleman, FL 33521-0819

Dear Mr. Kinney:

Your letter addressed to former Attorney General Vacco has been forwarded to the Committee on Open Government. Although you expressed the belief that the Attorney General's office offers assistance in relation to the Freedom of Information Law, this office, a unit of the Department of State, is authorized to provide guidance concerning that statute.

As I understand the matter, you requested records from the Division of State Police, some of which were made available. Other records were withheld on the grounds that disclosure would result in an unwarranted invasion of personal privacy or identify a confidential source. You indicated that you want to pursue the matter and perhaps challenge the denial of access in court.

In this regard, although I am unfamiliar with the records at issue, I note that §87(2)(b) of the Freedom of Information Law authorizes an agency to deny access to records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." Similarly, §87(2)(e) permits an agency to withhold records "compiled for law enforcement purposes" in certain circumstances, one of which involves situations in which disclosure would identify a confidential source or reveal confidential information relating to a criminal investigation.

Since you appealed and the appeal was denied, you may seek judicial review of the denial within four months of the agency's final determination of your appeal by initiating a proceeding under Article 78 of the Civil Practice Law and Rules. That is the vehicle under which a member of the public may challenge the action of a government agency on the ground that the agency acted unreasonably or failed to carry out a duty required by law to be performed. Since you are outside of New York, I believe that an Article 78 proceeding would be brought in Supreme Court, Albany County.

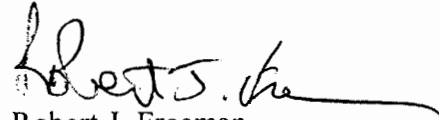
It is noted that §89(4)(b) of the Freedom of Information Law states that the agency that has denied access has the burden of proving that the records withheld fall within the exceptions to rights of access appearing in paragraphs (a) through (i) of §87(2) of the Law.

Mr. Alan Kinney
August 9, 1999
Page -2-

Enclosed for your review is a copy of the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

Enc.



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11619

Committee Members

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

August 10, 1999

Executive Director

Robert J. Freeman

Mr. Gary Jarvis
95-A-3713 APPU
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. Jarvis:

I have received your letter of July 13. In brief, you sought information concerning the functions of the Committee on Open Government and assistance relating to a delay in response to your request for records of the Division of Parole.

In this regard, first, the Committee on Open Government was created as part of the Freedom of Information Law and functions within the Department of State. The primary function of the Committee involves providing advice and opinions concerning rights of access to government information, primarily under the state's Freedom of Information, Open Meetings and Personal Privacy Protection Laws.

Second, 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..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges

Mr. Gary Jarvis
August 10, 1999
Page -2-

that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

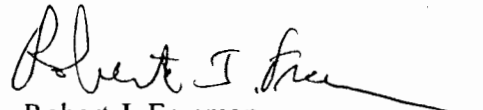
"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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 Division of Parole designated to determine appeals is Terrence X. Tracy, Counsel to the Division.

I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:jm

cc: David Molik, Records Access Officer



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

707L-190-11620

Committee Members

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Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

August 10, 1999

Executive Director

Robert J. Freeman

E-Mail

TO: John Kinney *RJF*
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. Kinney:

I have received your letter of July 16. In brief, while you did not describe the records that you requested, you contend that the City of Auburn has engaged in delays in responding to your requests for records.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body,

Mr. John Kinney
August 10, 1999
Page -2-

who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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.

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI-AO-11621

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Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

August 10, 1999

Mr. Herbert A. Kline
Village of Port Dickinson
Village Hall
788 Chenango Street
Port Dickinson, NY 13901

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Kline:

I have received your letter of July 13 in which you sought guidance concerning the implementation of the Freedom of Information Law. Specifically, you raised the following question:

“...would a village clerk have access to records maintained by the police department in attempting to respond to an FOI request or should he/she request the police department to research the matter and report the results of their research to the clerk who as records access officer will then respond to the FOI request.”

In this regard, I offer the following comments.

First, as you are aware, pursuant to §4-402 of the Village Law, the clerk is the custodian of all village records. Therefore, even though a village clerk may not have physical custody of records maintained by or for a village, he or she would have legal custody of the records.

Second, assuming that a village clerk has been designated by a board of trustees as “records access officer”, that person would have the initial authority to determine to grant or deny access to records and, in my view, the ability to acquire and view records (unless the records have been sealed) in an effort to carry out his or her duties.

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

Mr. Herbert A. Kline

August 10, 1999

Page - 2-

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 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 from doing so.”

Section 1401.2 (b) of the regulations describes the duties of a records access officer and states in part that:

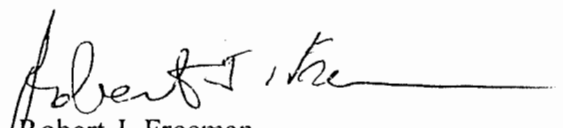
“The records access officer is responsible for assuring that agency personnel...

- (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. As part of that coordination, the records access officer may in my opinion consult with staff at the Police Department without actually reviewing records, or he or she may obtain the records for the purpose of reviewing them in an effort to determine the extent to which they 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

7071-20-11622

Committee Members

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Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

August 10, 1999

TO: [REDACTED]

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 Mr. Mustico:

I have received your letter of July 15 in which you asked whether requests may be made for "Freedom of Information request forms."

In this regard, I offer the following comments.

First, I believe that written requests made pursuant to the Freedom of Information Law constitute "records" that fall within the coverage of that statute. Section 86(4) defines the term "record" expansively to mean:

"any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, when a written request is made to an agency, I believe that the request is itself 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. From my perspective, with the exception of portions of certain kinds of requests, the records in question would be accessible under the law.

Mr. John P. Mustico, Esq

August 10, 1999

Page - 2 -

In my view, the only instances in which the records at issue may be withheld in part would involve situations in which, due to the nature of their contents, disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §§87(2)(b) and 89(2)]. For instance, if a recipient of public assistance seeks records pertaining to his or her participation in a public assistance program, disclosure of the request would itself indicate that he or she has received public assistance. In that case, I believe that identifying details could be deleted to protect against an unwarranted invasion of personal privacy.

As stated by the Court of Appeals, the exception in the Freedom of Information Law pertaining to the protection of personal privacy involves details about one's life "that would ordinarily and reasonably be regarded as intimate, private information" [Hanig v. State Department of Motor Vehicles, 79 NY2d 106, 112 (1992)]. In most instances, a request or the correspondence pertaining to it between the agency and the applicant for records does not include intimate information about the applicant. For example, if a request is made for an agency's budget, the minutes of a meeting of a municipal board, or an agency's contract to purchase goods or services, the request typically includes nothing of an intimate nature about the applicant. Further, many requests are made by firms, associations, or persons representing business entities. In those cases, it is clear that there is nothing "personal" about the requests, for they are made by persons acting in a business or similar capacity (see e.g., American Society for the Prevention of Cruelty to Animals v. NYS Department of Agriculture and Markets, Supreme Court, Albany County, May 10, 1989; Newsday v. NYS Department of Health, Supreme Court, Albany County, October 15, 1991).

I hope that I have been of assistance.

RJF:tt



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI-90-11623

Committee Members

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Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

August 10, 1999

Mr. Jerry Moore



The staff of the Committee on Open 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 letters of July 17 and July 20 and the materials relating to them. You have raised questions concerning your efforts to inspect records of the Scotia-Glenville School District. Specifically, you wrote as follows:

“First, does the law permit Mr. Marcelle [the Superintendent] to restrict access to public records **previously approved for inspection** to times and dates he chooses? Second, since the noon hour may be the only time I have available to inspect public records in the future, does the law require the district to provide access to public records **previously approved for inspection** during the noon hour if its offices are otherwise open for conducting any of public business?”
(emphasis yours).

In this regard, as you are aware, it has been advised by this office and held judicially that an agency cannot limit the ability of the public to inspect records to a period less than its regular business hours. 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

Mr. Jerry Moore
August 10, 1999
Page - 2 -

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."

As suggested earlier, relevant to your inquiry is a decision rendered by the Appellate Division. Among the issues was the validity of a limitation regarding the time permitted to inspect records established by a Village pursuant to regulation. The Court held that the village was required to enable the public to inspect records during its regular business hours, stating in part 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 2e 101 (1994), 210 AD 2d 411].

Based on the foregoing, if the District conducts business and is open "during the noon hour", I believe that it must make records available for your inspection during that time.

I do not believe, however, that a member of the public may designate the date or dates on which he or she seeks to review records. If, for instance, records will be in use by staff on a particular date or during a particular period of time, an agency would not, in my view, be required to alter its schedule or work plan. In that instance, the agency could offer a series of dates to the person seeking to inspect the records in order that he or she could choose a date suitable to both parties.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Michael Marcelle
Diane Hartman



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-DO-11624

Committee Members

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Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

August 10, 1999

Mr. Phil Robinson
95-A-4867
Attica Correctional Facility
Attica, NY 14011-0149

Dear Mr. Robinson:

I have received your letter of August 2 in which you requested dental records relating to your treatment at the Harlem Valley Correctional Center.

In this regard, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. The Committee does not have general custody or control of records. In short, I cannot provide the records, because this office does not possess them.

In the future, it is suggested that a request be directed to the agency that maintains the records of your interest. In this instance, it is possible that the records were forwarded with you to your current facility, that they may be kept at the facility where the dental work was performed, or that they have been sent to a central office at the Department of Correctional Services.

With 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 Department personnel could be characterized as "intra-agency materials" that fall within the scope of §87 (2)(g) of the Freedom of Information Law. To the extent that such materials consist of advice, opinion, recommendation and the like, I believe that the Freedom of Information Law would permit a denial.

However, a different statute, §18 of the Public Health Law generally grant rights of access to medical records to the subjects of the records. As such, that statute may provide greater access to medical records than the Freedom of Information Law. It is suggested that you refer to §18 of the Public Health Law in any request for medical records.

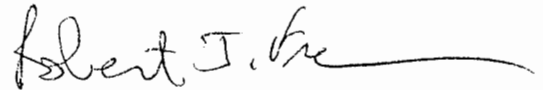
Lastly, since you referred to fee waivers under "the amended F.O.I.A.", I note that the reference involves the federal Freedom of Information Act, which applies only to records maintained by federal agencies. There are no similar provisions in the New York Freedom of Information Law,

Mr. Phil Robinson
August 10, 1999
Page - 2 -

and it has been held that an agency may charge its established fees for copies, 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,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and has a long, sweeping horizontal line extending to the right.

Robert J. Freeman
Executive Director

RJF:tt



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI - 90 - 11624A

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Warren Mitofsky
Wade S. Norwood
David A. Schultz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

August 10, 1999

Mr. John L. Minogue



The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Minogue:

I have received your letter of July 13. In brief, you have complained with respect to the delay in response your request for records of the Town of North Hempstead.

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."

Mr. John L. Minogue

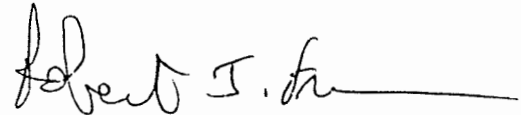
August 10, 1999

Page - 2 -

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal line extending to the right.

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board
Records Access Officer



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AJ-11625

Committee Members

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Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

August 11, 1999

Executive Director

Robert J. Freeman

Mr. Alan Kinney
#48565-053 B-3
P.O. Box 879
Coleman, FL 33521

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Kinney:

I have received your letter of July 11. In brief, you complained with respect to delays by agencies in responding to your requests for records.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Mr. Alan Kinney
August 11, 1999
Page -2-

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Kerri N. Lehtrecker, Assistant District Attorney



STATE OF NEW YORK
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FOIL A-11626

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Alexander F. Treadwell

August 11, 1999

Executive Director

Robert J. Freeman

Mr. Marvin Datz



The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Datz:

I have received your letter of July 13 concerning your requests for records of several agencies. In brief, recently and over the course of years, my contacts with those agencies indicate that they engage in serious efforts to comply with the Freedom of Information Law. I note, too, that the Committee on Open Government is not empowered to enforce that statute or compel an agency to grant or deny access to records.

Since one of your requests involves complaints against a police officer, I point out that such records are generally confidential.

As you may be aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

The first ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §50-a of the Civil Rights Law. In brief, that statute provides that personnel records of police and correction officers that are used to evaluate performance toward continued employment or promotion are confidential. The Court of Appeals, the State's highest court, in reviewing the legislative history leading to its enactment, has held that §50-a 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

context of a civil or criminal action' (Matter of Capital Newspapers Div. of Hearst Corp. v. Burns, 109 AD 2d 92, 96). In view of the FOIL's presumption of access, our practice of construing FOIL exemptions narrowly, and this legislative history, section 50-a should not be construed to exempt intervenor's 'Lost Time Record' from disclosure by the Police Department in a non-litigation context under Public Officers section 87(2)(a)" [Capital Newspapers v. Burns, 67 NY 2d 562, 569 (1986)].

It was also found that the exemption from disclosure conferred by §50-a of the Civil Rights Law "was designed to limit access to said personnel records by criminal defense counsel, who used the contents of the records, including unsubstantiated and irrelevant complaints against officers, to embarrass officers during cross-examination" (id. at 568).

In another decision which dealt with unsubstantiated complaints against correction officers, the Court of Appeals held that the purpose of §50-a "was to prevent the release of sensitive personnel records that could be used in litigation for purposes of harassing or embarrassing correction officers" [Prisoners' Legal Services v. NYS Department of Correctional Services, 73 NY 2d 26, 538 NYS 2d 190, 191 (1988)].

From my perspective, complaints against a police officer are exempt from disclosure under §50-a of the Civil Rights Law and, therefore, §87(2)(a) of the Freedom of Information Law. I note, however, that records otherwise deniable may be ordered disclosed by a court insofar as they are relevant and material to an action or proceeding. Specifically, subdivisions (2) and (3) of §50-a state that:

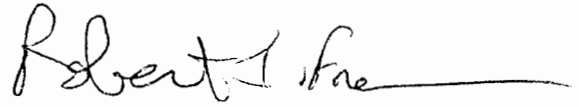
"2. Prior to issuing such court order the judge must review all such requests and give interested parties the opportunity to be heard. No such order shall issue without a clear showing of facts sufficient to warrant the judge to request records for review.

3. If, after such hearing, the judge concludes there is a 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 finding the court shall make those parts of the record found to be relevant and material available to the persons so requesting."

Mr. Marvin Datz
August 11, 1999
Page -3-

I hope that the foregoing serves to clarify your understanding of the matter and that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm
cc: Alexandra Sussman
Madonna Samuda Nianwan



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August 11, 1999

Executive Director

Robert J. Freeman

Mr. Charles B. Smith



The staff of the Committee 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:

As you are aware, I have received a copy of a denial of a your request for records issued by the Office of the Rensselaer County Attorney. Specifically, Assistant County Attorney Stephen A. Pechenik wrote that:

“The County of Rensselaer declines your Freedom of Information Law request to review copies of any and all job applications in the possession of Rensselaer County for those employees currently holding the positions of District Attorney, Assistant District Attorney and First Assistant District Attorney under the authority of the Mtr. of New York Veteran Police Assoc., 61 N.Y. 2d 659.”

From my perspective, portions of the records sought must be disclosed in accordance with the following commentary.

First, I am mindful of the decision cited by the Assistant County Attorney. In that case, the issue involved a request for “the names and addresses of all retirees of the New York City Police Department currently receiving pensions and annuities” (id. 660), and the Court of Appeals reversed the lower court’s determination based on an amendment to the Freedom of Information Law that had recently been enacted. That provision, §89(7), states in relevant part that:

“Nothing in this article shall require the disclosure of the home address of an officer or employee, former officer or employee, or of a retiree of a public employees’ retirement system; nor shall anything in this article require the disclosure of the name or home address of a

Mr. Charles B. Smith
August 11, 1999
Page -2-

beneficiary of a public employees's retirement system or of an *applicant* for appointment to public employment..."

The decision quoted from the language of the amendment pertinent to records at issue and then also referred to "an *application* for appointment to public employment" (*id.*, 661). The statutory language involves the name of an *applicant* for public employment, not an *application*, and it is my view, particularly in the context of the decision, that the use of the term *application* was a typographical error or oversight. The request and the records sought pertained to neither applicants nor applications, and the Court did not focus on those kinds of records. In short, I do not believe that the County may justifiably rely on New York Veteran Police Association as a basis for a denial of access.

Second, that is especially so in light of a decision dealing with the kinds of records that you requested that was recently unanimously affirmed by the Appellate Division, Kwasnik v. City of New York (Appellate Division, Second Department, NYLJ, June 21, 1999).

By way of background, 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].

In conjunction with the foregoing, I note that it has been held by the Appellate Division, Third Department, 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 the lower court decision rendered in Kwasnik (Supreme Court, New York County, September 26, 1997), the court cited 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 Court quoted from the Committee's opinion, which 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 quoting from the opinion, the court also concurred with the following:

"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)]."

Items within an application for employment or a resume that may be withheld in my view would include social security numbers, marital status, home addresses, hobbies, and other details of one's life that are unrelated to the position for which he or she was hired.

In affirming the decision of the Supreme Court, the Appellate Division found that:

"This result is supported by opinions of the Committee on Open Government, to which courts should defer (*see, Miracle Mile Assocs. v. Yudelson*, 68 AD2d 176, 181, *lv denied* 48 NY2d 706), favoring disclosure of public employees' resumes if only because public employment is, by dint of FOIL itself, a matter of public record (FOIL-AO-4010; FOIL-AO-7065; Public Officers Law §87[3][b]). The dates of attendance at academic institutions should also be subject to disclosure, at least where, as here, the employee did not meet the licensing requirement for employment when hired and therefore had

Mr. Charles B. Smith

August 11, 1999

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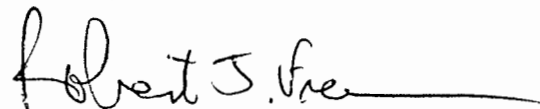
to have worked a minimum number of years in the field in order to have qualified for the job. In such circumstances, the agency's need for the information would be great and the personal hardship of disclosure small (*see*, Public Officers Law §89[2][b][iv]).”

In sum, again, I believe that the details within an employment applicant application that are irrelevant to the performance of one's duties may generally be withheld. However, based on judicial decisions, those portions of such a record or its equivalent detailing one's prior public employment and other items that are matters of public record, general educational background, licenses and certifications, and items that indicate that an individual has met the requisite criteria to serve in the position must be disclosed.

In an effort to resolve the matter, a copy of this opinion will be sent to Mr. Pechenik.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and extends across the width of the page.

Robert J. Freeman
Executive Director

RJF:jm

cc: Stephen A. Pechenik



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August 11, 1999

Executive Director

Robert J. Freeman

* Ms. Maia Newman
Executive Director
Shenendehowa Senior Citizens, Inc.
15 Town Hall Plaza
Clifton Park, NY 12065

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Newman:

As you are aware, your letter of July 17 addressed to Daniel Degnan, Counsel to the Office for the Aging, 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 asked whether "not-for-profits and senior centers are covered by FOIL" and whether there is an obligation to disclose the Shenendehowa Senior Center's membership list. In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to agency records, and §86(3) of that statute defines the term "agency" to mean:

"any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, the Freedom of Information Law is generally applicable to entities of state and local government. Most not-for-profit corporations are not governmental in nature and, therefore, do not constitute "agencies" that fall within the coverage of that statute. Since you characterized the Shenendehowa Senior Center as "a 503 c independent not-for-profit organization", I do not believe that it would be subject to the Freedom of Information Law.

Ms. Maia Newman

August 11, 1999

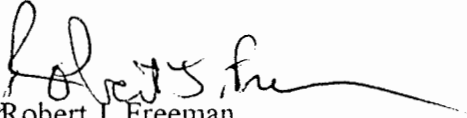
Page -2-

Second, even if that law applied, a membership list could, in my view, be withheld. Although the Freedom of Information Law is based on a presumption of access, it authorizes agencies to withhold records insofar as disclosure would result in "an unwarranted invasion of personal privacy" [§87(2)(b)]. In a variety of 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.

It is also noted 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."

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: Daniel Degnan



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August 11, 1999

Executive Director

Robert J. Freeman

E-Mail

TO: Janon Fisher

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.

As you are aware, I have received your letter of July 19. You have sought guidance in your efforts to obtain copies of "the 911 tapes and/or internal dispatch voice communications, say between dispatcher and police and an incident or arrest report..." You have also asked for "a solid definition of when a case is considered no longer under investigation."

In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Second, assuming that a 911 call is made through an "enhanced" system, a so-called "E-911 system, the record of that call would be confidential. In an E-911 system, in addition to the information offered orally by the caller, the recipient of the call also receives the phone number of the instrument used to make the call and the location from which the call was made. Relevant in that circumstance 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 §308(4) of the County Law, which states that:

"Records, in whatever form they may be kept, of calls made to a municipality's E911 system shall not be made available to or obtained by any entity or person, other than that municipality's public safety

Mr. Janon Fisher

August 11, 1999

Page -2-

agency, another government agency or body, or a private entity or a person providing medical, ambulance or other emergency services, and shall not be utilized for any commercial purpose other than the provision of emergency services."

In my view, "records...of calls" means either a recording or a transcript of the communication between a person making a 911 emergency call, and the employee who receives the call. I do not believe that §308(4) can validly be construed to mean records regarding or relating to a 911 call. If that were so, innumerable police and fire reports, including arrest reports and police blotter entries, would be exempt from disclosure in their entirety.

Third, the calls made by a dispatcher, for example, to a police officer following the receipt of a 911 call would not be subject to the County Law, but rather to the Freedom of Information Law, as would incident and arrest reports. With respect to those records, the issue in my view does not involve defining when a case is no longer under investigation; I know of no such definition. Often records or portions of records are available by law even though an investigation is ongoing; conversely, there may be records or portions thereof that may be withheld even though an investigation has ended. In short, an analysis of public rights of access or an agency's authority to deny access to records involves the content of the records and the effects of disclosure.

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 inquiry, 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..."

Mr. Janon Fisher

August 11, 1999

Page -3-

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those 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)]). 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.

I note that in a case dealing with tapes of conversations between a dispatcher and a police officer, although the tapes constituted "intra-agency material", the court, based on their contents, found that they consisted of "instructions to staff that affect the public" that had to be disclosed [Buffalo Broadcasting Co. v. City of Buffalo, 126 AD 2d 983 (1987)]/

Also of potential significance regarding the records of your interest 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 enhance your understanding of the issues and that I have been of assistance.

RJF:jm



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7070-190-11630

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Alexander F. Treadwell

Executive Director

Robert J. Freeman

August 12, 1999

Mr. Kone Madou
96-R-7731
Gowanda Correctional Facility
P.O. Box 311
Gowanda, NY 14070-0311

Dear Mr. Madou:

I have received your letter of August 2, which reached this office on August 11, and in which you appealed denials 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 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 therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought.”

As such, an appeal following a denial of access to records is not made to or determined by the Committee on Open Government, but rather by the head of an agency or that person's designee. Only after an appeal made under §89(4)(a) is denied would an applicant have exhausted his administrative remedies and have the ability to seek judicial review of a final agency determination.

For your information, the person designated by the Division of Parole to determine appeals is Terrence X. Tracy, Counsel to the Division.

Mr. Kone Madou
August 12, 1999
Page - 2 -

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
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- Alexander F. Treadwell

Executive Director

Robert J. Freeman

August 17, 1999

Hon. Theodore M. Fafinski
Town Supervisor
Town of Farmington
1000 County Road 8
Farmington, NY 14425

The staff of the Committee on 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 Fafinski:

I appreciate having received your determination of an appeal in which you sustained a denial of a request for the qualifications of a person who appears to have been hired as assessor by the Town of Farmington. While I would agree that some aspects of the records sought may be withheld, others, based on the judicial interpretation of the Freedom of Information Law, must in my opinion be disclosed.

In this regard, I offer the following comments.

By way of background, 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. As you suggested, 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 a variety of judicial decisions, it is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that those individuals are required to be more accountable than others. The courts have found that, as a general rule, records that are relevant to the performance of the official duties of a public officer or employee are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims,

Mr. Theodore M. Fafinski

August 17, 1999

Page - 2 -

1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that items relating to public officers or employees are irrelevant to the performance of their official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977, dealing with membership in a union; Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1981, involving the back of a check payable to a municipal attorney that could indicate how that person spends his/her money; Selig v. Sielaff, 200 AD 2d 298 (1994), concerning disclosure of social security numbers].

In conjunction with the foregoing, I note that it has been held by the Appellate Division, Third Department, 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 the lower court decision rendered in Kwasnik v. City of New York (Supreme Court, New York County, September 26, 1997), the court cited 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 Court quoted from the Committee's opinion, which 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 quoting from the opinion, the court also concurred with the following:

"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)]."

Mr. Theodore M. Fafinski

August 17, 1999

Page - 3 -

Items within an application for employment or a resume that may be withheld in my view would include social security numbers, marital status, home addresses, hobbies, and other details of one's life that are unrelated to the position for which he or she was hired.

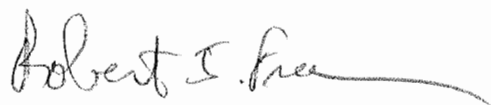
In affirming the decision of the Supreme Court, the Appellate Division found that:

“This result is supported by opinions of the Committee on Open Government, to which courts should defer (*see, Miracle Mile Assocs. v. Yudelson*, 68 AD2d 176, 181, *lv denied* 48 NY2d 706), favoring disclosure of public employees' resumes if only because public employment is, by dint of FOIL itself, a matter of public record (FOIL-AO-4010; FOIL-AO-7065; Public Officers Law §87[3][b]). The dates of attendance at academic institutions should also be subject to disclosure, at least where, as here, the employee did not meet the licensing requirement for employment when hired and therefore had to have worked a minimum number of years in the field in order to have qualified for the job. In such circumstances, the agency's need for the information would be great and the personal hardship of disclosure small (*see, Public Officers Law §89[2][b][iv]*)” (Appellate Division, Second Department, NYLJ, June 21, 1999).

In sum, again, I believe that the details within an employment application that are irrelevant to the performance of one's duties may generally be withheld. However, based on judicial decisions, those portions of such a record or its equivalent detailing one's prior public employment and other items that are matters of public record, general educational background, licenses and certifications, and items that indicate that an individual has met the requisite criteria to serve in the position must be disclosed.

I hope that the foregoing serves to clarify your understanding of the matter 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: Thomas W. O'Connell



STATE OF NEW YORK
DEPARTMENT OF STATE
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Joseph J. Seymour
Alexander F. Treadwell

August 17, 1999

Executive Director

Robert J. Freeman

Mr. Perry Bellamy
87-A-6653
Clinton Correctional Facility
Dannemora, NY 12929

Dear Mr. Bellamy:

I have received your letter of July 25, which reached this office on August 17. Please be advised that you used an incorrect zip code.

You have sought information concerning the outcome of a case and the day that you were released. You asked for similar information regarding an arrest that occurred in 1985.

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 provide the information that you have requested because this agency does not possess it.

As a general matter, a request for records made under the Freedom of Information Law should be sent to the "records access officer" at the agency that maintains the records of your interest. The records access officer has the duty of coordinating an agency's response to requests. In addition, §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.

Since the incidents appear to have occurred in New York City, I would conjecture that the records are maintained by the New York City Police Department, whose records access officer is Sgt. Richard Evangelista.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

7076-AO-11633

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

August 18, 1999

Executive Director

Robert J. Freeman

Mr. Ericander Stevenson
94-A-2168
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. Stevenson:

I have received your letter of July 15 in which you sought information concerning your ability to "retrieve documents used at trial eighteen years ago from the District Attorney's Office." You also questioned whether you may obtain "another person's criminal record."

In this regard, I offer the following comments.

First, pursuant to regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), each agency is required to designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests, and requests should ordinarily be directed to that person. I note that §89(3) of the Freedom of Information Law requires that a request "reasonably describe" the records sought. Therefore, a request should include sufficient detail to enable agency staff to locate the records.

Second, with respect to records used at trial, 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.

Mr. Ericander Stevenson

August 18, 1999

Page -2-

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.

It is likely that the court during which the proceeding was conducted would also serve as a source of the records in which you are interested. While the courts are not "agencies" subject to the Freedom of Information Law, court records are frequently available under other provisions of law (see e.g., Judiciary Law, §255). As such, it is suggested that a request for court records be made to the clerk of the appropriate court, citing an applicable provision of law as the basis for such a request.

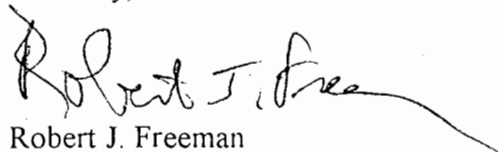
Lastly, with respect to criminal history records, the general repository of those records is the Division of Criminal Justice Services. While the subject of a criminal history record may obtain such record from the Division, it has been held that criminal history records maintained by that agency are 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 a request involves records analogous to those found to be available in *Thompson*, I believe that a 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.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm



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August 18, 1999

Executive Director

Robert J. Freeman

Mr. Richard G. Tarbell

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Tarbell:

I have received your letters of June 18 and June 29. Please note the address of this office. As you requested, enclosed is copy of "Your Right to Know", which describes the Freedom of Information and Open Meetings Laws.

According to your initial letter, you "sent an FOI request to the City of Port Jervis, NY for the number of sexual offenders registered with the City..." The City denied the request, and you have questioned whether you have a right to the information sought.

In this regard, having conferred with officials of the Department of Law and the Division of Criminal Justice Services, I believe that rights of access are not governed by the Freedom of Information Law, but rather by the "Sex Offender Registration Act" (hereafter "the Act"), Article 6-C of the Correction Law, also known as "Megan's Law."

By way of brief background, subdivision (1) of §168-b of the Act directs the Division of Criminal Justice Services to "establish and maintain a file of individuals required to register" under the Act and includes guidelines concerning the content of what is characterized as the "registry." Subdivision (2) states that:

"The division is authorized to make the registry available to any regional or national registry of sex offenders for the purpose of sharing information. The division shall accept files from any regional or national registry of sex offenders and shall make such available when requested pursuant to the provisions of this article. *The division shall require that no information included in the registry shall be made available except in the furtherance of the provisions of this article*" (emphasis added).

Based on the sentence highlighted above, it is the position of both the Department of Law and the Division of Criminal Justice Services, and I concur, that information contained in the registry is to be disclosed only pursuant to the provisions of the Act, "only in the furtherance of the provisions of this article", which, again, is Article 6-C of the Correction Law.

While the Freedom of Information Law deals generally with access to records, agencies' obligations to disclose records, and their ability to deny access, according to the rules of statutory construction (see McKinney's Statutes, §32), the different or "special" statute prevails when such a statute pertains to particular records. Since information contained in the registry may be disclosed only in furtherance of the Act, the Freedom of Information Law, in my view, does not apply to that information.

Certain aspects of the contents of the registry are forwarded to local government agencies in conjunction with notification requirements imposed upon the "Board of Examiners of Sex Offenders" pursuant to §168-l of the Act. In subdivision (6) of that provision, reference is made to "three levels of notification...depending upon the degree of the risk of re-offense by the sex offender."

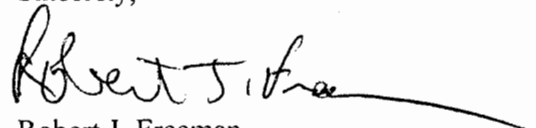
Paragraph (a) of §168-l(6) provides that "[i]f the risk of repeat offense is low, a level one designation shall be given to such sex offender." In that instance, certain law enforcement agencies are notified. Paragraph (b) states that "[i]f the risk of repeat offense is moderate, a level two designation shall be given..." Pursuant to paragraph (c), "[i]f the risk of repeat offense is high and there exists a threat to the public safety, such sex offender shall be deemed a 'sexually violent predator' and a level three designation shall be given..." In both of those instances, local law enforcement agencies are authorized to disclose various kinds of information pertaining to sex offenders. Those entities "may disclose or further disseminate such information at their discretion." As such, there appears to be no obligation to disclose or any public right of access.

It is emphasized that if an agency acquires records regarding a sex offender (or any other person convicted of a crime) from a source other than the registry, it is my view that those records are subject to the Freedom of Information Law. For example, if a police department obtained a copy of a mugshot of a person convicted of a crime independent of the requirements of the Act, such a record would be available under the Freedom of Information Law [see Planned Parenthood of Westchester, Inc. v Town Board of Town of Greenburgh, 587 NYS2d 461 (1992)].

In sum, information contained within the registry that is disseminated pursuant to the Act to a local law enforcement agency may be disclosed by the agency in its discretion. Records acquired by an agency from a source other than the registry are subject to rights conferred by the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

Enc.



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701L-90-11635

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Alexander F. Treadwell

August 18, 1999

Executive Director

Robert J. Freeman

E-Mail

TO: Linda Towler
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. Towler:

As you are aware, I have received your letter of July 21. In your capacity as a member of a board of education, you asked whether you may "issue a copy of a letter the acting superintendent wrote to the special education director in response to an original letter written by an ex-board member." You added that "[t]he ex-board member wrote the letter to the state and copied the current board members", and that the acting superintendent, in response, "raise[d] five allegations against the ex-board member to the state." Since the acting superintendent did not transmit a copy to the ex-board member, you asked whether you may "give the ex-board member a copy of this correspondence in order for him to answer the charges."

In this regard, while I believe that the letter *could* be withheld under the Freedom of Information Law, I know of no law that would preclude you from disclosing the document in question to the former board member.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, it is likely that two of the grounds for denial would authorize the school district to withhold the letter.

First, in situations in which a person is the subject of allegations or questions involving impropriety or misconduct that have not yet been determined or did not result in disciplinary action,

Ms. Linda Towler

August 18, 1999

Page -2-

it has been held that records relating to those allegations or questions may be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy pursuant to §87(2)(b) of the Freedom of Information Law.

Second, a letter sent by the district to a state agency would constitute "inter-agency material" that falls within the scope of §87(2)(g). Insofar as its contents include unsubstantiated allegations, it could, in my view, be withheld under that exception as well.

Notwithstanding the foregoing, it is emphasized that the Freedom of Information Law is permissive. In other words, while that statute authorizes an agency to withhold records in accordance with the grounds for denial, it has been held by the Court of Appeals that the exceptions are not mandatory, and that an agency may choose to disclose records even though the authority to withhold exists [Capital Newspapers v. Burns], 67 NY 2d 562, 567 (1986)].

Again, I am unaware of any statute that would prohibit a board member from disclosing the kind of record that you described. Further, even when information might have been obtained during an executive session properly held or from records marked "confidential", I note that the term "confidential" in my view has a narrow and precise technical meaning. For records or information to be validly characterized as confidential, I believe that such a claim must be based upon a statute that specifically confers or requires confidentiality.

For instance, if a discussion by a board of education concerns a record pertaining to a particular student (i.e., in the case of consideration of disciplinary action, an educational program, an award, etc.), the discussion would have to occur in private and the record would have to be withheld insofar as public discussion or disclosure would identify the student. As you may be aware, the Family Educational Rights and Privacy Act (20 USC §1232g) generally prohibits an educational agency from disclosing education records or information derived from those records that are identifiable to a student, unless the parents of the student consent to disclosure. In the context of the Open Meetings Law, a discussion concerning a student would constitute a matter made confidential by federal law and would be exempted from the coverage of that statute [see Open Meetings Law, §108(3)]. In the context of the Freedom of Information Law, an education record would be specifically exempted from disclosure by statute in accordance with §87(2)(a). In both contexts, I believe that a board of education, its members and school district employees would be prohibited from disclosing, because a statute requires confidentiality. Again, however, no statute of which I am aware would confer or require confidentiality with respect to the matter described in your correspondence.

I hope that I have been of assistance.

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11636

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Executive Director

Robert J. Freeman

August 18, 1999

Ms. Juanita Bryant



The staff of the Committee on Open 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 July 14, which reached this office on August 5. You have asked whether certain "privately-held corporations" are "exempt from New York State Freedom of Information Laws for public disclosures."

In this regard, those kinds of corporations, whether headquartered in or outside of New York, are not subject to the Freedom of Information Law. That statute pertains to agency records, and §86(3) defines the term "agency" to mean:

"any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, as a general matter, the Freedom of Information Law applies to entities of state and local government; it does not apply to private corporations.

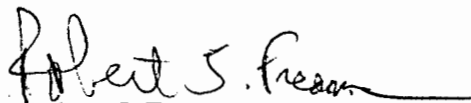
I note that the federal Freedom of Information Act applies to federal agencies. Like its state counterpart, the coverage of that statute excludes private corporations.

You also asked whether privately held corporations headquartered outside of New York are "exempt from licensing guidelines and laws." While I do not have the expertise to respond with certainty, in general, I believe that entities doing business in New York must comply with its laws.

Ms. Juanita Bryant
August 18, 1999
Page - 2 -

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink that reads "Robert J. Freeman". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:tt



STATE OF NEW YORK
DEPARTMENT OF STATE
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August 18, 1999

Executive Director

Robert J. Freeman

Mr. Jim Martin

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Martin:

I have received your letter of July 20 and the correspondence attached to it between yourself and Mr. Robert L. Jokajtys, Director of Human Resources at Onondaga Community College. You have sought guidance concerning your efforts in obtaining information from the College. Having reviewed the correspondence, I am in partial agreement (and disagreement) with you and Mr. Jokajtys.

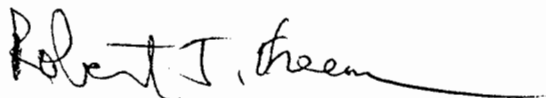
In this regard, I would agree with your contention that portions of existing records likely would include reference to an employee's academic degrees and general educational background. Insofar as that information appears within existing records, the College would not be preparing a new record; it would be disclosing portions of existing records. Further, it is reiterated that it has been held judicially that portions of records indicating one's educational background must be disclosed [Ruberti, Girvin & Ferlazzo v. Division of State Police, 218 AD2d 494 (1996)].

The other aspect of your request involves "copies of the applicable provisions and pages of the Civil Service Law and applicable rules promulgated by the Department of Civil Service which govern the creation and appointment of management confidential positions" (emphasis yours). In my view, the foregoing is not a request for records. In essence, it is a request for an interpretation of law requiring a judgment. Any number of provisions of law might be "applicable", and a disclosure of some of them, based on one's knowledge, may be incomplete due to an absence of expertise regarding the content and interpretation of each such law. Two people, even or perhaps especially two attorneys, might differ as to the applicability of a given provision of law. In contrast, if a request is made, for example, for "section 209 of the Civil Service Law", no interpretation or judgment is necessary, for sections of law appear numerically and can readily be identified. That kind of request, in my opinion, would involve a portion of a record that must be disclosed. Again, a request for laws that might be "applicable" is not, in my view, a request for a record as envisioned by the Freedom of Information Law.

Mr. Jim Martin
August 18, 1999
Page -2-

I hope that the foregoing serves to clarify misunderstandings and that I have been of assistance.

Sincerely,

A handwritten signature in black ink that reads "Robert J. Freeman". The signature is written in a cursive style with a long, sweeping underline that extends to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Robert L. Jokajty



STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

FOI-AO-11638

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Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

August 18, 1999

Mr. Peter W. Sluys
Editor-in-Chief
Rockland County Times
14 East Central Ave.
P.O. Box 510
Pearl River, NY 10965

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Sluys:

I have received your letters of July 20 and August 4. Please understand that, in fairness, responses to requests for written advisory opinions are generally prepared in the order of receipt. Since this office receives nearly eight hundred requests for written opinions annually, and because the staff is small (myself and two secretarial assistants), the time for responding may be, as in this instance, approximately a month from receipt.

In brief, you described a series of difficulties in gaining access to records of the Town of Haverstraw. 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..."

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

Mr. Peter W. Sluys

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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, vacation schedules, workload 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, it has been advised by this office and held judicially that an agency cannot limit the ability of the public to inspect records to a period less than its regular business hours. 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.”

Relevant to the matter is a decision rendered by the Appellate Division, Second Department. Among the issues was the validity of a limitation regarding the time permitted to inspect records established by a village pursuant to regulation. The Court held that the village was required to enable the public to inspect records during its regular business hours, stating in part 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 2e 101 (1994), 210 AD 2d 411].

Mr. Peter W. Sluys
August 18, 1999
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Based on the foregoing, the Town, in my view, cannot limit your ability to inspect records to a period less than its regular business hours.

I do not believe, however, that a member of the public may designate the date or dates on which he or she seeks to review records. If, for instance, records will be in use by staff on a particular date or during a particular period of time, an agency would not, in my view, be required to alter its schedule or work plan. In that instance, the agency could offer a series of dates to the person seeking to inspect the records in order that he or she could choose a date suitable to both parties. Similarly, if a request involves a variety of items, while the applicant may ask that certain records be made available sooner than others, I do not believe that he or she can require an agency to make records available in a certain order. Again, the kinds of factors mentioned earlier in conjunction with the time needed to respond to requests would be pertinent.

Third, 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.

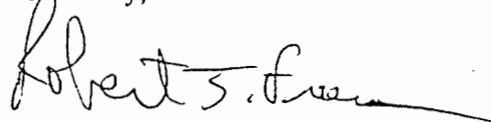
For example, I do not believe that you would have the right to inspect W-2 forms, for they include information that you have no right to see. Based upon the direction provided by the Freedom of Information Law and the courts, insofar as W-2 forms pertaining to public employees indicate gross wages, they must be disclosed. However, pursuant to §87(2)(b) of the Freedom of Information Law 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. That conclusion has been reached judicially, and the court cited an advisory opinion rendered by this office in so holding (Day v. Town of Milton, Supreme Court, Saratoga County, April 27, 1992). In short, while portions of the forms containing names and gross wages must be disclosed, the town could seek payment of the requisite fee for photocopies, which would be made available after the deletion of certain details (see Van Ness v. Center for Animal Care and Control and the New York City Department of Health, Supreme Court, New York County, January 28, 1999).

Lastly, you questioned the ability of a municipality to charge fees for copies of local laws before the laws are passed. Although copies of proposed local laws frequently are made available free of charge, I know of no statute that would preclude an agency from charging its fee established under the Freedom of Information Law.

Mr. Peter W. Sluys
August 18, 1999
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I hope that the foregoing serves to clarify your understanding of the Freedom of Information Law and that I have been of assistance.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman". The signature is written in black ink and extends to the right with a long, thin horizontal stroke.

Robert J. Freeman
Executive Director

RJF:tt

cc: Sean D. Purdy



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

7076-AO-11639

Committee Members

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Robert J. Freeman

August 20, 1999

Mr. Douglas A. Kellner
Kellner, Chehebar & Deveney
One Madison Avenue
New York, NY 10010

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Kellner:

I have received your letter of July 22 in which you sought an advisory opinion concerning a denial of your request for records by the New York City Educational Construction Fund ("ECF").

You indicated that it is your belief that "115-87 Owners Corp. has made proposals to ECF and the City of New York to acquire ownership of the building or in some way to modify the ground lease for the apartment building" in which your client resides. That building "is run as a cooperative by 115-87 Owners Corp. which has a long-term lease from the City of New York and ECF." Consequently, on behalf of the client, you requested:

"Any proposal made by 115-87 Owners Corp., or anyone acting on their behalf, since January 1, 1998 relating to the sale, lease, refinancing or any other type of financial transaction regarding the property at 113-123 East 87th Street, New York, New York, also known as 108-118 East 88th Street, Block 1516, Lots 7 and 9007 (PS 169)."

The request was denied in its entirety by the Director of Finance of the ECF on the basis of §87(2)(c) of the Freedom of Information Law.

From my perspective, if 115-87 Owners Corp. is the only entity involved with the ECF in a possible sale, lease, refinancing or other financial transaction concerning the property at issue, the denial of the request would appear to be inappropriate and inconsistent with law. In this regard, I offer the following comments, some of which will reiterate contentions offered in advisory opinions previously rendered and with which you are familiar.

First, according to §451 of the Education Law, the ECF is "a corporate governmental agency of the state, constituting a public benefit corporation..." Since a public benefit corporation is a kind of public corporation (see General Construction Law, §66), and since a public corporation is an "agency" as that term is defined in §86(3) of the Freedom of Information Law, I believe that is an "agency" required to comply to the with that statute.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

The provision upon which the ECF has relied 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" a contracting or bargaining process by diminishing the ability of the government to reach an optimal agreement on behalf of the taxpayers. That an agreement has not been signed or consummated, in my view, is not determinative of rights of access or, conversely, an agency's ability to deny access to records. Rather, I believe that consideration of the effects of disclosure is the primary factor in determining the extent to which §87(2)(c) may justifiably be asserted.

As I understand its application, §87(2)(c) generally encompasses situations in which an agency or a party to negotiations maintains records that have not been made available to others. For example, if an agency seeking bids or proposals has received a number of bids, but the deadline for their submission has not been reached, premature disclosure for the bids to another possible submitter might provide that person or firm with an unfair advantage vis a vis those who already submitted bids. Further, disclosure of the identities of bidders or the number of bidders might enable another potential bidder to tailor his bid in a manner that provides him with an unfair advantage in the bidding process. In such a situation, harm or "impairment" would likely be the result, and the records could justifiably be denied. However, after the deadline for submission of bids or proposals are available after a contract has been awarded, and that, in view of the requirements of the Freedom of Information Law, "the successful bidder had no reasonable expectation of not having its bid open to the public" [Contracting Plumbers Cooperative Restoration Corp. v. Ameruso, 105 Misc. 2d 951, 430 NYS 2d 196, 198 (1980)]. Similarly, if an agency is involved in collective bargaining negotiations with a public employee union, and the union requests records reflective of the agency's strategy, the items that it considers to be important or otherwise, its estimates and projections, it is likely that disclosure to the union would place the agency at an unfair disadvantage at the bargaining table and, therefore, that disclosure would "impair" negotiating the process.

I point out that that the Court of Appeals has sustained the assertion of §87(2)(c) in a case that did not clearly involve "contract awards" or collective bargaining negotiations. In Murray v. Troy Urban Renewal Agency [56 NY2d 888 (1982)], the issue pertained to real property transactions where appraisals in possession of an agency were requested prior to the consummation of a transaction. Because premature disclosure would have enabled the public to know the prices the

agency sought, thereby potentially precluding the agency from receiving optimal prices, the agency's denial was upheld [see Murray v. Troy Urban Renewal Agency, 56 NY 2d 888 (1982)].

In each of the kinds of the situations described 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 and there are no other potential parties to a transaction, 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.

On the other hand, if 115-87 Owners Corp. is one among other entities that have made similar proposals to the ECF, the response may be different. In that event, if the ECF as owner of the property is considering the sale or lease of the parcel to others, and disclosure to your client would impair its ability to reach an agreement optimal to taxpayers, §87(2)(c) would likely serve as a basis for withholding some aspects of the documentation sought. Again, however, if there is no other entity that may be involved in the kind of transaction to which you referred, there would appear to be no basis for a denial of access to the records sought.

Mr. Douglas A. Kellner

August 20, 1999

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Even if entities other than that identified in your letter may be potentially be involved in a transaction, it is unlikely in my view that a denial of the request in its entirety would have been appropriate. 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. 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 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 short, even if an exception is pertinent, the records sought must be reviewed individually by an agency for the purpose of ascertaining the extent to which they 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

Mr. Douglas A. Kellner

August 20, 1999

Page - 5 -

may deny access records under an exception only "as long as the requisite particularized showing is made" (*id.*, 277).

Lastly, I note that the denial of your request failed to inform you of your right to appeal. 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:

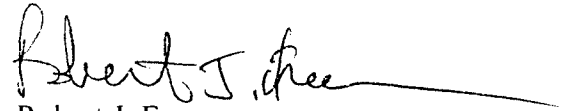
"[i]nasmuch as the District Attorney failed to advise petitioner of the availability of an administrative appeal in the office (see, 21 NYCRR 1401.7[b]) and failed to demonstrate in the proceeding that the procedures for such an appeal had, in fact, even been established (see, Public Officers Law [section] 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 resolve the matter, a copy of this opinion will be sent to the ECF.

Mr. Douglas A. Kellner
August 20, 1999
Page - 6 -

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal line extending to the right.

Robert J. Freeman
Executive Director

RJF:tt

cc: Andrew J. Maniglia



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL NO - 116410

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August 20, 1999

Executive Director

Robert J. Freeman

Hon. Carolyn M. Symonds
Yates County Clerk
110 Court Street
Penn Yan, NY 14527-1130

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Symonds:

I have received your letter of July 21. You have sought an advisory opinion concerning your "obligation to allow a private company to bring in their own equipment to the county clerk's office to scan county clerk records for their own profit at no charge to the private company."

From my perspective, there are two separate but related issues to consider. In this regard, I offer the following comments.

First, when records are accessible under the Freedom of Information Law, they must be made available for inspection and copying [see §87(2)]. In general, the purpose for which a request is made and the intended use of records are irrelevant to right of access [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)]. If an applicant seeks to inspect accessible records, no fee may be charged. Further, an applicant may take notes or copy the contents of records on his or her own. If an applicant want copies of records, an agency is obliged to make copies available upon payment of the requisite fee [see §87 (1)(b)(iii) and 89 (3)].

In a case in which one of the issues involved the ability of a member of the public to bring and use his own photocopier, the court upheld regulations adopted by a village prohibiting the use of personal photocopiers, holding that:

"This Court must balance the petitioner's rights against the respondents' need to carry out their responsibilities. Given the voluminous requests for documents, respondents were justified in establishing regulations which would prevent unreasonable interference with their other governmental duties" [Murtha v. Leonard, Supreme Court, Nassau County, June 16, 1993; modified on other grounds, 210 AD2d 411 (1994)].

Ms. Carolyn M. Symonds

August 20, 1999

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I note that the municipality in Murtha, a small village, had limited space and staff. In my opinion, the ability of an agency to prohibit the use of one's own copying or scanning equipment would be dependent in part on the reasonableness of a prohibition in view of the physical arrangements of the agency's premises and its staffing requirements or needs. If the use of scanning equipment would not be significantly inconvenient or disruptive, it is questionable whether an agency could prohibit the use of the equipment, especially in consideration of the intent of the Freedom of Information Law to make records available "wherever and whenever feasible" (see §84).

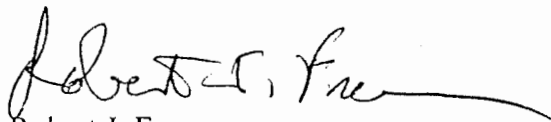
The second consideration involves the duty to maintain the custody, security and integrity of County records. Here I direct your attention to §57.25(1) of the Arts and Cultural Affairs Law which states in relevant part that:

" 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..."

Based on the foregoing, as County Clerk, an element of your responsibilities, in my view, involves "protecting" the records, ensuring that they are not stolen, defaced, misfiled or otherwise handled or used in a manner in which their value and utility to the County and the public generally may be compromised. If it is determined or reasonable to determine that the custody or integrity of the records is or would be threatened, I believe that you would have the authority to preclude a member of the public from taking temporary control of the records through the use of a scanner or similar equipment. If such a determination is reached, a person seeking the records would continue to have the right to inspect them or to obtain copies upon payment of the fees authorized by law.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Bernetta Bourcy, County Attorney



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO
FOIL-AO-11641

Committee Members

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August 23, 1999

Executive Director

Robert J. Freeman

Mr. Joseph A. Glazer
President & CEO
Mental Health Association in
New York State, Inc.
194 Washington Avenue - Suite 415
Albany, NY 12210

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Glazer:

I have received your letter of July 20 and the materials attached to it concerning a "Member Confidentiality Agreement" that must be signed by persons serving on Institutional Review Boards (IRB's). Those entities engage in "an observatory role in relation to certain activities at the State Psychiatric Hospital Facilities run by the New York State Office of Mental Health." According to the documentation, "a memo was distributed by the Research Foundation for Mental Hygiene, Inc. to members of the IRB's regarding their confidentiality responsibilities."

You wrote that you have "serious concerns regarding such mandatory gag agreements" and asked whether they may be "violative of any state laws regarding access to information."

While I question the scope of the meaning of the term "confidentiality", the memorandum on that subject distributed to IRB chairpersons appears in my view to encourage IRB members to recognize that various records that may come into their possession may or in some instances must be withheld from the public, and that disclosures to the public should be coordinated by the OMH public information officer. In this regard, I offer the following comments.

First, as you may be aware, §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 head or governing body of an agency 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:

Mr. Joseph A. Glazer

August 23, 1999

Page -2-

"(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.

From my perspective, it is routine to limit the authority of agency personnel and others to make disclosures on their own initiative or in response to requests. In many agencies, requests for records are forwarded as a matter of policy to the designated records access officer in order that he or she can make an initial determination to grant or deny access in accordance with applicable law. The direction given in the memorandum appears to be consistent with that kind of procedure.

Second, the Freedom of Information Law pertains not only to records in the physical possession of an agency, but also those maintained for an agency. That statute applies 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."

The Court of Appeals has construed the definition as broadly as its specific language suggests. The first such decision that dealt squarely with the scope of the term "record" involved documents pertaining to a lottery sponsored by a fire department. Although the agency contended that the documents did not pertain to the performance of its official duties, i.e., fighting fires, but rather to a "nongovernmental" activity, the Court rejected the claim of a "governmental versus nongovernmental dichotomy" [see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581 (1980)] and found that the documents constituted "records" subject to rights of access granted by the Law. Moreover, the Court determined that:

"The statutory definition of 'record' makes nothing turn on the purpose for which it relates. This conclusion accords with the spirit as well as the letter of the statute. For not only are the expanding boundaries of governmental activity increasingly difficult to draw, but in perception, if not in actuality, there is bound to be considerable

crossover between governmental and nongovernmental activities, especially where both are carried on by the same person or persons" (id.).

In 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).

More recently, in a case involving records in possession of a not-for-profit corporation that carried out certain functions for the State University pursuant to contract, it was held that the records were held *for* the University and, therefore, were agency records that fell within the coverage of the Freedom of Information Law, even though they were not in the physical custody of the University [see Encore College Bookstores, Inc. v. Auxiliary Services Corporation of the State University, 87 NY2d 410 (1995)].

While I believe that the Research Foundation for Mental Hygiene, Inc. is an agency that falls within the requirements of the Freedom of Information Law [see e.g., Buffalo News v. Buffalo Enterprise Development Corp., 84 NY2d 488 (1994)], irrespective of that issue, my understanding is that its functions are performed for one or more agencies, such as the Office of Mental Health, and that, therefore, its records are maintained for an agency and are subject to rights conferred by the Freedom of Information Law.

Third, based on several judicial decisions, an assertion or promise of confidentiality, unless it is based upon a statute, is generally meaningless. When confidentiality is conferred by a statute, an act of the State Legislature or Congress, records fall outside the scope of rights of access pursuant to §87(2)(a) of the Freedom of Information Law, which states that an agency may withhold records that "are specifically exempted from disclosure by state or federal statute". If there is no statute upon which an agency can rely to characterize records as "confidential" or "exempted from disclosure", the records are subject to whatever rights of access exist under the Freedom of Information Law [see Doolan v. BOCES, 48 NY 2d 341 (1979); Washington Post v. Insurance Department, 61 NY 2d 557 (1984); Gannett News Service, Inc. v. State Office of Alcoholism and Substance Abuse, 415 NYS 2d 780 (1979)]. As such, an assertion or promise of confidentiality, without more, would not in my view serve to enable an agency to withhold a record.

Mr. Joseph A. Glazer

August 23, 1999

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In the context of the kinds of records that may be pertinent to the duties of the Foundation, the IRB's and the Office of Mental Health, a statute that requires confidentiality is §33.13 of the Mental Hygiene Law. That statute essentially prohibits the disclosure of clinical records identifiable to a person receiving treatment except in circumstances that it prescribes. When records fall within the confidentiality requirements imposed by §33.13, they would be "specifically exempted from disclosure by...statute" in accordance with §87(2)(a) of the Freedom of Information Law.

Also pertinent to the duties of those concerned may be the Personal Privacy Protection Law, which deals in part with the disclosure of records or personal information by state agencies concerning data subjects. A "data subject" is "any natural person about whom personal information has been collected by an agency" [Personal Privacy Protection Law, §92(3)]. "Personal information" is defined to mean "any information concerning a data subject which, because of name, number, symbol, mark or other identifier, can be used to identify that data subject" [§92(7)]. For purposes of 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, when 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.

When either §33.13 of the Mental Hygiene Law or the Personal Privacy Protection Law applies, there is essentially no discretion to disclose to the public. In other circumstances, however, although records *may* be withheld, there is no obligation to do so. Reference is made in the materials to "proprietary rights." Depending on the effects of disclosure, so-called "proprietary" information might properly be withheld under §87(2)(d) of the Freedom of Information Law. Nevertheless, unlike the provisions cited above, under §87(2)(d) and the remaining grounds for denial in the Freedom of Information Law, there is nothing in law that would prohibit disclosure. Section 87(2)(d) permits (but does not require) an agency to withhold records or portions 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..."

Mr. Joseph A. Glazer

August 23, 1999

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The mere characterization of a record as "proprietary" or as a trade secret, like a claim of confidentiality, is essentially meaningless; the capacity to deny access involves the extent to which disclosure "would cause substantial injury to the competitive position" of a commercial enterprise.

In sum, it is likely that many of the records used or maintained by IRB members may be "confidential", but that would be so only when a statute prohibits disclosure. In other instances, there may be discretion to withhold under the Freedom of Information Law, but no legal obligation to do so. Perhaps most importantly, the Freedom of Information Law requires agencies to adopt regulations regarding the procedural implementation of the law. In accordance with such a procedure, one or more "records access officers" may be given the duty of coordinating an agency's response to requests and disclosure practices. Unless authority to disclose is otherwise granted to persons other than the records access officer, limiting the ability of those other persons to disclose is, in my opinion, within the discretion of an agency.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Susan J. Delano
Robin Goldman
Roger Clingman

FOIL-AO-11642

From: Robert Freeman
To: Internet:Susan_Hutchison@tax.state.ny.us
Date: Mon, Aug 23, 1999 2:39 PM
Subject: Susan - -

Susan - -

As a general rule, we have advised that FOIL requests are public. However, if a request itself includes information of an intimate nature, identifying details may be deleted to protect privacy. For instance, if a recipient of public assistance writes to a department of social services, indicates that he or she is a recipient and asks for records about himself or herself, disclosure would indicate that he or she is poor, which is nobody's business. In that case, personally identifying details may be deleted.

If a request is from a business entity or a person acting in a business capacity, there would be nothing intimate or personal about the request. Similarly, if a request discloses nothing intimate or personal due to the nature of the subject matter, I do not believe that there would be a basis for denial. For example, if I request minutes of the meeting of the town board, the request indicates nothing personal about me and would, in my view, be public.

If you need additional information or would like to discuss the matter further, please feel free to contact me.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518 - Phone
(518) 474-1927 - Fax
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Alexander F. Treadwell

Executive Director

Robert J. Freeman

August 24, 1999

Hon. Bernard Kessler
Law Offices of Bernard Kessler
Route 9 & Kessler Drive
P.O. Box 681
Hyde Park, NY 12538

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Judge Kessler:

As you are aware, I have received your letter of July 23 and the correspondence attached to it. You have asked that I review a request made under the Freedom of Information Law and your response to it.

The request, which was made by a law firm, involves "information....concerning applications for zoning variances, approvals and denials thereof, applications for Building Permits, approvals and denials thereof, and actions brought by the Town of Rhinebeck to enforce its Zoning Laws and Building Codes for all years since 1980." The request later specified the kinds of records included within the request, all of which pertain to the period of 1980 to the present, such as complaints received by Town officials concerning "construction, operations or activities in the Town", "pleadings in every enforcement action commenced by the Town....making allegations of violations of the Building Code, the Zoning Law or Building Permits", all citations issued in relation to those provisions and minutes of meetings in which reference is made to applications for zoning variances.

In response, although you agreed to comply to the extent possible, you contended that a request encompassing such a lengthy period, nineteen years, is "unreasonable." The remainder of the response dealt with each aspect of the request and indicated that some records, depending on the means by which they are filed, could be located and made available for inspection or upon payment of the request fees for copying, but that others could not be retrieved without additional identifying information.

In this regard, I offer the following comments.

First, the coverage of the Freedom of Information Law is extensive, for it includes all "agency records" within its scope. Section 86(4) of that statute defines the term "record" expansively to include:

"any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, irrespective of the age of a document, if it continues to be maintained by the Town, I believe that it would constitute a "record" that falls within the framework of the Freedom of Information Law [see Capital Newspapers v. Whalen, 69 NY2d 246 (1987)].

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, with one exception, the records sought would appear to be available, for none of the grounds for denial would be applicable. The only category of requested records that would in my opinion include the ability to deny access is complaints. Depending on attendant facts, personally identifying details pertaining to complainants might justifiably be deleted on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" pursuant to §87(2)(b).

Third, and most importantly, I believe that the key 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,

Hon. Bernard Kessler

August 24, 1999

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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.

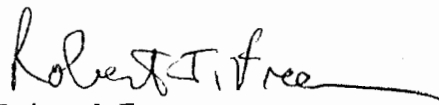
While I am unfamiliar with the recordkeeping systems of the Town, to extent that the records sought can be located with reasonable effort, the request, in my opinion would have met the requirement of reasonably describing the records. On the other hand, if the records are not maintained in a manner that 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.

In the context of the matter at hand, there are several aspects of the request that do not appear to meet the requirement that the records be "reasonably described." For instance, you indicated that records relating to applications for zoning variances are kept alphabetically, by applicants' names. Since the request seeks the records by means of a time period, chronologically, there would be no way to locate the records other than by reviewing each applicant file to ascertain whether it falls within the scope of the request. Minutes of meetings are apparently not indexed by subject matter, and all minutes for the past nineteen years would have to be reviewed to determine whether they contain information falling within the request. You wrote that violations and citations "are included in general correspondence to and from the Town", and that a "better identification of same would be most helpful."

In those and similar other aspects of the request, I do not believe that the firm seeking the records would have met the standard of reasonably describing the records. In each of those instances, the Town does not maintain the records in a manner that enables Town officials to locate the items within a category of records sought without reviewing virtually every record filed over the course of nineteen years. According to the Court of Appeals in Konigsberg, an agency is not required to engage such extensive searches to locate and retrieve the records.

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



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

707C-AO-11644

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August 24, 1999

Executive Director

Robert J. Freeman

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 letter of July 23 and the materials attached to it. You have sought my opinion concerning a request for records that you made to the New York City Police Department.

From my perspective, several elements of the request were adequately considered in the opinion addressed to you on March 22. The primary focus of the more recent letter appears to involve records relating to overtime, attendance and a claim of disability by a particular police officer. In this regard, I offer the following comments.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Although tangential to the issues raised by your request, I point out that the Freedom of Information Law generally does not require that agencies maintain or prepare records [see §89(3)], but that 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..."

Mr. Rafael Robles
August 24, 1999
Page -2-

While §87(2)(b) of the Freedom of Information Law authorizes an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy", the courts have provided substantial direction regarding the privacy of public employees. First, it is clear that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. Second, with regard to records pertaining to public employees, the courts have found that, as a general rule, records that are relevant to the performance of a public employee's official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980; Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

Based upon the foregoing, it is clear in my view that records reflective of salaries of public employees must be prepared and made available. Similarly, records reflective of other payments, whether they pertain to overtime, or participation in work-related activities, for example, would be available, for those records in my view would be relevant to the performance of one's official duties.

It is 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 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.

Insofar as the records sought include reference to a particular medical problem or injury, I believe that they may be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy. Even though they might not be characterized as medical records, because they contain information that is medical in nature, they may be withheld to that extent [see Hanig v. NYS Department of Motor Vehicles, 79 NY2d 106 (1992)].

Lastly, you requested "a complete itemized inventory" of the records that might be withheld with a justification for the denial of access to each. In my view, the Department would not be required to prepare such an inventory. 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

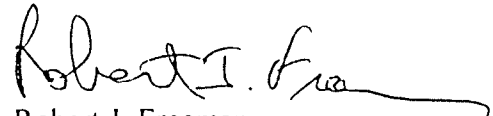
Mr. Rafael Robles
August 24, 1999
Page -3-

burden of proof remains on the agency. 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 Farberman & Sons v. New York City Health and Hosps. Corp., 62 NY 2d 75, 83; Matter of Fink v. Lefkowitz, 47 NY 2d 567, 571), did not constitute error. To make such disclosure would effectively subvert the purpose of these statutory exemptions which is to preserve the confidentiality of this information" [Nalo v. Sullivan, 125 AD 2d 311, 312 (1987)].

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Susan Petito
Sgt. Richard Evangelista



STATE OF NEW YORK
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Executive Director

Robert J. Freeman

August 24, 1999

Mr. Kevin Crayton
98-B-0864
Orleans Correctional Facility
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. Crayton:

I have received your letter of July 20. You asked that this office "intervene" on your behalf in connection with your efforts in obtaining records from the Office of the Niagara County Clerk relating to an indictment and its dismissal.

In this regard, first, the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee is not empowered to "intervene" in the legal sense or compel an agency to grant or deny access to records.

Second, as I understand the matter, the records in question would likely have been sealed and be beyond public rights of access.

In general, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Relevant 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 §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

Mr. Kevin Crayton
August 24, 1999
Page -2-

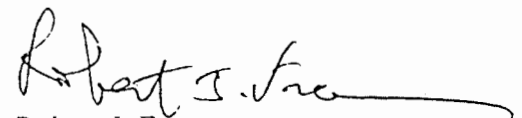
criminal action or proceeding was terminated shall immediately notify the commissioner of the division of criminal justice services and the heads of all appropriate police departments and other law enforcement agencies that the action has been terminated in favor of the accused, and unless the court has directed otherwise, that the record of such action or proceeding has been sealed. Upon receipt of notification of such termination and sealing...

(c) all official records and papers, including judgments and orders of a court but not including published court decisions or opinions or records and briefs on appeal, relating to the arrest or prosecution, including all duplicates and copies thereof, on file with the division of criminal justice services, any court, police agency, or prosecutor's office shall be sealed and not made available to any person or public or private agency..."

Assuming that a court in which a proceeding was heard has not directed otherwise, typically when charges are dismissed in favor of an accused, records of or relating to the charges would be sealed in conjunction with the provisions quoted above. Since the indictment to which you referred was dismissed, it is assumed that the records have been sealed.

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: Niagara County Clerk
Bernard Stack



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOJL-AO - 116416

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August 24, 1999

Executive Director

Robert J. Freeman

Mr. Martin T. Reid
Director of Issue Management
State University of New York
Office of the Vice Chancellor
State University Plaza
Albany, NY 12246

Dear Mr. Reid:

I have received your determination of an appeal rendered on July 27 in response to a request made by Samuel B. Golub, M.D. In brief, you determined that certain records could be made available for inspection pursuant to the Family Educational Rights and Privacy Act ("FERPA"), but you indicated that FERPA "does not require an educational institution to provide copies of any educational records."

While I agree that FERPA does not provide a right to have copies of records, I believe that the applicant would enjoy such a right under the Freedom of Information Law.

In this regard, as you are aware, the State University of New York clearly constitutes an "agency" as that term is defined in §86(3) of the Freedom of Information Law, and §86(4) of that statute defines the term "record" to mean:

"any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the definition, the materials 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

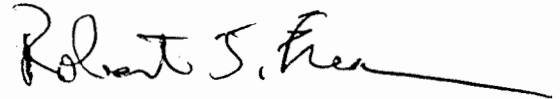
Mr. Martin T. Reid
August 24, 1999
Page -2-

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 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 records accessible under FERPA, 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,

A handwritten signature in black ink that reads "Robert J. Freeman". The signature is written in a cursive style and is followed by a long horizontal line extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Samuel B. Golub, M.D.



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI LAO - 11647

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August 25, 1999

Executive Director

Robert J. Freeman

Mr. Bruce E. Baker

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence, unless otherwise indicated.

Dear Mr. Baker:

I have received your letter of July 26 and the materials attached to it. You have questioned certain responses to your requests made under the Freedom of Information Law to the Hoosick Falls Central School District.

The first issue that you raised involves a request for a copy of a videotape of a meeting. You contend that the District has the resources to reproduce the tape; the Superintendent has indicated that the District does not have the resources to do so and must find an entity outside of the District to prepare a copy. In short, if the Superintendent has stated that the District does not have the ability to reproduce the tape, I have no reason to conclude otherwise.

If the District does not have the capacity to prepare a reproduction and must have a duplicate prepared by a private entity, it could charge a fee based on the "actual cost of reproduction" [see Freedom of Information Law, §87(1)(b)(iii)]. I believe that I discussed the matter with Ms. Chase, and that she informed me that the local entity that could prepare a new tape had no "pricelist". In that event, it is assumed that a bill for services rendered would indicate the payment to that entity. If there are postage or similar charges, they, too, could be included in determining the "actual cost."

Second, it has been advised that when an agency produces copies of records in response to a request but the applicant for the records has not paid the requisite fee, the agency can refuse to honor further requests until the fee is paid.

There is no judicial decision of which I am aware that is pertinent to the matter. However, when a request for copies of records is served upon an agency, both the agency and the applicant bear a responsibility. The agency is responsible for compliance with the Freedom of Information Law by retrieving the records sought and disclosing them to the extent required by law. The agency is also

Mr. Bruce E. Baker
August 25, 1999
Page -2-

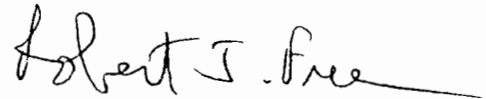
required to produce copies of records "[u]pon payment of, or offer to pay, the fee prescribed therefor" [see Freedom of Information Law, §89(3)]. Concurrently, if the applicant requests copies, I believe that he or she bears the responsibility of paying the appropriate fee.

If an agency has prepared copies of records in good faith and the applicant fails or refuses to pay the fee, I do not believe that the agency would be required to make available those copies that have been prepared. In my view, it follows that an agency should not be required to honor ensuing requests until the applicant has fulfilled his or her responsibility by tendering the fee for copies previously made.

I am unaware of the entirety of the facts in relation to the situation, and the propriety of the District's response would in my view be dependent on its reasonableness in conjunction with the attendant facts.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and extends across the width of the text area.

Robert J. Freeman
Executive Director

RJF:jm

cc: Nancy B. Chase



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-DO-11648

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Alexander F. Treadwell

August 25, 1999

Executive Director

Robert J. Freeman

Mr. Ronald J. Hall
96-A-5913
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. Hall:

I have received your letter of July 26 and the materials attached to it. You have sought an opinion concerning your right to obtain records pertaining to certain indictments that apparently led to your conviction from the Office of the Rockland County District Attorney. The request was denied "since the documents you seek pertain to a criminal matter the appeal of which has not yet been exhausted", citing §87(2)(e)(i) and (iii).

Those provisions permit an agency to withhold "records compiled for law enforcement purposes" when disclosure would:

- "(i) interfere with law enforcement investigations or judicial proceedings....
- (iii) identify a confidential source or disclose confidential information relating to a criminal investigation..."

In my view, subparagraph (i), if my understanding of the facts is accurate, would not serve as an appropriate basis for a denial of access. Subparagraph (iii) might properly be asserted to withhold some aspects of the records, but it would not likely justify a blanket denial of your request. In this regard, I offer the following comments.

When an investigation is ongoing, to the extent that disclosure would impair the ability of the government to solve a crime or prosecute offenders, for example, I believe that §87(2)(e)(i) would clearly be applicable. Similarly, premature disclosure of evidentiary material or other records might interfere with a judicial proceeding, in which case, the cited provision might properly be asserted.

Mr. Ronald J. Hall
August 25, 1999
Page -2-

In this instance, however, as I understand the matter, the investigation has been completed and you have been convicted. If that is so, the provision at issue would not in my opinion serve as a basis for denial.

In a decision recently rendered by the Appellate Division, Second Department [Pittari v. Pirro, ___AD2d___, NYLJ, August 20, 1999], the case involved a request by an attorney for all records pertaining to the arrest and prosecution of his client while the case was pending and before any determination of guilt or innocence. The Court referred to decisions rendered under the counterpart to the New York statute, the federal Freedom of Information Act (5 USC §552), and found that the exception analogous to §87(2)(e)(i):

“...applies to documents applicable to a pending criminal investigation, since disclosure of such information ‘could result in destruction of evidence, chilling and intimidation of witnesses, and revelation of the scope and nature of the Government’s investigation’ (see, *Solar Sources, Inc. v. U.S.*, 142 F3d 1033, 1039)...

“The determination of the Court of Appeals in *Matter of Gould v. New York City Police Dept.* (89 NY2d 267, supra) does not contradict this analysis. That case held that complaint follow-up reports (commonly referred to as DD5's) and police activity logs (commonly referred to as memo books) are agency records subject to disclosure under FOIL. The question of whether those records were exempt from disclosure on the ground that disclosure would interfere with law enforcement investigations or judicial proceedings was not explored (see, *Matter of Gould v. New York City Police Dept.*, supra, at 277). It is apparent in *Gould* that the petitioners’ criminal proceedings had concluded.

“Similarly, the other cases relied upon by the petitioner in support of his claim that disclosure is warranted do not refer to pending criminal proceedings (see, *Burtis v. New York Police Dept.*, 240 AD2d 259; *Brown v. Town of Amherst*, 195 AD2d 979; *Matter of Buffalo Broadcasting Co. v. New York State Dept. of Correctional Servs.*, 155 AD2d 106)...

“In the instant case, on the other hand, the petitioner acknowledged in his FOIL requests that the documents requested were ‘pertaining to his arrest and prosecution.’ Nor was there any dispute that the criminal action was pending when the FOIL request was made... Such disclosure during the course of a criminal proceeding would have a chilling effect on the pending prosecution (see, *Matter of Huston v. Turkel*, 236 AD2d 283; *Hawkins v. Kurlander*, 98 AD2d 14, 16).”

In my view, the clear implication of the foregoing is that §87(2)(e)(i) is pertinent *before* a trial, a plea of guilty, a conviction or a dismissal. After those events have occurred, the ability to solve a

crime, the destruction of evidence or the intimidation of witnesses, for example, become irrelevant in terms of their impact on a proceeding. In this instance, the request appears to have been made following a conviction but during the pendency of an appeal. In that kind of circumstance, with one exception, I do not believe that the provision at issue may justifiably be asserted. That exception would pertain to the situation in which there may be a number of individuals involved in an investigation and the conviction of or dismissal of charges against one defendant represents one aspect of a larger case involving others in which related investigations or criminal proceedings have not yet resulted in a trial, a plea, a conviction or a dismissal.

The other provision cited in the denial, subparagraph (iii) of §87(2)(e), may be more difficult to analyze. If indeed there may have been confidential sources, I believe that an agency may engage in redactions adequate to prevent the disclosure of information that could be used to identify those persons. However, the phrase "confidential information relating to a criminal investigation" has never been the subject of in depth judicial analysis. In general, it is my belief that the exceptions to rights of access appearing in §87(2) of the Freedom of Information Law are intended to enable the government to prevent or avoid harmful consequences; I do not believe that a court would ordinarily accept an assertion based on §87(2)(e)(iii) as a means of withholding a file in its entirety, particularly after a conviction..

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:

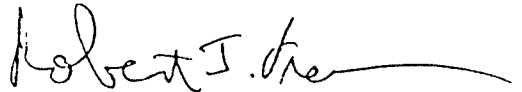
Mr. Ronald J. Hall
August 25, 1999
Page -4-

"...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.*).

Lastly, other grounds for denial and considerations may also be pertinent, and it appears that you addressed them in the "discussion" portion of your appeal.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Steven Moore
Ellen O'Hara Woods



STATE OF NEW YORK
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FOIL-90-116419

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Alexander F. Treadwell

August 25, 1999

Executive Director

Robert J. Freeman

Mr. Hernand Vasquez
96-R-4694
Orleans Correctional Facility
3531 Gaines Basin Road
Albion, NY 14411

Dear Mr. Vasquez:

I have received your letter of July 26, as well as the materials attached to this office. You indicated that you requested information pertaining to property held during your incarceration at the Queens House of Detention, and you "appealed" to this office in an effort to resolve the matter and asked that I provide the information in question.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized to provide and guidance concerning the Freedom of Information Law. The Committee is not empowered to compel an agency to grant or deny access to records, and it does not have custody or control of records generally. In short, I cannot make the information of your interest available because this office does not possess it.

Second, 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 requests should ordinarily be sent to that person. While I believe that the recipient of your request should have responded directly in a manner consistent with the Freedom of Information Law or forwarded the request to the appropriate person, it is suggested that you renew your request and send it to Mr. Thomas Antenen, Records Access Officer, Department of Corrections, 60 Hudson Street, 6th Floor, New York, NY 10013.

Lastly, for future reference, I point out that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record

Mr. Hernand Vasquez
August 25, 1999
Page -2-

reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

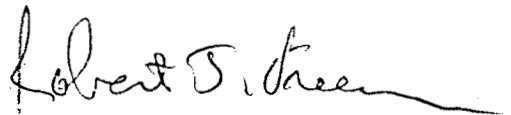
If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Thomas Antenen



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7076-A0-11650

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Alexander F. Treadwell

August 25, 1999

Executive Director

Robert J. Freeman

Mr. Phil Christie

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Christie:

I have received your letter of July 28 and the materials relating to it. You requested records from the Bedford Central School District that include its bank account numbers. The District indicated that the bank account numbers are "confidential" and that they must be deleted, and that you would be charged for copies from which the deletions would be made.

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 only ground for denial of potential relevance 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.e., to make "electronic transfers", I believe that the bank account numbers 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. In that event, the records would be available in their entirety, and you would have the right to inspect them at no charge.

Second, assuming that the District may properly delete the bank account numbers, I do not believe that you would have the right to inspect the records, for they include information that you

Mr. Phil Christe
August 25, 1999
Page -2-

have no right to see. The District could in that circumstance seek payment of the requisite fee for photocopies, which would be made available after the deletion of the bank account numbers (see Van Ness v. Center for Animal Care and Control and the New York City Department of Health, Supreme Court, New York County, January 28, 1999).

I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:jm

cc: Rev. Paul Alcorn
Dr. Bruce L. Dennis
Verna Carr



STATE OF NEW YORK
DEPARTMENT OF STATE
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707C-AO-11651

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

August 25, 1999

Executive Director

Robert J. Freeman

Mr. Michael Henriquez
96-A-2731
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. Henriquez:

I have received your letter of July 26 concerning unanswered requests made under the Freedom of Information Law. You have raised questions concerning the matter, and in this regard, I offer the following comments.

First, while there is no agency that is empowered to enforce the Freedom of Information Law, the Committee on Open Government is authorized to offer advice and opinions pertaining to 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:

Mr. Michael Henriquez
August 25, 1999
Page -2-

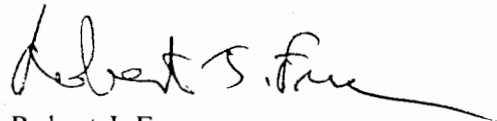
"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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 you wrote that you are attempting to obtain "the location and present name" of a particular woman, I note that home addresses of members of the public may generally be withheld pursuant to §87(2)(b) on the ground that disclosure would result in "an unwarranted invasion of personal privacy."

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink that reads "Robert J. Freeman". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

707L-10-11652

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August 25, 1999

Executive Director

Robert J. Freeman

Mr. Paul Bouros
94-A-2268
Fishkill Correctional Facility
Box 1245
Beacon, NY 12508

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Bouros:

I have received your letter of July 24 in which you sought assistance concerning an unanswered request for records maintained at the Riker's Island Correctional Facility.

In this regard, 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 requests should ordinarily be sent to that person. While I believe that the recipient of your request should have responded directly in a manner consistent with the Freedom of Information Law or forwarded the request to the appropriate person, it is suggested that you renew your request and send it to Mr. Thomas Antenen, Records Access Officer, Department of Corrections, 60 Hudson Street, 6th Floor, New York, NY 10013.

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..."

Mr. Paul Bouros
August 25, 1999
Page -2-

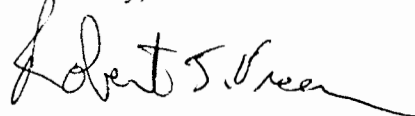
If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Thomas Antenen



STATE OF NEW YORK
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FOI-AD-11653

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Alexander F. Treadwell

Executive Director

Robert J. Freeman

August 25, 1999

Mr. Victor Iadarola
94-A-5290
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. Iadarola:

I have received your letter of July 27 and the materials attached to it. You have asked that I review them and "make a finding whether the information should be released" to you.

In this regard, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. The Committee is not empowered to issue a "finding" that is binding or to compel an agency to grant or deny access to records. Nevertheless, based on a review of the correspondence, 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:

Mr. Victor Iadarola

August 25, 1999

Page - 2 -

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 sought or the effects of their disclosure, I cannot advise as to the extent you may have a right of access to them. However, there are several grounds for denial that may be pertinent. For instance, §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) and (iv) provide, respectively, that an agency may withhold records compiled for law enforcement purposes when disclosure involves "confidential information relating to a criminal investigation" or would reveal other than routine criminal investigative techniques or procedures; and §87(2)(f) authorizes an agency to withhold records insofar as disclosure "would endanger the life or safety of any person." It is possible that those exceptions, depending on attendant circumstances, the contents of the records, and the effects of disclosure, might properly be asserted.

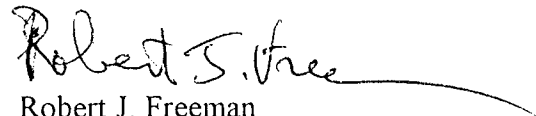
Mr. Victor Iadarola

August 25, 1999

Page - 3 -

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and has a long, sweeping horizontal line extending to the right from the end of the name.

Robert J. Freeman
Executive Director

RJF:tt

cc: Chaim Sandler



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

7071-AO-11654

Committee Members

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Robert L. King
Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

August 26, 1999

Mr. Paul Hynard

Dear Mr. Hynard:

I have received your letter of July 26 and the correspondence attached to it. You have asked that this office notify the Office of the New York County District Attorney and the United States Customs Service of their duty to respond to requests for records.

In this regard, the Committee on Open Government is a New York State agency authorized to provide advice concerning the New York Freedom of Information Law. That statute is applicable to entities of state and local government in New York. The Customs Service is a federal agency that falls within the coverage of the federal Freedom of Information Act (5 USC 552). As such, issues pertaining to compliance with the federal Act are beyond the jurisdiction of the Committee.

Having communicated with the Office of the New York County District Attorney on many occasions, I am sure that its staff is fully familiar with the provisions of the Freedom of Information Law. Nevertheless for your knowledge and 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:

Mr. Paul Hynard
August 26, 1999
Page - 2 -

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and is positioned above the printed name and title.

Robert J. Freeman
Executive Director

RJF:tt

cc: Gary Galperin



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

7076-AO-11655

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

August 25, 1999

Executive Director

Robert J. Freeman

Mr. Burnie Daniels

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Daniels:

I have received your letter of July 26 concerning an unanswered request made under the Freedom of Information Law to the records access officer at the Ontario County Jail. You have asked that I contact the Jail on your behalf to ask why your request has not been answered. While I will not do so, I offer the following comments and will send this response to the County Jail.

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,

Mr. Burnie Daniels
August 25, 1999
Page -2-

who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

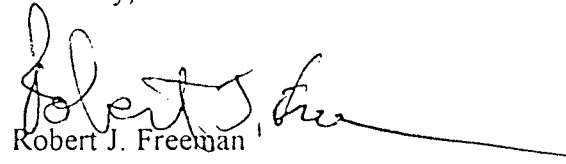
In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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 the event that no inventory of materials kept by the Jail law library is maintained, you asked that such a list be compiled. Here I point out 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 in response to a request. Therefore, if no inventory exists, there would be no obligation on the part of Jail staff to prepare an inventory on your behalf.

Lastly, the same provision requires that an applicant "reasonably describe" the records sought. If the invoices that you requested are kept or filed in a particular area and can be located and identified with reasonable effort, I believe that that aspect of your request would reasonably describe the records. If, however, the invoices are filed with all other County invoices and are kept in chronological order, for example, locating those of your interest would involve reviewing every invoice pertaining to a two year period. In that situation, the request would not, in my view, meet the standard of reasonably describing the records.

I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIA-11656

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

August 26, 1999

Mr. Richard A. Brinson



The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Brinson:

I have received your letter of August 3 pertaining to the advisory opinion prepared on July 27 in response to your inquiry. Although you presented additional information, I do not believe that the outcome would be significantly different, even if your contentions are accurate.

The issue involved a request for a "market appraisal", and I referred to two grounds for denial pertinent to ascertaining rights of access, paragraphs (c) and (g) of §87(2) of the Freedom of Information Law. Your comments focus on the former and your contention that since an agreement had been reached, any impairment of the ability of the government agency to reach an optimal agreement would become irrelevant. While that may be so, the other ground for denial remains applicable. Again, under §87(2)(g), those portions of inter-agency or intra-agency materials consisting of opinions, recommendations, advice and the like may be withheld. By its nature, an appraisal consists, at least in substantial part, of opinions. That being so, even if §87(2)(c) no longer applies, those portions of the record sought may in my view continue to be withheld.

I hope that the foregoing serves to clarify your understanding of the Freedom of Information Law.

Sincerely,

Robert J. Freeman
Executive Director

cc: Ron LeDonni
Michael Valente



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

7071-A0-11657

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

August 26, 1999

Robert J. Freeman

Ms. Kathy Hovis
Ithaca Journal
123 West State Street
Ithaca, NY 14850

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Hovis:

I have received your correspondence of August 9 and the materials attached to it. You have asked that I comment with respect to a contention by the Tompkins County District Attorney that autopsy reports are "confidential" and that "[u]nauthorized disclosure...violates the law..."

While autopsy reports and related records are not accessible as of right to the public generally, based on a review of the applicable statute, I do not believe that disclosure of those records would constitute a violation of law or that there is any prohibition against disclosure.

In his letter to the Tompkins County Medical Examiner, the District Attorney referred to §677(3)(b) of the County Law, which pertains to autopsy reports and related records and 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 right to obtain such records is based solely on §677(3)(b). In my view, only a district attorney and the next of kin

Ms. Kathy Hovis

August 26, 1999

Page - 2 -

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 to gain a right of access.

Nevertheless, a careful reading of the provision quoted above indicates that nothing in its terms *prohibits* a coroner, a medical examiner, a district attorney or others from disclosing the records falling within its coverage. In my experience, there have been numerous situations in which coroners and medical examiners, as well as district attorneys and police departments, have asserted their discretionary authority to disclose records falling within the scope of §677(3)(b), even though there was no obligation to do so.

In my view, a finding that records are confidential and *cannot* be disclosed must be consistent with the specific and unequivocal language of a statute. For example, and for the purpose of comparing the language of § 677(3)(b) of the County Law with another provision of the County Law, I believe that §308(4) is a statute that prohibits disclosure and leaves no discretion to the agency that maintains the records falling within its scope. The cited provision states that:

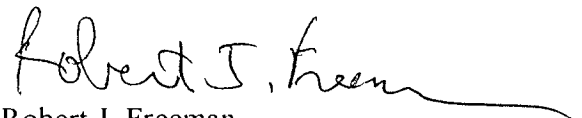
"Records, in whatever form they may be kept, of calls made to a municipality's E911 system *shall not be made available to or obtained by any entity or person*, other than that municipality's public safety agency, another government agency or body, or a private entity or a person providing medical, ambulance or other emergency services, and shall not be utilized for any commercial purpose other than the provision of emergency services."

Section 677(3)(b) provides a right of access to certain persons, but nowhere specifies that disclosures to others is prohibited. In contrast, §308(4) states that certain records "shall not be made available" except in specified circumstances.

In sum, while the news media and the general public may have no right to autopsy reports and related records, there is nothing in the law which in my view precludes a government official or agency from disclosing those records.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. George M. Dentes
Hon. C. Judson Kilgore, MD



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI-AO-11658

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Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

August 26, 1999

Mr. William V. Camfield
Turning Point Enterprises
263 Verbeck Ave
Schaghticoke, NY 12154

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Camfield:

I have received your letter of August 3 and the materials relating to it. You described a series of frustrations involving your efforts in gaining information from the Town of Stillwater. In this regard, I offer the following comments.

First, with respect to your recent requests for an "itemized accounting", it is emphasized that the Freedom of Information Law pertains to existing records. Section 89(3) of that statute states in part that an agency is not required to create a record in response to a request. Therefore, if no itemized accounting exists, there would be no obligation on the part of the Town to prepare such a record on your behalf. Similarly, if there is no record indicating the status of a certain account on a given date, there would be no requirement that the Town create a record containing the information sought.

Second, insofar as records exist, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, to the extent that the information that you are seeking exists in the form of a record or records, it would appear to be available, for none of the grounds for denial would be pertinent.

Third, I point out that the Freedom of Information Law applies to all agency records, irrespective of the location in which they are maintained. Section 86(4) of the Law defines the term "record" expansively to include:

Mr. William V. Camfield
August 26, 1999
Page - 2 -

"any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, 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, in addition to records held by Town officials, records maintained *for* the Town by the engineering firm to which you referred would also fall within the scope of the Freedom of Information Law.

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)].

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

Mr. William V. Camfield

August 26, 1999

Page - 3 -

than five business days may be needed to grant or deny a request, so long as it provides an approximate date indicating when the request will be granted or denied, and that date is reasonable in view of the attendant circumstances, I believe that the agency would be acting in compliance with law.

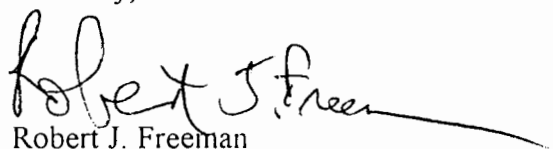
Notwithstanding the foregoing, in my view, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, if records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a lengthy delay in disclosure. As the Court of Appeals has asserted:

"...the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objectives cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" [Westchester News v. Kimball, 50 NY 2d 575, 579 (1980)].

If a request is voluminous and a significant amount of time is needed to locate records and review them to determine rights of access, a delay beyond five business days, in view of those and perhaps the other kinds of factors mentioned earlier, might be reasonable. On the other hand, if a record 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. Rose Petronis
Town Board



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI-AO-11659

Committee Members

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Robert L. King
Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

August 26, 1999

Executive Director

Robert J. Freeman

Mr. Wallace S. Nolen
94-a-6723
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. Nolen:

I have received your letters of July 7, both of which reached this office on August 2. As suggested in other recent correspondence, please note the zip code of this office.

With respect to the first letter, the issue relates to §87(3)(b) of the Freedom of Information Law, which requires that “[e]ach agency shall maintain...a record setting forth the name, public office address, title and salary of every officer or employee of the agency....” You indicated that the Town of Dannemora has contended that it may provide a post office address for all its employees, rather than a work location. You questioned whether that would satisfy the requirement that a “public office address” be included in the record required to be maintained pursuant to the cited provision. You also questioned the use of nicknames or initials.

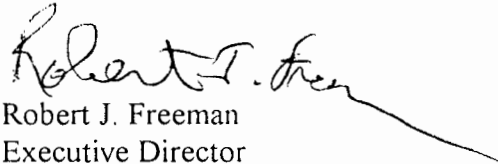
In this regard, as you may recall, the manner in which names appear on the record in question was considered some time ago in an opinion that you sought. The issue relative to the address has not arisen. However, I do not believe that providing a post office box for all employees would meet the requirement imposed by the law. In my view, one’s “public office address” is the location at which a public employee is routinely stationed on where his or her usual office is located.

In conjunction with the second letter, enclosed as requested are the latest supplement to the Committee’s annual report and copies of letters sent to you since the beginning of this year.

Mr. Wallace S. Nolen
August 26, 1999
Page - 2 -

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board, Town of Dannemora



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI C-40-11660

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Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

August 26, 1999

Mr. Dave Jones
98-A-7182
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. Jones:

I have received your undated letter, which reached this office on August 2. You indicated that the receipt of a request for records of the New York City Police Department was acknowledged and that you were informed that a response would be rendered in approximately 120 days. You wrote that you need the records to perfect your appeal and you asked that the response to your request be "expedited."

In this regard, there is no provision in the Freedom of Information Law that requires an agency to expedite its response to a request or give a preference when records are to be used in a judicial proceeding. I note that the statute provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89 (3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

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, the

Mr. Dave Jones
August 26, 1999
Page -2-

number of other requests received 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,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and extends to the right with a long horizontal flourish.

Robert J. Freeman
Executive Director

RJF:tt

cc: Sgt. Richard Evangelista



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL AD - 11661

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Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

August 26, 1999

Mr. O. Shelly



The staff of the Committee 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. Shelly:

I have received your letter of August 1 in which you sought an opinion concerning access to a portion of the State Insurance Fund's Claims-Medical Department Procedures Manual that you characterized as "Procedure 90." You referred to the exceptions in the Freedom of Information Law pertaining to inter-agency and intra-agency materials and to trade secrets, and you contended that neither would apply. In addition, you indicated that the Manual is available to many agency employees on an intranet.

In this regard, while I am unfamiliar with the contents of Procedure 90, an analogous issue has arisen in the past, and as you inferred, the provision of primary significance is §87(2)(d) of the Freedom of Information Law. That provision 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."

I agree with your contention that the State Insurance Fund ("the Fund") "does not regulate business." Your reference, however, to §89(5) is misplaced, for that provision deals with the protection of records submitted by commercial enterprises to state agencies. In this instance, the record at issue is a portion of a manual apparently prepared by the Fund.

As I understand its functions, the Fund essentially operates as an insurance company in competition with other insurance carriers licensed to do business in the state. While the Fund as a state agency is not typical of commercial enterprises, my understanding is that, in many respects, it carries out many of its duties as an entity in competition with private firms in the insurance industry.

Most pertinent to the matter, I note that there is case law indicating that when a governmental entity performs functions essentially commercial in nature in competition with private, profit making entities, it may withhold records pursuant to §87(2)(d) in appropriate circumstances (Syracuse & Oswego Motor Lines, Inc. v. Frank, Sup. Ct., Onondaga Cty., October 15, 1985). In this instance, assuming that the Fund is engaged in competition with private firms engaged in the same area of commercial activity, I believe that §87(2)(d) would serve as a potential basis for a denial of access.

The question under §87(2)(d) involves the extent, if any, to which disclosure would "cause substantial injury to the competitive position" of a commercial entity. The concept and parameters of what might constitute a "trade secret" were discussed in Kewanee Oil Co. v. Bicron Corp., which was decided by the United States Supreme Court in 1973 (416 U.S. 470). Central to the issue was a definition of "trade secret" upon which reliance is often based. Specifically, the Court cited the Restatement of Torts, section 757, comment b (1939), which states that:

"[a] trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers" (id. at 474, 475).

In its review of the definition, the court stated that "[T]he subject of a trade secret must be secret, and must not be of public knowledge or of a general knowledge in the trade or business" (id.). The phrase "trade secret" is more extensively defined in 104 NY Jur 2d 234 to mean:

"...a formula, process, device or compilation of information used in one's business which confers a competitive advantage over those in similar businesses who do not know it or use it. A trade secret, like any other secret, is something known to only one or a few and kept from the general public, and not susceptible to general knowledge. Six factors are to be considered in determining whether a trade secret exists: (1) the extent to which the information is known outside the business; (2) the extent to which it is known by a business' employees and others involved in the business; (3) the extent of measures taken by a business to guard the secrecy of the information; (4) the value of the information to a business and to its competitors; (5) the amount of effort or money expended by a business in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. If there has been a voluntary disclosure by the plaintiff, or if the facts pertaining to the matter are a subject of general knowledge in the trade, then any property right has evaporated."

In my view, the nature of record, the area of commerce in which a commercial entity is involved and the presence of the conditions described above that must be found to characterize records as trade secrets would be the factors used to determine the extent to which disclosure would "cause substantial injury to the competitive position" of a commercial enterprise. Therefore, the proper assertion of §87(2)(d) would be dependent upon the facts and, again, the effect of disclosure upon the competitive position of the entity to which the records relate.

Also relevant to the analysis is a recent decision rendered by the Court of Appeals, the State's highest court, which, for the first time, considered the phrase "substantial competitive injury" [Encore College Bookstores, Inc. v. Auxiliary Service Corporation of the State University of New York at Farmingdale, 87 NY2d 410(1995)]. In that decision, the Court reviewed the legislative history of the Freedom of Information Law as it pertains to §87(2)(d), and due to the analogous nature of equivalent exemption 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))...

"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

Mr. O. Shelly
August 27, 1999
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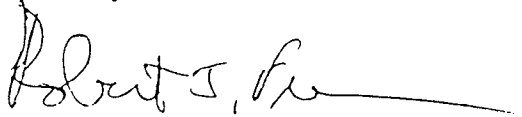
retrieval costs for the information, rather than the considerable costs of private reproduction, they may be getting quite a bargain. Such bargains could easily have competitive consequences not contemplated as part of FOIA's principal aim of promoting openness in government (id., 419-420)."

In sum, I believe that the State Insurance Fund could in the context of the preceding remarks be characterized as a commercial entity and therefore, assert §87(2)(d). To the extent that that provision or any other ground for denial may justifiably be asserted in accordance with the preceding commentary, the record sought could, in my opinion, be withheld.

Lastly, the fact that the record may be available to Fund employees via an intranet is irrelevant to public rights of access. Employees receive the record in the performance of their official duties, not as members of the public seeking the record pursuant to the Freedom of Information Law. Further, the record is the property of the Fund and cannot be disclosed by its employees without authorization to do so (see attached Information Security Policy).

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt
Enc.

cc: Jacob Weintraub



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-90-11662

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Alexander F. Treadwell

August 27, 1999

Executive Director

Robert J. Freeman

Mr. Christopher Lue-Shing
92-A-9582
Clinton Correctional Facility
P.O. Box 2002
Dannemora, NY 12929-2002

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Lue-Shing:

I have received your letter of July 23, which reached this office on August 3. You complained that the Division of Parole has repeatedly delayed responding to your requests for records and asked whether there is any method of compelling the Division to comply with the Freedom of Information Law other than through the initiation of litigation.

In this regard, I believe that the Division of Parole seeks to comply with the Freedom of Information Law and carries out its duties in good faith. Further, I am unaware of any means of compelling an agency to comply with law short of initiating litigation and obtaining a judicial order.

I note, however, that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges

Mr. Christopher Lue-Shing

August 27, 1999

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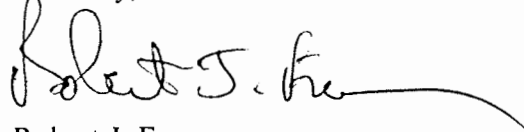
that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: David Molik



STATE OF NEW YORK
DEPARTMENT OF STATE
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FOI-AO-11663

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Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

August 27, 1999

Mr. Paul Hynard

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Hynard:

I have received your letters of July 26, 27 and 28.

The first pertains to a request for records of the New York City Police Department that has not been answered. In a response to a different matter sent to you yesterday, I offered guidance concerning the time limits for responding to requests and the steps that may be taken. The same information would be applicable in this instance. For your information, the person designated by the Department to determine appeals is Susan Petito, Special Counsel.

The second and third letters deal with unanswered requests for court records. 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."

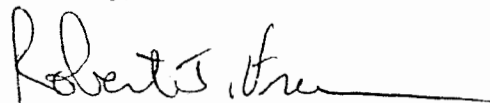
Mr. Paul Hynard
August 27, 1999
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Based on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law (see e.g., Judiciary Law, §255) may grant broad public access to those records. Even though other statutes may deal with access to court records, the procedural provisions associated with the Freedom of Information Law (i.e., those involving the designation of a records access officer or the right to appeal a denial) would not ordinarily be applicable.

It is suggested that you resubmit your requests to the clerk of the appropriate court, citing an applicable provision of law as the basis for your requests.

I hope that the foregoing serves to clarify your understanding of the matter and that I have been of assistance.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman", with a long horizontal line extending to the right.

Robert J. Freeman
Executive Director

RJF:tt



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI-AO-116604

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

August 27, 1999

Executive Director

Robert J. Freeman

Mr. Ronald Logan
87-A-9529
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. Logan:

I have received your letter of August 2 and the materials attached to it. You have sought my views concerning rights of access to "statistical data" that may be maintained by the Division of Parole relating to the period of 1995 to 1998.

From my perspective, there are two issues pertinent to your request. In this regard, I offer the following comments.

First, §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Consequently, an applicant must supply sufficient detail to enable an agency to locate and identify the records [see Konigsberg v. Coughlin, 68 NY2d 245 (1986)]. Having reviewed your request, it is questionable in my view whether or the extent to which you met the standard of reasonably describing the records of your interest. You sought "statistical data depicting inmates who were characterized as violent felony offenders" who were released during the years 1995 to 1998, as well as such data following their first, second or third appearances before the Parole Board. I cannot ascertain on the basis of your request which data you want (i.e., data concerning time served, health condition, whether they had job placements, previous convictions, ethnic breakdowns, number of disciplinary proceedings, etc). In my opinion, it is doubtful that your request is consistent with the aforementioned requirement.

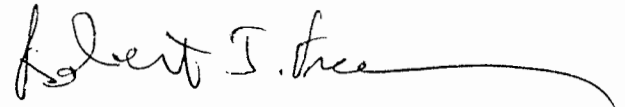
Second, the Freedom of Information Law pertains to existing records, and §89(3) also states that an agency is not required to create a record in response to a request. Therefore, to the extent that the statistical data of your interest has not been prepared and cannot be generated based on the Division's current computer programs, it would not be required to prepare new records or data on

Mr. Ronald Logan
August 27, 1999
Page -2-

your behalf. However, insofar as your request reasonably describes statistical data that is maintained by the Division, I believe that it would be accessible under the Freedom of Information Law, for none of the grounds for denial appearing in §87(2) would be pertinent.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Terrence X. Tracy
Steven H. Philbrick



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11665

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Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

August 27, 1999

Robert J. Freeman

Mr. Emanuel Rodriguez
97-A-0208
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. Rodriguez:

I have received your letter of July 4 and the materials attached to it. As I understand the matter, you gave testimony that was recorded on audiotape concerning an alleged assault by correction officers. Your request for records made to the Office of the Bronx County District Attorney, including your taped testimony, was initially denied, but the denial of was reversed following your appeal. Nevertheless, you were later informed that the District Attorney's office no longer has possession of the audiotape, and that it was forwarded to an investigator at the New York City Department of Correction. Although several requests have been made to that person, you have received no response. Consequently, you have sought assistance in the matter.

In this regard, 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 requests should ordinarily be sent to that person. While I believe that the recipient of your request should have responded directly in a manner consistent with the Freedom of Information Law or forwarded the request to the appropriate person, it is suggested that you renew your request, describe the situation and send it to Mr. Thomas Antenen, Records Access Officer, Department of Corrections, 60 Hudson Street, 6th Floor, New York, NY 10013.

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

Mr. Emanuel Rodriguez

August 27, 1999

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requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

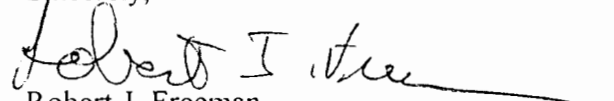
If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89 (4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89 (4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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
Investigator Angel Camacho



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

Omc-Ao-3062
FOIL-AO-116666

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Alexander F. Treadwell

August 27, 1999

Executive Director

Robert J. Freeman

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 July 29 and the materials attached to it. You have raised a variety of issues concerning compliance with the Freedom of Information and Open Meetings Laws by the Village of Freeport.

You referred initially to an appeal that you submitted under the Freedom of Information Law and asked whether the Village sent copies of the proper records to this office as required by §89(4)(a) of that statute. The cited provision states in relevant part that:

"any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought. In addition, each agency shall immediately forward to the committee on open government a copy of such appeal and the ensuing determination thereon."

Based on a review of our records relating to appeals for the month of July, the Village apparently did not send the requisite documentation to this office.

Next, you referred to the acknowledgment of the receipt of requests that do not include an approximation of when a request might be granted or denied. Here I point out that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

Mr. Stewart S. Lilker
August 27, 1999
Page -2-

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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, it appears that some aspects of your requests do not meet the requirements imposed by the Freedom of Information Law. In a request of May 28, you asked for all resolutions brought before the Board of Trustees dealing with its rules of procedure, laws, rules, decisions and the like relating to those rules that may be in possession of the Village, and any decisions rendered by this office since 1993.

One issue in relation to the request involves the extent to which the request "reasonably describes" the records sought as required by §89(3) of the Freedom of Information Law. I 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, a request, in my opinion 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 a request, to that extent, the request would not in my opinion meet the standard of reasonably describing the records.

If, for example, minutes of meetings are not indexed by subject matter, locating minutes that include reference to a particular subject would likely require a review of all the minutes, line by line, covering the period that you described. In my view, a request of that nature would not "reasonably describe" the records.

Similarly, a request for laws, rules, regulations and the like is not, in my view, a request for records. In essence, it is a request for an interpretation of law requiring a judgment. Any number of provisions of law might be "applicable", and a disclosure of some of them, based on one's knowledge, may be incomplete due to an absence of expertise regarding the content and interpretation of each such law. Further, people, and perhaps attorneys in particular, might differ as to the applicability of a given provision of law. In contrast, if a request is made, for example, for "section 10 of the Village Code", no interpretation or judgment is necessary, for sections of law appear numerically and can readily be identified. That kind of request, in my opinion, would involve a portion of a record that

must be disclosed. Again, a request for laws that might be "applicable" is not, in my view, a request for a record as envisioned by the Freedom of Information Law.

Other issues relate to the Open Meetings Law and minutes of meetings. Section 106 pertains to minutes and states that:

" 1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.

2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.

3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such 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.

Further, in my opinion, 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.

Mr. Stewart S. Lilker

August 27, 1999

Page -5-

Lastly, one of the issues relates to matters involving a real property transaction, and the pertinent provision concerning the ability to conduct an executive session to discuss such matters is §105(1)(h). That provision permits a public body to enter into executive session to discuss:

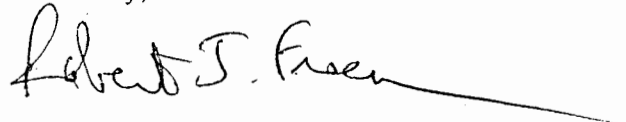
"the proposed acquisition, sale or lease of real property or the proposed acquisition of securities, or sale or exchange of securities held by such public body, but only when publicity would substantially affect the value thereof."

In my opinion, the language quoted above, like the other grounds for entry into executive session, is based on the principle that public business must be discussed in public unless public discussion would in some way be damaging, either to an individual, for example, or to a government in terms of its capacity to perform its functions appropriately and in the best interest of the public. It is clear that §105(1)(h) does not permit public bodies to conduct executive sessions to discuss all matters that may relate to the transaction of real property; only to the extent that publicity would "substantially affect the value of the property" can that provision validly be asserted.

If indeed publicity would substantially affect the value of real property, records, i.e., minutes of executive sessions, could likely be withheld in accordance with §106(2) of the Open Meetings Law to the extent authorized by §87(2)(c) of the Freedom of Information Law. That provision permits an agency to withhold records insofar as disclosure "would impair present or imminent contract awards..." As in the case of the rationale of §105(1)(h) of the Open Meetings Law, the cited provision of the Freedom of Information Law in my view authorizes an agency to withhold records insofar as disclosure would place a government agency at a disadvantage in negotiations or would otherwise preclude the agency from engaging in an agreement optimal to taxpayers.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees
Anna Knoeller, Village Clerk



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-RO-11667

Committee Members

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

August 30, 1999

Mr. Anthony Bennett
96-B-1530
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. Bennett:

I have received your letter of August 3 in which you wrote that you have encountered difficulty in obtaining your arrest record from the City of Lockport Police Department. You indicated that you must send a "signed release statement notarized" and the reason for the request "along with a \$10.00 fee." Although you met those conditions, you stated that you had received no further response as of the date of your letter to this office.

In this regard, I offer the following comments.

First, as a general matter, the reason for making a request is irrelevant, and it has been held that records accessible under the Freedom of Information Law must be made equally available to any person, regardless of the status or interest of the person making the request [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)]. If the request involves materials that could be withheld from the public generally on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" but which would be available to you as the subject of the materials, the agency could require that you provide reasonable proof of your identity [see Freedom of Information Law, §89(2)(c)], such as a notarized statement proving your identity.

Second, assuming that your request involves a copy of an existing record, the Freedom of Information Law, §87(1)(b)(iii), limits the fee that can be charged to twenty-five cents per photocopy up to nine by fourteen inches.

Mr. Anthony Bennett

August 30, 1999

Page - 2 -

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..."

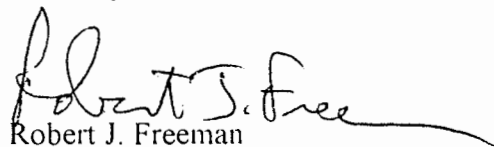
If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively 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:tt

cc: Records Access Officer



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI-AO-11669

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

September 3, 1999

Executive Director

Robert J. Freeman

Mr. Anthony Majette
93-A-5831
Upstate Correctional Facility
P.O. Box 2001
Malone, NY 12953

Dear Mr. Majette:

I have received two letters from you, and you requested records from this office in both.

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 provide the records in which you are interested because this office does not possess them.

For future reference, when seeking records, a request should be made to the agency that you believe maintains them. In view of the nature of your requests, it would appear that the records are kept at your facility. If that is so, I note that the regulations promulgated by 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.

In addition, I point out that the Freedom of Information Law pertains to existing records and that §89(3) states in relevant part that an agency is not required to create a record in response to a request. In the context of your request, if, for instance, the Department does not maintain "a list of employees designated by the Commissioner" to conduct certain hearings, it would not be required to create such a list on your behalf.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL A0-11070

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

September 3, 1999

Executive Director

Robert J. Freeman

Mr. Paul Bunker
97-A-1151
Green Haven Correctional Facility
Drawer B
Stormville, NY 12582

Dear Mr. Bunker:

I have received your letter of August 30 in which you requested a subject matter list pertaining to you.

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 provide the record that you are seeking because this office does not possess it.

Further, while each agency is required to maintain a subject matter list, there is no requirement that such a list be prepared or maintained with respect to particular individuals.

By way of background, as you may be aware, §87(3)(c) of the Freedom of Information Law requires that each agency maintain:

"a reasonably detailed current list by subject matter, of all records in the possession of the agency, whether or not available under this article."

The subject matter list is not, in my opinion, required to identify each and every record of an agency; rather I believe that it must refer, by category and in reasonable detail, to the kinds of records maintained by an agency. Again, a subject matter list is not prepared with respect to records pertaining to a single individual.

Reference to the subject matter list is made in the regulations promulgated by the Department of Correctional Services, which in §5.13 state that:

Mr. Paul Bunker
September 3, 1999
Page -2-

"(a) Every custodian of records under these regulations shall maintain an up-to-date subject matter list, reasonably detailed, of all records in their possession. The records access officer shall maintain a master index, reasonably detailed, of all records maintained by the department. The master index shall include the lists kept by all custodians as well as a list of records maintained at the department's central office.

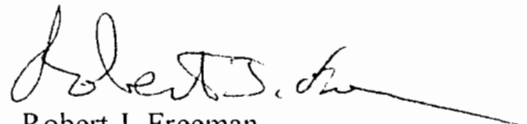
(b) Each subject matter list and the master index shall be sufficiently detailed to permit identification of the file category of the record sought.

(c) The master index shall be updated not less than twice per year. The most recent update shall appear on the first page of the subject matter list. Each custodian of records and the records access officer shall make available the index kept by him for inspection and copying. Any person desiring a copy of such list may request in writing a copy and upon payment of the appropriate fee, unless waived, a copy of such list shall be mailed or delivered."

Based on the foregoing, it is clear in my view that a master list must be maintained and made available at each facility. By reviewing a subject matter list, you can ascertain the kinds of records maintained by an agency and thereafter, request records based upon your review of the list.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman".

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

7071-AO-11671

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Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

September 3, 1999

Mr. Paul Archer
99-B-0679
Gowanda Correctional Facility
P.O. Box 311
Gowanda, NY 14070-0311

Dear Mr. Archer:

I have received your letter of August 25 in which you appealed a denial of access to records by the Commission of Correction to this office.

In this regard, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to determine appeals and cannot 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 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.

Mr. Paul Archer
September 3, 1999
Page - 2 -

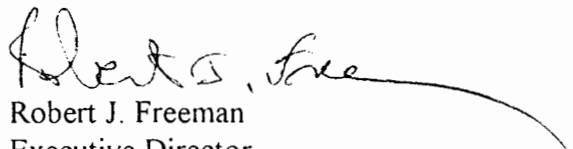
(b) Denial of access shall be in writing stating the reason therefor and advising the person denied access of his or her right to appeal to the person or body established to hear appeals, and that person or body shall be identified by name, title, business address and business telephone number. The records access officer shall not be the appeals officer" (section 1401.7).

It is noted that the state's highest court has held that a failure to inform a person denied access to records of the right to appeal enables that person to seek judicial review of a denial. Citing the Committee's regulations and the Freedom of Information Law, the Court of Appeals in Barrett v. Morgenthau held that:

"[i]nasmuch as the District Attorney failed to advise petitioner of the availability of an administrative appeal in the office (see, 21 NYCRR 1401.7[b]) and failed to demonstrate in the proceeding that the procedures for such an appeal had, in fact, even been established (see, Public Officers Law [section] 87[1][b], he cannot be heard to complain that petitioner failed to exhaust his administrative remedies" [74 NY 2d 907, 909 (1989)].

I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:tt

cc: Scott E. Steinhardt



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMC-AO-3063
FOI-AO-11672

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Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

September 3, 1999

Executive Director

Robert J. Freeman

Mr. Richard E. Slagle
Planing Board Chairman
Town of Celoron
21 Boulevard Avenue
Celoron, NY 14720

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Slagle:

As you are aware, I have received your letter of August 5. Please accept my apologies for the delay in response.

You have raised questions concerning the status of "work sessions" under the Open Meetings Law, the right of the public to speak at meetings, and the ability to gain access to records of a volunteer fire company. In this regard, I offer the following comments.

First, there is no legal distinction between a work session and a meeting. By way of background, it is noted that the definition of "meeting" has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

I point out that the decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that so-called "work sessions" and similar gatherings held for the purpose of discussion, but without an intent to take action, fell outside the scope of the Open Meetings Law. In discussing the issue, the Appellate Division, whose determination was unanimously affirmed by the Court of Appeals, stated that:

"We believe that the Legislature intended to include more than the mere formal act of voting or the formal execution of an official

document. Every step of the decision-making process, including the decision itself, is a necessary preliminary to formal action. Formal acts have always been matters of public record and the public has always been made aware of how its officials have voted on an issue. There would be no need for this law if this was all the Legislature intended. Obviously, every thought, as well as every affirmative act of a public official as it relates to and is within the scope of one's official duties is a matter of public concern. It is the entire decision-making process that the Legislature intended to affect by the enactment of this statute" (60 AD 2d 409, 415).

The court also dealt with the characterization of meetings as "informal," stating that:

"The word 'formal' is defined merely as 'following or according with established form, custom, or rule' (Webster's Third New Int. Dictionary). We believe that it was inserted to safeguard the rights of members of a public body to engage in ordinary social transactions, but not to permit the use of this safeguard as a vehicle by which it precludes the application of the law to gatherings which have as their true purpose the discussion of the business of a public body" (*id.*).

Based upon the direction given by the courts, if a majority of a public body gathers to discuss public business, any such gathering, in my opinion, would ordinarily constitute a "meeting" subject to the Open Meetings Law that must be preceded by notice given in accordance with §104 of the Law.

Unless a public body has adopted a rule to the contrary, it may take action at a work session. With respect to minutes of work sessions and other meetings, the Open Meetings Law contains what might be viewed as minimum requirements concerning the contents of minutes. Specifically, §106 of the Open Meetings Law states that:

1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.

2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.

3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information

law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

Based upon the foregoing, it is clear in my view that minutes need not consist of a verbatim account of what was said at a meeting; similarly, there is no requirement that minutes refer to every topic discussed or identify those who may have spoken. Although a public body may choose to prepare expansive minutes, at a minimum, minutes of open meetings must include reference to all motions, proposals, resolutions and any other matters upon which votes are taken. If those kinds of actions, such as motions or votes, do not occur during workshops, technically I do not believe that minutes must be prepared.

Second, the Open Meetings Law clearly provides the public with the right "to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy" (see Open Meetings Law, §100). However, the Law is silent with respect to the issue of public participation. Consequently, by means of example, if a public body does not want to answer questions or permit the public to speak or otherwise participate at its meetings, I do not believe that it would be obliged to do so. On the other hand, a public body may choose to answer questions and permit public participation, and many do so. When a public body does permit the public to speak, I believe that it should do so based upon reasonable rules that treat members of the public equally.

While public bodies have the right to adopt rules to govern their own proceedings (see e.g., Village Law, §4-412), the courts have found in a variety of contexts that such rules must be reasonable. For example, although a board of education may "adopt by laws and rules for its government and operations", in a case in which a board's rule prohibited the use of tape recorders at its meetings, the Appellate Division found that the rule was unreasonable, stating that the authority to adopt rules "is not unbridled" and that "unreasonable rules will not be sanctioned" [see Mitchell v. Garden City Union Free School District, 113 AD 2d 924, 925 (1985)]. Similarly, if by rule, a public body chose to permit certain citizens to address it for ten minutes while permitting others to address it for three, or not at all, such a rule, in my view, would be unreasonable.

And third, the status of volunteer fire companies had been unclear in the initial stages of the Freedom of Information Law. Those companies are generally not-for-profit corporations that perform their duties by means of contractual relationships with municipalities. As not-for-profit corporations, it was difficult to determine whether or not they conducted public business and performed a governmental function. Nevertheless, in Westchester-Rockland Newspapers v. Kimball [50 NYS 2d 575 (1980)], a case involving access to records relating to a lottery conducted by a volunteer fire company, the Court of Appeals, found that volunteer fire companies, despite their status as not-for-profit corporations, are "agencies" subject to the Freedom of Information Law. In so holding, the Court stated that:

"We begin by rejecting respondent's contention that, in applying the Freedom of Information Law, a distinction is to be made between a volunteer organization on which a local government relies for

performance of an essential public service, as is true of the fire department here, and on the other hand, an organic arm of government, when that is the channel through which such services are delivered. Key is the Legislature's own unmistakably broad declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (emphasis added; Public Officers Law, §84).

"True, the Legislature, in separately delineating the powers and duties of volunteer fire departments, for example, has nowhere included an obligation comparable to that spelled out in the Freedom of Information statute (see Village Law, art 10; see, also, 39 NY Jur, Municipal Corporations, §§560-588). But, absent a provision exempting volunteer fire departments from the reach of article 6-and there is none-we attach no significance to the fact that these or other particular agencies, regular or volunteer, are not expressly included. For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objections cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" (*id.* at 579).

Moreover, although it was contended that documents concerning the lottery were not subject to the Freedom of Information Law because they did not pertain to the performance of the company's fire fighting duties, the Court held that the documents constituted "records" subject to the Freedom of Information Law [see §86(4)].

More recently, another decision confirmed in an expansive manner that volunteer fire companies are required to be accountable. That decision, S.W. Pitts Hose Company et al. v. Capital Newspapers (Supreme Court, Albany County, January 25, 1988), dealt with the issue in terms of government control over volunteer fire companies. In its analysis, the Court stated that:

"Section 1402 of the Not-for-Profit Corporation Law is directly applicable to the plaintiffs and pertains to how volunteer fire companies are organized. Section 1402(e) provides:

'...a fire corporation, hereafter incorporated under this section shall be under the control of the city, village,

Mr. Richard E. Slagle
September 3, 1999
Page -5-

fire district or town authorities having by law, control over the prevention or extinguishment of fires therein. Such authorities may adopt rules and regulations for the government and control of such corporations.'

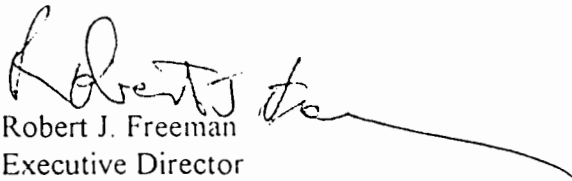
"These fire companies are formed by consent of the Colonie Town Board. The Town has control over the membership of the companies, as well as many other aspects of their structure, organization and operation (section 1402). The plaintiffs' contention that their relationship with the Town of Colonie is solely contractual is a mischaracterization. The municipality clearly has, by law, control over these volunteer organizations which reprovide a public function...

"This court recognizes the long, distinguished history of volunteer fire companies in New York State, and the vital services they provide to many municipalities. But not to be ignored is that their existence is inextricably linked to, dependent on, and under the control of the municipalities for which they provide an essential public service."

In sum, volunteer fire companies are required to disclose pursuant to the Freedom of Information Law in the same manner as municipal agencies.

I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11643

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Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

August 24, 1999

Hon. Bernard Kessler
Law Offices of Bernard Kessler
Route 9 & Kessler Drive
P.O. Box 681
Hyde Park, NY 12538

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Judge Kessler:

As you are aware, I have received your letter of July 23 and the correspondence attached to it. You have asked that I review a request made under the Freedom of Information Law and your response to it.

The request, which was made by a law firm, involves "information....concerning applications for zoning variances, approvals and denials thereof, applications for Building Permits, approvals and denials thereof, and actions brought by the Town of Rhinebeck to enforce its Zoning Laws and Building Codes for all years since 1980." The request later specified the kinds of records included within the request, all of which pertain to the period of 1980 to the present, such as complaints received by Town officials concerning "construction, operations or activities in the Town", "pleadings in every enforcement action commenced by the Town....making allegations of violations of the Building Code, the Zoning Law or Building Permits", all citations issued in relation to those provisions and minutes of meetings in which reference is made to applications for zoning variances.

In response, although you agreed to comply to the extent possible, you contended that a request encompassing such a lengthy period, nineteen years, is "unreasonable." The remainder of the response dealt with each aspect of the request and indicated that some records, depending on the means by which they are filed, could be located and made available for inspection or upon payment of the request fees for copying, but that others could not be retrieved without additional identifying information.

In this regard, I offer the following comments.

First, the coverage of the Freedom of Information Law is extensive, for it includes all "agency records" within its scope. Section 86(4) of that statute defines the term "record" expansively to include:

"any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, irrespective of the age of a document, if it continues to be maintained by the Town, I believe that it would constitute a "record" that falls within the framework of the Freedom of Information Law [see Capital Newspapers v. Whalen, 69 NY2d 246 (1987)].

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, with one exception, the records sought would appear to be available, for none of the grounds for denial would be applicable. The only category of requested records that would in my opinion include the ability to deny access is complaints. Depending on attendant facts, personally identifying details pertaining to complainants might justifiably be deleted on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" pursuant to §87(2)(b).

Third, and most importantly, I believe that the key 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,

Hon. Bernard Kessler

August 24, 1999

Page - 3 -

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.

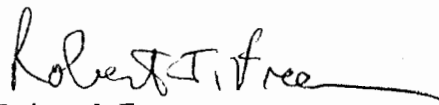
While I am unfamiliar with the recordkeeping systems of the Town, to extent that the records sought can be located with reasonable effort, the request, in my opinion would have met the requirement of reasonably describing the records. On the other hand, if the records are not maintained in a manner that 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.

In the context of the matter at hand, there are several aspects of the request that do not appear to meet the requirement that the records be "reasonably described." For instance, you indicated that records relating to applications for zoning variances are kept alphabetically, by applicants' names. Since the request seeks the records by means of a time period, chronologically, there would be no way to locate the records other than by reviewing each applicant file to ascertain whether it falls within the scope of the request. Minutes of meetings are apparently not indexed by subject matter, and all minutes for the past nineteen years would have to be reviewed to determine whether they contain information falling within the request. You wrote that violations and citations "are included in general correspondence to and from the Town", and that a "better identification of same would be most helpful."

In those and similar other aspects of the request, I do not believe that the firm seeking the records would have met the standard of reasonably describing the records. In each of those instances, the Town does not maintain the records in a manner that enables Town officials to locate the items within a category of records sought without reviewing virtually every record filed over the course of nineteen years. According to the Court of Appeals in Konigsberg, an agency is not required to engage such extensive searches to locate and retrieve the records.

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



STATE OF NEW YORK
DEPARTMENT OF STATE
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707C-AO-11644

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Alexander F. Treadwell

August 24, 1999

Executive Director

Robert J. Freeman

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 letter of July 23 and the materials attached to it. You have sought my opinion concerning a request for records that you made to the New York City Police Department.

From my perspective, several elements of the request were adequately considered in the opinion addressed to you on March 22. The primary focus of the more recent letter appears to involve records relating to overtime, attendance and a claim of disability by a particular police officer. In this regard, I offer the following comments.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Although tangential to the issues raised by your request, I point out that the Freedom of Information Law generally does not require that agencies maintain or prepare records [see §89(3)], but that an exception involves payroll information. Specifically, §87(3) of the Law states in relevant part that:

"Each agency shall maintain...

(b) a record setting forth the name, public office address, title and salary of every officer or employee of the agency..."

While §87(2)(b) of the Freedom of Information Law authorizes an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy", the courts have provided substantial direction regarding the privacy of public employees. First, it is clear that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. Second, with regard to records pertaining to public employees, the courts have found that, as a general rule, records that are relevant to the performance of a public employee's official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

Based upon the foregoing, it is clear in my view that records reflective of salaries of public employees must be prepared and made available. Similarly, records reflective of other payments, whether they pertain to overtime, or participation in work-related activities, for example, would be available, for those records in my view would be relevant to the performance of one's official duties.

It is 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 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.

Insofar as the records sought include reference to a particular medical problem or injury, I believe that they may be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy. Even though they might not be characterized as medical records, because they contain information that is medical in nature, they may be withheld to that extent [see Hanig v. NYS Department of Motor Vehicles, 79 NY2d 106 (1992)].

Lastly, you requested "a complete itemized inventory" of the records that might be withheld with a justification for the denial of access to each. In my view, the Department would not be required to prepare such an inventory. 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

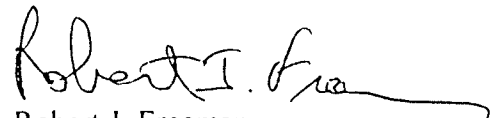
Mr. Rafael Robles
August 24, 1999
Page -3-

burden of proof remains on the agency. 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 Farberman & Sons v. New York City Health and Hosps. Corp., 62 NY 2d 75, 83; Matter of Fink v. Lefkowitz, 47 NY 2d 567, 571), did not constitute error. To make such disclosure would effectively subvert the purpose of these statutory exemptions which is to preserve the confidentiality of this information" [Nalo v. Sullivan, 125 AD 2d 311, 312 (1987)].

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Susan Petito
Sgt. Richard Evangelista



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Executive Director

Robert J. Freeman

August 24, 1999

Mr. Kevin Crayton
98-B-0864
Orleans Correctional Facility
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. Crayton:

I have received your letter of July 20. You asked that this office "intervene" on your behalf in connection with your efforts in obtaining records from the Office of the Niagara County Clerk relating to an indictment and its dismissal.

In this regard, first, the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee is not empowered to "intervene" in the legal sense or compel an agency to grant or deny access to records.

Second, as I understand the matter, the records in question would likely have been sealed and be beyond public rights of access.

In general, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Relevant 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 §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

Mr. Kevin Crayton
August 24, 1999
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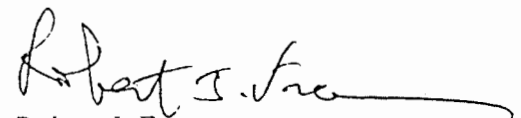
criminal action or proceeding was terminated shall immediately notify the commissioner of the division of criminal justice services and the heads of all appropriate police departments and other law enforcement agencies that the action has been terminated in favor of the accused, and unless the court has directed otherwise, that the record of such action or proceeding has been sealed. Upon receipt of notification of such termination and sealing...

(c) all official records and papers, including judgments and orders of a court but not including published court decisions or opinions or records and briefs on appeal, relating to the arrest or prosecution, including all duplicates and copies thereof, on file with the division of criminal justice services, any court, police agency, or prosecutor's office shall be sealed and not made available to any person or public or private agency..."

Assuming that a court in which a proceeding was heard has not directed otherwise, typically when charges are dismissed in favor of an accused, records of or relating to the charges would be sealed in conjunction with the provisions quoted above. Since the indictment to which you referred was dismissed, it is assumed that the records have been sealed.

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: Niagara County Clerk
Bernard Stack



STATE OF NEW YORK
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FOJL-AO - 116416

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August 24, 1999

Executive Director

Robert J. Freeman

Mr. Martin T. Reid
Director of Issue Management
State University of New York
Office of the Vice Chancellor
State University Plaza
Albany, NY 12246

Dear Mr. Reid:

I have received your determination of an appeal rendered on July 27 in response to a request made by Samuel B. Golub, M.D. In brief, you determined that certain records could be made available for inspection pursuant to the Family Educational Rights and Privacy Act ("FERPA"), but you indicated that FERPA "does not require an educational institution to provide copies of any educational records."

While I agree that FERPA does not provide a right to have copies of records, I believe that the applicant would enjoy such a right under the Freedom of Information Law.

In this regard, as you are aware, the State University of New York clearly constitutes an "agency" as that term is defined in §86(3) of the Freedom of Information Law, and §86(4) of that statute defines the term "record" to mean:

"any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the definition, the materials 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

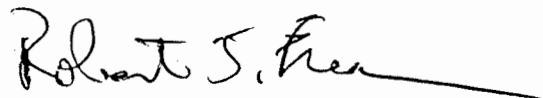
Mr. Martin T. Reid
August 24, 1999
Page -2-

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 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 records accessible under FERPA, 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,

A handwritten signature in black ink that reads "Robert J. Freeman". The signature is written in a cursive style and is followed by a long horizontal line extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Samuel B. Golub, M.D.



STATE OF NEW YORK
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Alexander F. Treadwell

August 25, 1999

Executive Director

Robert J. Freeman

Mr. Bruce E. Baker

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence, unless otherwise indicated.

Dear Mr. Baker:

I have received your letter of July 26 and the materials attached to it. You have questioned certain responses to your requests made under the Freedom of Information Law to the Hoosick Falls Central School District.

The first issue that you raised involves a request for a copy of a videotape of a meeting. You contend that the District has the resources to reproduce the tape; the Superintendent has indicated that the District does not have the resources to do so and must find an entity outside of the District to prepare a copy. In short, if the Superintendent has stated that the District does not have the ability to reproduce the tape, I have no reason to conclude otherwise.

If the District does not have the capacity to prepare a reproduction and must have a duplicate prepared by a private entity, it could charge a fee based on the "actual cost of reproduction" [see Freedom of Information Law, §87(1)(b)(iii)]. I believe that I discussed the matter with Ms. Chase, and that she informed me that the local entity that could prepare a new tape had no "pricelist". In that event, it is assumed that a bill for services rendered would indicate the payment to that entity. If there are postage or similar charges, they, too, could be included in determining the "actual cost."

Second, it has been advised that when an agency produces copies of records in response to a request but the applicant for the records has not paid the requisite fee, the agency can refuse to honor further requests until the fee is paid.

There is no judicial decision of which I am aware that is pertinent to the matter. However, when a request for copies of records is served upon an agency, both the agency and the applicant bear a responsibility. The agency is responsible for compliance with the Freedom of Information Law by retrieving the records sought and disclosing them to the extent required by law. The agency is also

Mr. Bruce E. Baker
August 25, 1999
Page -2-

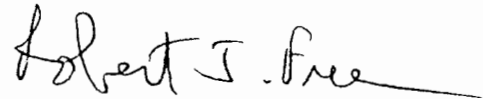
required to produce copies of records "[u]pon payment of, or offer to pay, the fee prescribed therefor" [see Freedom of Information Law, §89(3)]. Concurrently, if the applicant requests copies, I believe that he or she bears the responsibility of paying the appropriate fee.

If an agency has prepared copies of records in good faith and the applicant fails or refuses to pay the fee, I do not believe that the agency would be required to make available those copies that have been prepared. In my view, it follows that an agency should not be required to honor ensuing requests until the applicant has fulfilled his or her responsibility by tendering the fee for copies previously made.

I am unaware of the entirety of the facts in relation to the situation, and the propriety of the District's response would in my view be dependent on its reasonableness in conjunction with the attendant facts.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and extends across the width of the page.

Robert J. Freeman
Executive Director

RJF:jm

cc: Nancy B. Chase



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Alexander F. Treadwell

August 25, 1999

Executive Director

Robert J. Freeman

Mr. Ronald J. Hall
96-A-5913
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. Hall:

I have received your letter of July 26 and the materials attached to it. You have sought an opinion concerning your right to obtain records pertaining to certain indictments that apparently led to your conviction from the Office of the Rockland County District Attorney. The request was denied "since the documents you seek pertain to a criminal matter the appeal of which has not yet been exhausted", citing §87(2)(e)(i) and (iii).

Those provisions permit an agency to withhold "records compiled for law enforcement purposes" when disclosure would:

- "(i) interfere with law enforcement investigations or judicial proceedings....
- (iii) identify a confidential source or disclose confidential information relating to a criminal investigation..."

In my view, subparagraph (i), if my understanding of the facts is accurate, would not serve as an appropriate basis for a denial of access. Subparagraph (iii) might properly be asserted to withhold some aspects of the records, but it would not likely justify a blanket denial of your request. In this regard, I offer the following comments.

When an investigation is ongoing, to the extent that disclosure would impair the ability of the government to solve a crime or prosecute offenders, for example, I believe that §87(2)(e)(i) would clearly be applicable. Similarly, premature disclosure of evidentiary material or other records might interfere with a judicial proceeding, in which case, the cited provision might properly be asserted.

Mr. Ronald J. Hall
August 25, 1999
Page -2-

In this instance, however, as I understand the matter, the investigation has been completed and you have been convicted. If that is so, the provision at issue would not in my opinion serve as a basis for denial.

In a decision recently rendered by the Appellate Division, Second Department [Pittari v. Pirro, ___AD2d___, NYLJ, August 20, 1999], the case involved a request by an attorney for all records pertaining to the arrest and prosecution of his client while the case was pending and before any determination of guilt or innocence. The Court referred to decisions rendered under the counterpart to the New York statute, the federal Freedom of Information Act (5 USC §552), and found that the exception analogous to §87(2)(e)(i):

“...applies to documents applicable to a pending criminal investigation, since disclosure of such information ‘could result in destruction of evidence, chilling and intimidation of witnesses, and revelation of the scope and nature of the Government’s investigation’ (see, *Solar Sources, Inc. v. U.S.*, 142 F3d 1033, 1039)...

“The determination of the Court of Appeals in *Matter of Gould v. New York City Police Dept.* (89 NY2d 267, supra) does not contradict this analysis. That case held that complaint follow-up reports (commonly referred to as DD5's) and police activity logs (commonly referred to as memo books) are agency records subject to disclosure under FOIL. The question of whether those records were exempt from disclosure on the ground that disclosure would interfere with law enforcement investigations or judicial proceedings was not explored (see, *Matter of Gould v. New York City Police Dept.*, supra, at 277). It is apparent in *Gould* that the petitioners’ criminal proceedings had concluded.

“Similarly, the other cases relied upon by the petitioner in support of his claim that disclosure is warranted do not refer to pending criminal proceedings (see, *Burtis v. New York Police Dept.*, 240 AD2d 259; *Brown v. Town of Amherst*, 195 AD2d 979; *Matter of Buffalo Broadcasting Co. v. New York State Dept. of Correctional Servs.*, 155 AD2d 106)...

“In the instant case, on the other hand, the petitioner acknowledged in his FOIL requests that the documents requested were ‘pertaining to his arrest and prosecution.’ Nor was there any dispute that the criminal action was pending when the FOIL request was made... Such disclosure during the course of a criminal proceeding would have a chilling effect on the pending prosecution (see, *Matter of Huston v. Turkel*, 236 AD2d 283; *Hawkins v. Kurlander*, 98 AD2d 14, 16).”

In my view, the clear implication of the foregoing is that §87(2)(e)(i) is pertinent *before* a trial, a plea of guilty, a conviction or a dismissal. After those events have occurred, the ability to solve a

crime, the destruction of evidence or the intimidation of witnesses, for example, become irrelevant in terms of their impact on a proceeding. In this instance, the request appears to have been made following a conviction but during the pendency of an appeal. In that kind of circumstance, with one exception, I do not believe that the provision at issue may justifiably be asserted. That exception would pertain to the situation in which there may be a number of individuals involved in an investigation and the conviction of or dismissal of charges against one defendant represents one aspect of a larger case involving others in which related investigations or criminal proceedings have not yet resulted in a trial, a plea, a conviction or a dismissal.

The other provision cited in the denial, subparagraph (iii) of §87(2)(e), may be more difficult to analyze. If indeed there may have been confidential sources, I believe that an agency may engage in redactions adequate to prevent the disclosure of information that could be used to identify those persons. However, the phrase "confidential information relating to a criminal investigation" has never been the subject of in depth judicial analysis. In general, it is my belief that the exceptions to rights of access appearing in §87(2) of the Freedom of Information Law are intended to enable the government to prevent or avoid harmful consequences; I do not believe that a court would ordinarily accept an assertion based on §87(2)(e)(iii) as a means of withholding a file in its entirety, particularly after a conviction..

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:

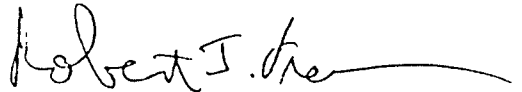
Mr. Ronald J. Hall
August 25, 1999
Page -4-

"...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.*).

Lastly, other grounds for denial and considerations may also be pertinent, and it appears that you addressed them in the "discussion" portion of your appeal.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Steven Moore
Ellen O'Hara Woods



STATE OF NEW YORK
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FOIL-90-116419

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August 25, 1999

Executive Director

Robert J. Freeman

Mr. Hernand Vasquez
96-R-4694
Orleans Correctional Facility
3531 Gaines Basin Road
Albion, NY 14411

Dear Mr. Vasquez:

I have received your letter of July 26, as well as the materials attached to this office. You indicated that you requested information pertaining to property held during your incarceration at the Queens House of Detention, and you "appealed" to this office in an effort to resolve the matter and asked that I provide the information in question.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized to provide and guidance concerning the Freedom of Information Law. The Committee is not empowered to compel an agency to grant or deny access to records, and it does not have custody or control of records generally. In short, I cannot make the information of your interest available because this office does not possess it.

Second, 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 requests should ordinarily be sent to that person. While I believe that the recipient of your request should have responded directly in a manner consistent with the Freedom of Information Law or forwarded the request to the appropriate person, it is suggested that you renew your request and send it to Mr. Thomas Antenen, Records Access Officer, Department of Corrections, 60 Hudson Street, 6th Floor, New York, NY 10013.

Lastly, for future reference, I point out that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record

Mr. Hernand Vasquez
August 25, 1999
Page -2-

reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

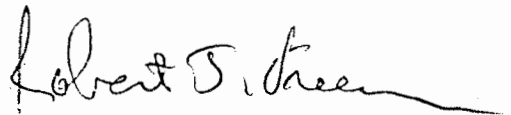
If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Thomas Antenen



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

7076-AO-11650

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Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

August 25, 1999

Executive Director

Robert J. Freeman

Mr. Phil Christie

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Christie:

I have received your letter of July 28 and the materials relating to it. You requested records from the Bedford Central School District that include its bank account numbers. The District indicated that the bank account numbers are "confidential" and that they must be deleted, and that you would be charged for copies from which the deletions would be made.

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 only ground for denial of potential relevance 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.e., to make "electronic transfers", I believe that the bank account numbers 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. In that event, the records would be available in their entirety, and you would have the right to inspect them at no charge.

Second, assuming that the District may properly delete the bank account numbers, I do not believe that you would have the right to inspect the records, for they include information that you

Mr. Phil Christe
August 25, 1999
Page -2-

have no right to see. The District could in that circumstance seek payment of the requisite fee for photocopies, which would be made available after the deletion of the bank account numbers (see Van Ness v. Center for Animal Care and Control and the New York City Department of Health, Supreme Court, New York County, January 28, 1999).

I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:jm

cc: Rev. Paul Alcorn
Dr. Bruce L. Dennis
Verna Carr



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

707C-AO-11651

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Warren Mitofsky
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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

August 25, 1999

Executive Director

Robert J. Freeman

Mr. Michael Henriquez
96-A-2731
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. Henriquez:

I have received your letter of July 26 concerning unanswered requests made under the Freedom of Information Law. You have raised questions concerning the matter, and in this regard, I offer the following comments.

First, while there is no agency that is empowered to enforce the Freedom of Information Law, the Committee on Open Government is authorized to offer advice and opinions pertaining to 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:

Mr. Michael Henriquez
August 25, 1999
Page -2-

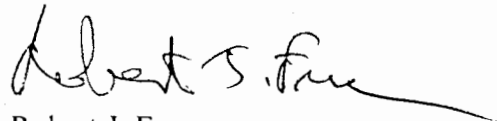
"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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 you wrote that you are attempting to obtain "the location and present name" of a particular woman, I note that home addresses of members of the public may generally be withheld pursuant to §87(2)(b) on the ground that disclosure would result in "an unwarranted invasion of personal privacy."

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

707L-10-11652

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

August 25, 1999

Executive Director

Robert J. Freeman

Mr. Paul Bouros
94-A-2268
Fishkill Correctional Facility
Box 1245
Beacon, NY 12508

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Bouros:

I have received your letter of July 24 in which you sought assistance concerning an unanswered request for records maintained at the Riker's Island Correctional Facility.

In this regard, 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 requests should ordinarily be sent to that person. While I believe that the recipient of your request should have responded directly in a manner consistent with the Freedom of Information Law or forwarded the request to the appropriate person, it is suggested that you renew your request and send it to Mr. Thomas Antenen, Records Access Officer, Department of Corrections, 60 Hudson Street, 6th Floor, New York, NY 10013.

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..."

Mr. Paul Bouros
August 25, 1999
Page -2-

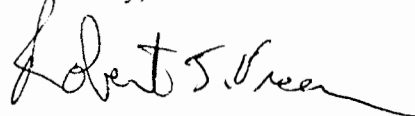
If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Thomas Antenen



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI-AD-11653

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

August 25, 1999

Mr. Victor Iadarola
94-A-5290
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. Iadarola:

I have received your letter of July 27 and the materials attached to it. You have asked that I review them and "make a finding whether the information should be released" to you.

In this regard, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. The Committee is not empowered to issue a "finding" that is binding or to compel an agency to grant or deny access to records. Nevertheless, based on a review of the correspondence, 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:

Mr. Victor Iadarola

August 25, 1999

Page - 2 -

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 sought or the effects of their disclosure, I cannot advise as to the extent you may have a right of access to them. However, there are several grounds for denial that may be pertinent. For instance, §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) and (iv) provide, respectively, that an agency may withhold records compiled for law enforcement purposes when disclosure involves "confidential information relating to a criminal investigation" or would reveal other than routine criminal investigative techniques or procedures; and §87(2)(f) authorizes an agency to withhold records insofar as disclosure "would endanger the life or safety of any person." It is possible that those exceptions, depending on attendant circumstances, the contents of the records, and the effects of disclosure, might properly be asserted.

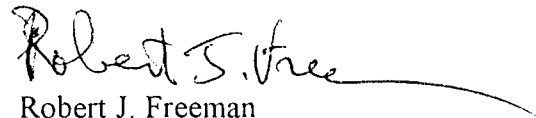
Mr. Victor Iadarola

August 25, 1999

Page - 3 -

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and has a long, sweeping horizontal line extending to the right from the end of the name.

Robert J. Freeman
Executive Director

RJF:tt

cc: Chaim Sandler



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

7071-AO-11654

Committee Members

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Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

August 26, 1999

Mr. Paul Hynard

Dear Mr. Hynard:

I have received your letter of July 26 and the correspondence attached to it. You have asked that this office notify the Office of the New York County District Attorney and the United States Customs Service of their duty to respond to requests for records.

In this regard, the Committee on Open Government is a New York State agency authorized to provide advice concerning the New York Freedom of Information Law. That statute is applicable to entities of state and local government in New York. The Customs Service is a federal agency that falls within the coverage of the federal Freedom of Information Act (5 USC 552). As such, issues pertaining to compliance with the federal Act are beyond the jurisdiction of the Committee.

Having communicated with the Office of the New York County District Attorney on many occasions, I am sure that its staff is fully familiar with the provisions of the Freedom of Information Law. Nevertheless for your knowledge and 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:

Mr. Paul Hynard
August 26, 1999
Page - 2 -

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and is positioned above the printed name and title.

Robert J. Freeman
Executive Director

RJF:tt

cc: Gary Galperin



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Alexander F. Treadwell

August 25, 1999

Executive Director

Robert J. Freeman

Mr. Burnie Daniels

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Daniels:

I have received your letter of July 26 concerning an unanswered request made under the Freedom of Information Law to the records access officer at the Ontario County Jail. You have asked that I contact the Jail on your behalf to ask why your request has not been answered. While I will not do so, I offer the following comments and will send this response to the County Jail.

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,

Mr. Burnie Daniels
August 25, 1999
Page -2-

who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

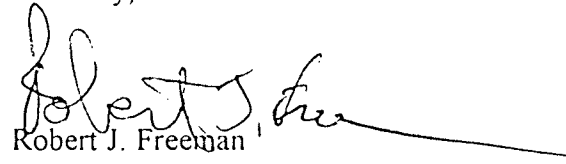
In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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 the event that no inventory of materials kept by the Jail law library is maintained, you asked that such a list be compiled. Here I point out 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 in response to a request. Therefore, if no inventory exists, there would be no obligation on the part of Jail staff to prepare an inventory on your behalf.

Lastly, the same provision requires that an applicant "reasonably describe" the records sought. If the invoices that you requested are kept or filed in a particular area and can be located and identified with reasonable effort, I believe that that aspect of your request would reasonably describe the records. If, however, the invoices are filed with all other County invoices and are kept in chronological order, for example, locating those of your interest would involve reviewing every invoice pertaining to a two year period. In that situation, the request would not, in my view, meet the standard of reasonably describing the records.

I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIA-11656

Committee Members

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

August 26, 1999

Mr. Richard A. Brinson



The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Brinson:

I have received your letter of August 3 pertaining to the advisory opinion prepared on July 27 in response to your inquiry. Although you presented additional information, I do not believe that the outcome would be significantly different, even if your contentions are accurate.

The issue involved a request for a "market appraisal", and I referred to two grounds for denial pertinent to ascertaining rights of access, paragraphs (c) and (g) of §87(2) of the Freedom of Information Law. Your comments focus on the former and your contention that since an agreement had been reached, any impairment of the ability of the government agency to reach an optimal agreement would become irrelevant. While that may be so, the other ground for denial remains applicable. Again, under §87(2)(g), those portions of inter-agency or intra-agency materials consisting of opinions, recommendations, advice and the like may be withheld. By its nature, an appraisal consists, at least in substantial part, of opinions. That being so, even if §87(2)(c) no longer applies, those portions of the record sought may in my view continue to be withheld.

I hope that the foregoing serves to clarify your understanding of the Freedom of Information Law.

Sincerely,

Robert J. Freeman
Executive Director

cc: Ron LeDonni
Michael Valente



STATE OF NEW YORK
DEPARTMENT OF STATE
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7071-AO-11657

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Joseph J. Seymour
Alexander F. Treadwell

Executive Director

August 26, 1999

Robert J. Freeman

Ms. Kathy Hovis
Ithaca Journal
123 West State Street
Ithaca, NY 14850

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Hovis:

I have received your correspondence of August 9 and the materials attached to it. You have asked that I comment with respect to a contention by the Tompkins County District Attorney that autopsy reports are "confidential" and that "[u]nauthorized disclosure...violates the law..."

While autopsy reports and related records are not accessible as of right to the public generally, based on a review of the applicable statute, I do not believe that disclosure of those records would constitute a violation of law or that there is any prohibition against disclosure.

In his letter to the Tompkins County Medical Examiner, the District Attorney referred to §677(3)(b) of the County Law, which pertains to autopsy reports and related records and 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 right to obtain such records is based solely on §677(3)(b). In my view, only a district attorney and the next of kin

Ms. Kathy Hovis

August 26, 1999

Page - 2 -

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 to gain a right of access.

Nevertheless, a careful reading of the provision quoted above indicates that nothing in its terms *prohibits* a coroner, a medical examiner, a district attorney or others from disclosing the records falling within its coverage. In my experience, there have been numerous situations in which coroners and medical examiners, as well as district attorneys and police departments, have asserted their discretionary authority to disclose records falling within the scope of §677(3)(b), even though there was no obligation to do so.

In my view, a finding that records are confidential and *cannot* be disclosed must be consistent with the specific and unequivocal language of a statute. For example, and for the purpose of comparing the language of § 677(3)(b) of the County Law with another provision of the County Law, I believe that §308(4) is a statute that prohibits disclosure and leaves no discretion to the agency that maintains the records falling within its scope. The cited provision states that:

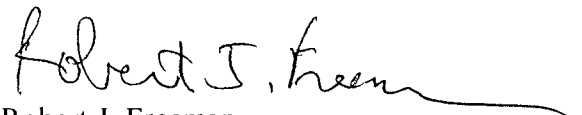
"Records, in whatever form they may be kept, of calls made to a municipality's E911 system *shall not be made available to or obtained by any entity or person*, other than that municipality's public safety agency, another government agency or body, or a private entity or a person providing medical, ambulance or other emergency services, and shall not be utilized for any commercial purpose other than the provision of emergency services."

Section 677(3)(b) provides a right of access to certain persons, but nowhere specifies that disclosures to others is prohibited. In contrast, §308(4) states that certain records "shall not be made available" except in specified circumstances.

In sum, while the news media and the general public may have no right to autopsy reports and related records, there is nothing in the law which in my view precludes a government official or agency from disclosing those records.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. George M. Dentes
Hon. C. Judson Kilgore, MD



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI-AO-11658

Committee Members

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Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

August 26, 1999

Mr. William V. Camfield
Turning Point Enterprises
263 Verbeck Ave
Schaghticoke, NY 12154

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Camfield:

I have received your letter of August 3 and the materials relating to it. You described a series of frustrations involving your efforts in gaining information from the Town of Stillwater. In this regard, I offer the following comments.

First, with respect to your recent requests for an "itemized accounting", it is emphasized that the Freedom of Information Law pertains to existing records. Section 89(3) of that statute states in part that an agency is not required to create a record in response to a request. Therefore, if no itemized accounting exists, there would be no obligation on the part of the Town to prepare such a record on your behalf. Similarly, if there is no record indicating the status of a certain account on a given date, there would be no requirement that the Town create a record containing the information sought.

Second, insofar as records exist, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, to the extent that the information that you are seeking exists in the form of a record or records, it would appear to be available, for none of the grounds for denial would be pertinent.

Third, I point out that the Freedom of Information Law applies to all agency records, irrespective of the location in which they are maintained. Section 86(4) of the Law defines the term "record" expansively to include:

Mr. William V. Camfield
August 26, 1999
Page - 2 -

"any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, 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, in addition to records held by Town officials, records maintained *for* the Town by the engineering firm to which you referred would also fall within the scope of the Freedom of Information Law.

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)].

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

Mr. William V. Camfield
August 26, 1999
Page - 3 -

than five business days may be needed to grant or deny a request, so long as it provides an approximate date indicating when the request will be granted or denied, and that date is reasonable in view of the attendant circumstances, I believe that the agency would be acting in compliance with law.

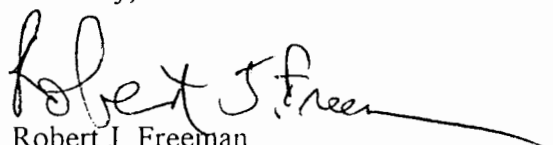
Notwithstanding the foregoing, in my view, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, if records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a lengthy delay in disclosure. As the Court of Appeals has asserted:

"...the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objectives cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" [Westchester News v. Kimball, 50 NY 2d 575, 579 (1980)].

If a request is voluminous and a significant amount of time is needed to locate records and review them to determine rights of access, a delay beyond five business days, in view of those and perhaps the other kinds of factors mentioned earlier, might be reasonable. On the other hand, if a record 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. Rose Petronis
Town Board



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI-AO-11659

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Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

August 26, 1999

Executive Director

Robert J. Freeman

Mr. Wallace S. Nolen
94-a-6723
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. Nolen:

I have received your letters of July 7, both of which reached this office on August 2. As suggested in other recent correspondence, please note the zip code of this office.

With respect to the first letter, the issue relates to §87(3)(b) of the Freedom of Information Law, which requires that “[e]ach agency shall maintain...a record setting forth the name, public office address, title and salary of every officer or employee of the agency....” You indicated that the Town of Dannemora has contended that it may provide a post office address for all its employees, rather than a work location. You questioned whether that would satisfy the requirement that a “public office address” be included in the record required to be maintained pursuant to the cited provision. You also questioned the use of nicknames or initials.

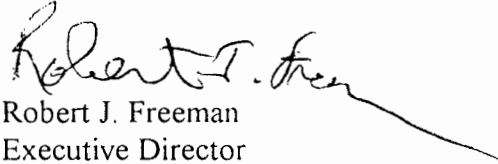
In this regard, as you may recall, the manner in which names appear on the record in question was considered some time ago in an opinion that you sought. The issue relative to the address has not arisen. However, I do not believe that providing a post office box for all employees would meet the requirement imposed by the law. In my view, one’s “public office address” is the location at which a public employee is routinely stationed on where his or her usual office is located.

In conjunction with the second letter, enclosed as requested are the latest supplement to the Committee’s annual report and copies of letters sent to you since the beginning of this year.

Mr. Wallace S. Nolen
August 26, 1999
Page - 2 -

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board, Town of Dannemora



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI C-40-11660

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

August 26, 1999

Mr. Dave Jones
98-A-7182
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. Jones:

I have received your undated letter, which reached this office on August 2. You indicated that the receipt of a request for records of the New York City Police Department was acknowledged and that you were informed that a response would be rendered in approximately 120 days. You wrote that you need the records to perfect your appeal and you asked that the response to your request be "expedited."

In this regard, there is no provision in the Freedom of Information Law that requires an agency to expedite its response to a request or give a preference when records are to be used in a judicial proceeding. I note that the statute provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89 (3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

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, the

Mr. Dave Jones
August 26, 1999
Page -2-

number of other requests received 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,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and extends to the right with a long horizontal flourish.

Robert J. Freeman
Executive Director

RJF:tt

cc: Sgt. Richard Evangelista



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AD-11661

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

August 26, 1999

Mr. O. Shelly



The staff of the Committee 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. Shelly:

I have received your letter of August 1 in which you sought an opinion concerning access to a portion of the State Insurance Fund's Claims-Medical Department Procedures Manual that you characterized as "Procedure 90." You referred to the exceptions in the Freedom of Information Law pertaining to inter-agency and intra-agency materials and to trade secrets, and you contended that neither would apply. In addition, you indicated that the Manual is available to many agency employees on an intranet.

In this regard, while I am unfamiliar with the contents of Procedure 90, an analogous issue has arisen in the past, and as you inferred, the provision of primary significance is §87(2)(d) of the Freedom of Information Law. That provision 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."

I agree with your contention that the State Insurance Fund ("the Fund") "does not regulate business." Your reference, however, to §89(5) is misplaced, for that provision deals with the protection of records submitted by commercial enterprises to state agencies. In this instance, the record at issue is a portion of a manual apparently prepared by the Fund.

As I understand its functions, the Fund essentially operates as an insurance company in competition with other insurance carriers licensed to do business in the state. While the Fund as a state agency is not typical of commercial enterprises, my understanding is that, in many respects, it carries out many of its duties as an entity in competition with private firms in the insurance industry.

Most pertinent to the matter, I note that there is case law indicating that when a governmental entity performs functions essentially commercial in nature in competition with private, profit making entities, it may withhold records pursuant to §87(2)(d) in appropriate circumstances (Syracuse & Oswego Motor Lines, Inc. v. Frank, Sup. Ct., Onondaga Cty., October 15, 1985). In this instance, assuming that the Fund is engaged in competition with private firms engaged in the same area of commercial activity, I believe that §87(2)(d) would serve as a potential basis for a denial of access.

The question under §87(2)(d) involves the extent, if any, to which disclosure would "cause substantial injury to the competitive position" of a commercial entity. The concept and parameters of what might constitute a "trade secret" were discussed in Kewanee Oil Co. v. Bicron Corp., which was decided by the United States Supreme Court in 1973 (416 U.S. 470). Central to the issue was a definition of "trade secret" upon which reliance is often based. Specifically, the Court cited the Restatement of Torts, section 757, comment b (1939), which states that:

"[a] trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers" (id. at 474, 475).

In its review of the definition, the court stated that "[T]he subject of a trade secret must be secret, and must not be of public knowledge or of a general knowledge in the trade or business" (id.). The phrase "trade secret" is more extensively defined in 104 NY Jur 2d 234 to mean:

"...a formula, process, device or compilation of information used in one's business which confers a competitive advantage over those in similar businesses who do not know it or use it. A trade secret, like any other secret, is something known to only one or a few and kept from the general public, and not susceptible to general knowledge. Six factors are to be considered in determining whether a trade secret exists: (1) the extent to which the information is known outside the business; (2) the extent to which it is known by a business' employees and others involved in the business; (3) the extent of measures taken by a business to guard the secrecy of the information; (4) the value of the information to a business and to its competitors; (5) the amount of effort or money expended by a business in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. If there has been a voluntary disclosure by the plaintiff, or if the facts pertaining to the matter are a subject of general knowledge in the trade, then any property right has evaporated."

In my view, the nature of record, the area of commerce in which a commercial entity is involved and the presence of the conditions described above that must be found to characterize records as trade secrets would be the factors used to determine the extent to which disclosure would "cause substantial injury to the competitive position" of a commercial enterprise. Therefore, the proper assertion of §87(2)(d) would be dependent upon the facts and, again, the effect of disclosure upon the competitive position of the entity to which the records relate.

Also relevant to the analysis is a recent decision rendered by the Court of Appeals, the State's highest court, which, for the first time, considered the phrase "substantial competitive injury" [Encore College Bookstores, Inc. v. Auxiliary Service Corporation of the State University of New York at Farmingdale, 87 NY2d 410(1995)]. In that decision, the Court reviewed the legislative history of the Freedom of Information Law as it pertains to §87(2)(d), and due to the analogous nature of equivalent exemption 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])...

"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

Mr. O. Shelly
August 27, 1999
Page - 4 -

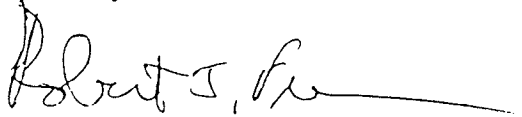
retrieval costs for the information, rather than the considerable costs of private reproduction, they may be getting quite a bargain. Such bargains could easily have competitive consequences not contemplated as part of FOIA's principal aim of promoting openness in government (id., 419-420)."

In sum, I believe that the State Insurance Fund could in the context of the preceding remarks be characterized as a commercial entity and therefore, assert §87(2)(d). To the extent that that provision or any other ground for denial may justifiably be asserted in accordance with the preceding commentary, the record sought could, in my opinion, be withheld.

Lastly, the fact that the record may be available to Fund employees via an intranet is irrelevant to public rights of access. Employees receive the record in the performance of their official duties, not as members of the public seeking the record pursuant to the Freedom of Information Law. Further, the record is the property of the Fund and cannot be disclosed by its employees without authorization to do so (see attached Information Security Policy).

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt
Enc.

cc: Jacob Weintraub



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-90-11662

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Walter Grunfeld
Robert L. King
Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

August 27, 1999

Executive Director

Robert J. Freeman

Mr. Christopher Lue-Shing
92-A-9582
Clinton Correctional Facility
P.O. Box 2002
Dannemora, NY 12929-2002

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Lue-Shing:

I have received your letter of July 23, which reached this office on August 3. You complained that the Division of Parole has repeatedly delayed responding to your requests for records and asked whether there is any method of compelling the Division to comply with the Freedom of Information Law other than through the initiation of litigation.

In this regard, I believe that the Division of Parole seeks to comply with the Freedom of Information Law and carries out its duties in good faith. Further, I am unaware of any means of compelling an agency to comply with law short of initiating litigation and obtaining a judicial order.

I note, however, that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges

Mr. Christopher Lue-Shing

August 27, 1999

Page -2-

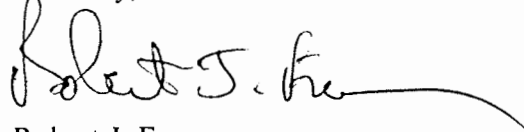
that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: David Molik



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI-AO-11663

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

August 27, 1999

Mr. Paul Hynard

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Hynard:

I have received your letters of July 26, 27 and 28.

The first pertains to a request for records of the New York City Police Department that has not been answered. In a response to a different matter sent to you yesterday, I offered guidance concerning the time limits for responding to requests and the steps that may be taken. The same information would be applicable in this instance. For your information, the person designated by the Department to determine appeals is Susan Petito, Special Counsel.

The second and third letters deal with unanswered requests for court records. 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."

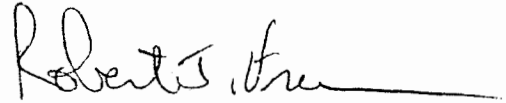
Mr. Paul Hynard
August 27, 1999
Page - 2 -

Based on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law (see e.g., Judiciary Law, §255) may grant broad public access to those records. Even though other statutes may deal with access to court records, the procedural provisions associated with the Freedom of Information Law (i.e., those involving the designation of a records access officer or the right to appeal a denial) would not ordinarily be applicable.

It is suggested that you resubmit your requests to the clerk of the appropriate court, citing an applicable provision of law as the basis for your requests.

I hope that the foregoing serves to clarify your understanding of the matter and that I have been of assistance.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman", with a long horizontal line extending to the right.

Robert J. Freeman
Executive Director

RJF:tt



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI-AO-116604

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Robert L. King
Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

August 27, 1999

Executive Director

Robert J. Freeman

Mr. Ronald Logan
87-A-9529
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. Logan:

I have received your letter of August 2 and the materials attached to it. You have sought my views concerning rights of access to "statistical data" that may be maintained by the Division of Parole relating to the period of 1995 to 1998.

From my perspective, there are two issues pertinent to your request. In this regard, I offer the following comments.

First, §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Consequently, an applicant must supply sufficient detail to enable an agency to locate and identify the records [see Konigsberg v. Coughlin, 68 NY2d 245 (1986)]. Having reviewed your request, it is questionable in my view whether or the extent to which you met the standard of reasonably describing the records of your interest. You sought "statistical data depicting inmates who were characterized as violent felony offenders" who were released during the years 1995 to 1998, as well as such data following their first, second or third appearances before the Parole Board. I cannot ascertain on the basis of your request which data you want (i.e., data concerning time served, health condition, whether they had job placements, previous convictions, ethnic breakdowns, number of disciplinary proceedings, etc). In my opinion, it is doubtful that your request is consistent with the aforementioned requirement.

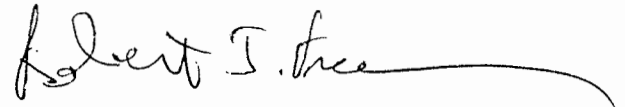
Second, the Freedom of Information Law pertains to existing records, and §89(3) also states that an agency is not required to create a record in response to a request. Therefore, to the extent that the statistical data of your interest has not been prepared and cannot be generated based on the Division's current computer programs, it would not be required to prepare new records or data on

Mr. Ronald Logan
August 27, 1999
Page -2-

your behalf. However, insofar as your request reasonably describes statistical data that is maintained by the Division, I believe that it would be accessible under the Freedom of Information Law, for none of the grounds for denial appearing in §87(2) would be pertinent.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Terrence X. Tracy
Steven H. Philbrick



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11665

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Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

August 27, 1999

Robert J. Freeman

Mr. Emanuel Rodriguez
97-A-0208
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. Rodriguez:

I have received your letter of July 4 and the materials attached to it. As I understand the matter, you gave testimony that was recorded on audiotape concerning an alleged assault by correction officers. Your request for records made to the Office of the Bronx County District Attorney, including your taped testimony, was initially denied, but the denial of was reversed following your appeal. Nevertheless, you were later informed that the District Attorney's office no longer has possession of the audiotape, and that it was forwarded to an investigator at the New York City Department of Correction. Although several requests have been made to that person, you have received no response. Consequently, you have sought assistance in the matter.

In this regard, 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 requests should ordinarily be sent to that person. While I believe that the recipient of your request should have responded directly in a manner consistent with the Freedom of Information Law or forwarded the request to the appropriate person, it is suggested that you renew your request, describe the situation and send it to Mr. Thomas Antenen, Records Access Officer, Department of Corrections, 60 Hudson Street, 6th Floor, New York, NY 10013.

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

Mr. Emanuel Rodriguez

August 27, 1999

Page - 2 -

requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

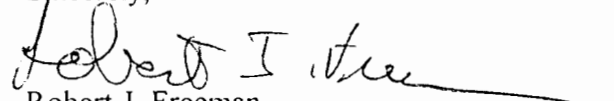
If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89 (4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89 (4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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
Investigator Angel Camacho



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

Omc-Ao-3062
FOIL-AO-116666

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Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

August 27, 1999

Executive Director

Robert J. Freeman

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 July 29 and the materials attached to it. You have raised a variety of issues concerning compliance with the Freedom of Information and Open Meetings Laws by the Village of Freeport.

You referred initially to an appeal that you submitted under the Freedom of Information Law and asked whether the Village sent copies of the proper records to this office as required by §89(4)(a) of that statute. The cited provision states in relevant part that:

"any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought. In addition, each agency shall immediately forward to the committee on open government a copy of such appeal and the ensuing determination thereon."

Based on a review of our records relating to appeals for the month of July, the Village apparently did not send the requisite documentation to this office.

Next, you referred to the acknowledgment of the receipt of requests that do not include an approximation of when a request might be granted or denied. Here I point out that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

Mr. Stewart S. Lilker
August 27, 1999
Page -2-

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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, it appears that some aspects of your requests do not meet the requirements imposed by the Freedom of Information Law. In a request of May 28, you asked for all resolutions brought before the Board of Trustees dealing with its rules of procedure, laws, rules, decisions and the like relating to those rules that may be in possession of the Village, and any decisions rendered by this office since 1993.

One issue in relation to the request involves the extent to which the request "reasonably describes" the records sought as required by §89(3) of the Freedom of Information Law. I 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, a request, in my opinion 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 a request, to that extent, the request would not in my opinion meet the standard of reasonably describing the records.

If, for example, minutes of meetings are not indexed by subject matter, locating minutes that include reference to a particular subject would likely require a review of all the minutes, line by line, covering the period that you described. In my view, a request of that nature would not "reasonably describe" the records.

Similarly, a request for laws, rules, regulations and the like is not, in my view, a request for records. In essence, it is a request for an interpretation of law requiring a judgment. Any number of provisions of law might be "applicable", and a disclosure of some of them, based on one's knowledge, may be incomplete due to an absence of expertise regarding the content and interpretation of each such law. Further, people, and perhaps attorneys in particular, might differ as to the applicability of a given provision of law. In contrast, if a request is made, for example, for "section 10 of the Village Code", no interpretation or judgment is necessary, for sections of law appear numerically and can readily be identified. That kind of request, in my opinion, would involve a portion of a record that

must be disclosed. Again, a request for laws that might be "applicable" is not, in my view, a request for a record as envisioned by the Freedom of Information Law.

Other issues relate to the Open Meetings Law and minutes of meetings. Section 106 pertains to minutes and states that:

" 1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.

2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.

3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such 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.

Further, in my opinion, 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.

Mr. Stewart S. Lilker

August 27, 1999

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Lastly, one of the issues relates to matters involving a real property transaction, and the pertinent provision concerning the ability to conduct an executive session to discuss such matters is §105(1)(h). That provision permits a public body to enter into executive session to discuss:

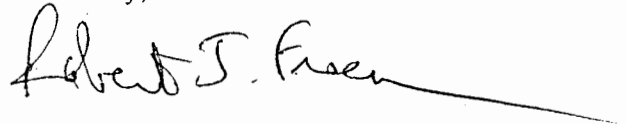
"the proposed acquisition, sale or lease of real property or the proposed acquisition of securities, or sale or exchange of securities held by such public body, but only when publicity would substantially affect the value thereof."

In my opinion, the language quoted above, like the other grounds for entry into executive session, is based on the principle that public business must be discussed in public unless public discussion would in some way be damaging, either to an individual, for example, or to a government in terms of its capacity to perform its functions appropriately and in the best interest of the public. It is clear that §105(1)(h) does not permit public bodies to conduct executive sessions to discuss all matters that may relate to the transaction of real property; only to the extent that publicity would "substantially affect the value of the property" can that provision validly be asserted.

If indeed publicity would substantially affect the value of real property, records, i.e., minutes of executive sessions, could likely be withheld in accordance with §106(2) of the Open Meetings Law to the extent authorized by §87(2)(c) of the Freedom of Information Law. That provision permits an agency to withhold records insofar as disclosure "would impair present or imminent contract awards..." As in the case of the rationale of §105(1)(h) of the Open Meetings Law, the cited provision of the Freedom of Information Law in my view authorizes an agency to withhold records insofar as disclosure would place a government agency at a disadvantage in negotiations or would otherwise preclude the agency from engaging in an agreement optimal to taxpayers.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees
Anna Knoeller, Village Clerk



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-RO-11667

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

August 30, 1999

Mr. Anthony Bennett
96-B-1530
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. Bennett:

I have received your letter of August 3 in which you wrote that you have encountered difficulty in obtaining your arrest record from the City of Lockport Police Department. You indicated that you must send a "signed release statement notarized" and the reason for the request "along with a \$10.00 fee." Although you met those conditions, you stated that you had received no further response as of the date of your letter to this office.

In this regard, I offer the following comments.

First, as a general matter, the reason for making a request is irrelevant, and it has been held that records accessible under the Freedom of Information Law must be made equally available to any person, regardless of the status or interest of the person making the request [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)]. If the request involves materials that could be withheld from the public generally on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" but which would be available to you as the subject of the materials, the agency could require that you provide reasonable proof of your identity [see Freedom of Information Law, §89(2)(c)], such as a notarized statement proving your identity.

Second, assuming that your request involves a copy of an existing record, the Freedom of Information Law, §87(1)(b)(iii), limits the fee that can be charged to twenty-five cents per photocopy up to nine by fourteen inches.

Mr. Anthony Bennett

August 30, 1999

Page - 2 -

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..."

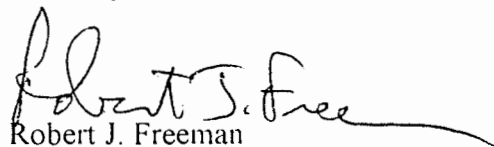
If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively 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:tt

cc: Records Access Officer



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI-AO-11669

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Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

September 3, 1999

Executive Director

Robert J. Freeman

Mr. Anthony Majette
93-A-5831
Upstate Correctional Facility
P.O. Box 2001
Malone, NY 12953

Dear Mr. Majette:

I have received two letters from you, and you requested records from this office in both.

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 provide the records in which you are interested because this office does not possess them.

For future reference, when seeking records, a request should be made to the agency that you believe maintains them. In view of the nature of your requests, it would appear that the records are kept at your facility. If that is so, I note that the regulations promulgated by 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.

In addition, I point out that the Freedom of Information Law pertains to existing records and that §89(3) states in relevant part that an agency is not required to create a record in response to a request. In the context of your request, if, for instance, the Department does not maintain "a list of employees designated by the Commissioner" to conduct certain hearings, it would not be required to create such a list on your behalf.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL A0-11070

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Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

September 3, 1999

Executive Director

Robert J. Freeman

Mr. Paul Bunker
97-A-1151
Green Haven Correctional Facility
Drawer B
Stormville, NY 12582

Dear Mr. Bunker:

I have received your letter of August 30 in which you requested a subject matter list pertaining to you.

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 provide the record that you are seeking because this office does not possess it.

Further, while each agency is required to maintain a subject matter list, there is no requirement that such a list be prepared or maintained with respect to particular individuals.

By way of background, as you may be aware, §87(3)(c) of the Freedom of Information Law requires that each agency maintain:

"a reasonably detailed current list by subject matter, of all records in the possession of the agency, whether or not available under this article."

The subject matter list is not, in my opinion, required to identify each and every record of an agency; rather I believe that it must refer, by category and in reasonable detail, to the kinds of records maintained by an agency. Again, a subject matter list is not prepared with respect to records pertaining to a single individual.

Reference to the subject matter list is made in the regulations promulgated by the Department of Correctional Services, which in §5.13 state that:

Mr. Paul Bunker
September 3, 1999
Page -2-

"(a) Every custodian of records under these regulations shall maintain an up-to-date subject matter list, reasonably detailed, of all records in their possession. The records access officer shall maintain a master index, reasonably detailed, of all records maintained by the department. The master index shall include the lists kept by all custodians as well as a list of records maintained at the department's central office.

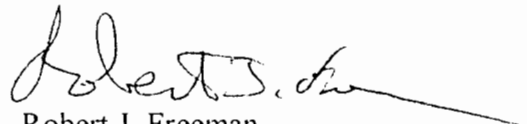
(b) Each subject matter list and the master index shall be sufficiently detailed to permit identification of the file category of the record sought.

(c) The master index shall be updated not less than twice per year. The most recent update shall appear on the first page of the subject matter list. Each custodian of records and the records access officer shall make available the index kept by him for inspection and copying. Any person desiring a copy of such list may request in writing a copy and upon payment of the appropriate fee, unless waived, a copy of such list shall be mailed or delivered."

Based on the foregoing, it is clear in my view that a master list must be maintained and made available at each facility. By reviewing a subject matter list, you can ascertain the kinds of records maintained by an agency and thereafter, request records based upon your review of the list.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

7071-AO-11671

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Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

September 3, 1999

Mr. Paul Archer
99-B-0679
Gowanda Correctional Facility
P.O. Box 311
Gowanda, NY 14070-0311

Dear Mr. Archer:

I have received your letter of August 25 in which you appealed a denial of access to records by the Commission of Correction to this office.

In this regard, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to determine appeals and cannot 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 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.

Mr. Paul Archer
September 3, 1999
Page - 2 -

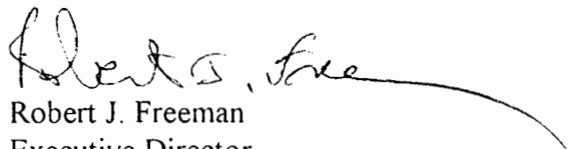
(b) Denial of access shall be in writing stating the reason therefor and advising the person denied access of his or her right to appeal to the person or body established to hear appeals, and that person or body shall be identified by name, title, business address and business telephone number. The records access officer shall not be the appeals officer" (section 1401.7).

It is noted that the state's highest court has held that a failure to inform a person denied access to records of the right to appeal enables that person to seek judicial review of a denial. Citing the Committee's regulations and the Freedom of Information Law, the Court of Appeals in Barrett v. Morgenthau held that:

"[i]nasmuch as the District Attorney failed to advise petitioner of the availability of an administrative appeal in the office (see, 21 NYCRR 1401.7[b]) and failed to demonstrate in the proceeding that the procedures for such an appeal had, in fact, even been established (see, Public Officers Law [section] 87[1][b], he cannot be heard to complain that petitioner failed to exhaust his administrative remedies" [74 NY 2d 907, 909 (1989)].

I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:tt

cc: Scott E. Steinhardt



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMC-AO-3063
FOI-AO-11672

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Alexander F. Treadwell

September 3, 1999

Executive Director

Robert J. Freeman

Mr. Richard E. Slagle
Planing Board Chairman
Town of Celoron
21 Boulevard Avenue
Celoron, NY 14720

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Slagle:

As you are aware, I have received your letter of August 5. Please accept my apologies for the delay in response.

You have raised questions concerning the status of "work sessions" under the Open Meetings Law, the right of the public to speak at meetings, and the ability to gain access to records of a volunteer fire company. In this regard, I offer the following comments.

First, there is no legal distinction between a work session and a meeting. By way of background, it is noted that the definition of "meeting" has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

I point out that the decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that so-called "work sessions" and similar gatherings held for the purpose of discussion, but without an intent to take action, fell outside the scope of the Open Meetings Law. In discussing the issue, the Appellate Division, whose determination was unanimously affirmed by the Court of Appeals, stated that:

"We believe that the Legislature intended to include more than the mere formal act of voting or the formal execution of an official

document. Every step of the decision-making process, including the decision itself, is a necessary preliminary to formal action. Formal acts have always been matters of public record and the public has always been made aware of how its officials have voted on an issue. There would be no need for this law if this was all the Legislature intended. Obviously, every thought, as well as every affirmative act of a public official as it relates to and is within the scope of one's official duties is a matter of public concern. It is the entire decision-making process that the Legislature intended to affect by the enactment of this statute" (60 AD 2d 409, 415).

The court also dealt with the characterization of meetings as "informal," stating that:

"The word 'formal' is defined merely as 'following or according with established form, custom, or rule' (Webster's Third New Int. Dictionary). We believe that it was inserted to safeguard the rights of members of a public body to engage in ordinary social transactions, but not to permit the use of this safeguard as a vehicle by which it precludes the application of the law to gatherings which have as their true purpose the discussion of the business of a public body" (*id.*).

Based upon the direction given by the courts, if a majority of a public body gathers to discuss public business, any such gathering, in my opinion, would ordinarily constitute a "meeting" subject to the Open Meetings Law that must be preceded by notice given in accordance with §104 of the Law.

Unless a public body has adopted a rule to the contrary, it may take action at a work session. With respect to minutes of work sessions and other meetings, the Open Meetings Law contains what might be viewed as minimum requirements concerning the contents of minutes. Specifically, §106 of the Open Meetings Law states that:

1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.

2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.

3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information

law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

Based upon the foregoing, it is clear in my view that minutes need not consist of a verbatim account of what was said at a meeting; similarly, there is no requirement that minutes refer to every topic discussed or identify those who may have spoken. Although a public body may choose to prepare expansive minutes, at a minimum, minutes of open meetings must include reference to all motions, proposals, resolutions and any other matters upon which votes are taken. If those kinds of actions, such as motions or votes, do not occur during workshops, technically I do not believe that minutes must be prepared.

Second, the Open Meetings Law clearly provides the public with the right "to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy" (see Open Meetings Law, §100). However, the Law is silent with respect to the issue of public participation. Consequently, by means of example, if a public body does not want to answer questions or permit the public to speak or otherwise participate at its meetings, I do not believe that it would be obliged to do so. On the other hand, a public body may choose to answer questions and permit public participation, and many do so. When a public body does permit the public to speak, I believe that it should do so based upon reasonable rules that treat members of the public equally.

While public bodies have the right to adopt rules to govern their own proceedings (see e.g., Village Law, §4-412), the courts have found in a variety of contexts that such rules must be reasonable. For example, although a board of education may "adopt by laws and rules for its government and operations", in a case in which a board's rule prohibited the use of tape recorders at its meetings, the Appellate Division found that the rule was unreasonable, stating that the authority to adopt rules "is not unbridled" and that "unreasonable rules will not be sanctioned" [see Mitchell v. Garden City Union Free School District, 113 AD 2d 924, 925 (1985)]. Similarly, if by rule, a public body chose to permit certain citizens to address it for ten minutes while permitting others to address it for three, or not at all, such a rule, in my view, would be unreasonable.

And third, the status of volunteer fire companies had been unclear in the initial stages of the Freedom of Information Law. Those companies are generally not-for-profit corporations that perform their duties by means of contractual relationships with municipalities. As not-for-profit corporations, it was difficult to determine whether or not they conducted public business and performed a governmental function. Nevertheless, in Westchester-Rockland Newspapers v. Kimball [50 NYS 2d 575 (1980)], a case involving access to records relating to a lottery conducted by a volunteer fire company, the Court of Appeals, found that volunteer fire companies, despite their status as not-for-profit corporations, are "agencies" subject to the Freedom of Information Law. In so holding, the Court stated that:

"We begin by rejecting respondent's contention that, in applying the Freedom of Information Law, a distinction is to be made between a volunteer organization on which a local government relies for

performance of an essential public service, as is true of the fire department here, and on the other hand, an organic arm of government, when that is the channel through which such services are delivered. Key is the Legislature's own unmistakably broad declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (emphasis added; Public Officers Law, §84).

"True, the Legislature, in separately delineating the powers and duties of volunteer fire departments, for example, has nowhere included an obligation comparable to that spelled out in the Freedom of Information statute (see Village Law, art 10; see, also, 39 NY Jur, Municipal Corporations, §§560-588). But, absent a provision exempting volunteer fire departments from the reach of article 6-and there is none-we attach no significance to the fact that these or other particular agencies, regular or volunteer, are not expressly included. For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objections cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" (*id.* at 579).

Moreover, although it was contended that documents concerning the lottery were not subject to the Freedom of Information Law because they did not pertain to the performance of the company's fire fighting duties, the Court held that the documents constituted "records" subject to the Freedom of Information Law [see §86(4)].

More recently, another decision confirmed in an expansive manner that volunteer fire companies are required to be accountable. That decision, S.W. Pitts Hose Company et al. v. Capital Newspapers (Supreme Court, Albany County, January 25, 1988), dealt with the issue in terms of government control over volunteer fire companies. In its analysis, the Court stated that:

"Section 1402 of the Not-for-Profit Corporation Law is directly applicable to the plaintiffs and pertains to how volunteer fire companies are organized. Section 1402(e) provides:

'...a fire corporation, hereafter incorporated under this section shall be under the control of the city, village,

Mr. Richard E. Slagle
September 3, 1999
Page -5-

fire district or town authorities having by law, control over the prevention or extinguishment of fires therein. Such authorities may adopt rules and regulations for the government and control of such corporations.'

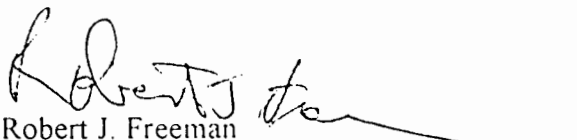
"These fire companies are formed by consent of the Colonie Town Board. The Town has control over the membership of the companies, as well as many other aspects of their structure, organization and operation (section 1402). The plaintiffs' contention that their relationship with the Town of Colonie is solely contractual is a mischaracterization. The municipality clearly has, by law, control over these volunteer organizations which reprovide a public function...

"This court recognizes the long, distinguished history of volunteer fire companies in New York State, and the vital services they provide to many municipalities. But not to be ignored is that their existence is inextricably linked to, dependent on, and under the control of the municipalities for which they provide an essential public service."

In sum, volunteer fire companies are required to disclose pursuant to the Freedom of Information Law in the same manner as municipal agencies.

I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AD-11673

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Alexander F. Treadwell

September 3, 1999

Executive Director

Robert J. Freeman

Mr. Patrick A. Hildreth

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Hildreth:

As you are aware, I have received your letter of August 5. You have sought assistance in relation to delays that you have encountered in your attempt to gain access to records from the Mechanicville Community Development Agency.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I note that although an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days, when such acknowledgement is given, there is no precise time period within which an agency must grant or deny access to records. The time needed to do so may be dependent upon the volume of a request, the possibility that other requests have been made, the necessity to conduct legal research, the search and retrieval techniques used to locate the records and the like. In short, when an agency acknowledges the receipt of a request because more than five business days may be needed to grant or deny a request, so long as it provides an approximate date indicating when the request will be granted or denied, and that date is reasonable in view of the attendant circumstances, I believe that the agency would be acting in compliance with law.

Notwithstanding the foregoing, in my view, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, if records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a lengthy delay in disclosure. As the Court of Appeals has asserted:

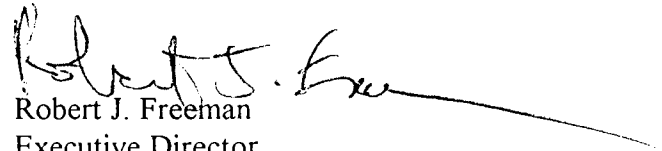
"...the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objectives cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" [Westchester News v. Kimball, 50 NY 2d 575, 579 (1980)].

If a request is voluminous and a significant amount of time is needed to locate records and review them to determine rights of access, a delay beyond five business days, in view of those and perhaps the other kinds of factors mentioned earlier, might be reasonable. On the other hand, if a record 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).

Mr. Patrick A. Hildreth
September 3, 1999
Page -3-

I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:jm

cc: William E. Connors



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FOIL-RO-11674

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Joseph J. Seymour
Alexander F. Treadwell

September 3, 1999

Executive Director

Robert J. Freeman

Mr. Ngozi Akaru
99-R-0447
Gowanda Correctional Facility
P.O. Box 311
Gowanda, NY 14070-0311

Dear Mr. Akaru:

I have received your letter of August 29 which you characterized as an appeal based on a failure on the part of officials at the Rikers Island Correctional Facility to respond to your request made under the Freedom of Information Law.

In this regard, the Committee on Open Government is authorized to provide and guidance concerning the Freedom of Information Law. The Committee is not empowered to determine appeals or to compel an agency to grant or deny access to records.

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 requests should ordinarily be sent to that person. While I believe that the recipient of your request should have responded directly in a manner consistent with the Freedom of Information Law or forwarded the request to the appropriate person, it is suggested that you renew your request and send it to Mr. Thomas Antenen, Records Access Officer, Department of Corrections, 60 Hudson Street, 6th Floor, New York, NY 10013.

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..."

Mr. Ngozi Akaru
September 3, 1999
Page -2-

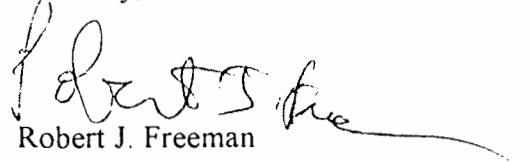
If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Thomas Antenen



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FOI Ltr - 11675

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Alexander F. Treadwell

September 7, 1999

Executive Director

Robert J. Freeman

Mr. Wallace S. Nolen
94-A-6723
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. Nolen:

I have received your letter of August 2 in which you requested an opinion concerning your right under the Freedom of Information Law "to view standard public issue telephone books (white and yellow pages)...the standard local telephone company directories which are regularly distributed by telephone companies to businesses/residences and which contain telephone numbers and addresses of telephone subscribers who have voluntarily elected to have their telephone numbers, names and sometimes their address published..." (emphasis yours).

In my opinion, since telephone directories are, by their nature, public, the only issue is whether they constitute agency records. There are no judicial decisions of which I am aware that have focused on the matter. If a court were to determine that telephone directories are not the kind of materials envisioned by the Freedom of Information Law and, therefore, are not agency records, you would have no right of access. On the other hand, if a court found that telephone directories in possession of agencies constitute agency records, I believe that they would be available. In view of their public nature and wide distribution, none of the grounds for denial appearing in §87(2) of that statute would in my opinion be pertinent or applicable in that circumstance.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Floyd Bennett
Mary Carroll
Anthony J. Annucci
William Gonzalez



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

7076-AO-11676

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Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

September 7, 1999

Mr. Darrel Isaac
96-A-4523
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. Isaac:

I have received your letters of August 3 and August 26 concerning the certification of records obtained from the New York City Police Department.

In my view, the Freedom of Information Law does not require that an agency provide a certification as envisioned by that statute unless asked to do so. As you are likely 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. 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 contents of the record.

In short, whether to seek a certification in accordance with §89(3) is your choice.

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

7076-AO-11677

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Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

September 9, 1999

Mr. Vincent Bernardo
98-A-6573
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. Bernardo:

I have received your letter of August 5 in which you sought guidance in your efforts in obtaining your medical records from Harlem Hospital.

In this regard, since Harlem Hospital is part of the New York City Health and Hospitals Corporation, I believe that its records are subject to the Freedom of Information Law. In terms of rights granted by that statute, it is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

With regard to medical records, the Freedom of Information Law, in my view, likely permits that some of those records may be withheld in whole or in part, depending upon their contents. For instance, medical records prepared by hospital personnel could be characterized as "intra-agency materials" that fall within the scope of §87(2)(g) of the Freedom of Information Law. To the extent that such materials consist of advice, opinion, recommendation and the like, I believe that the Freedom of Information Law would permit a denial.

Nevertheless, a different statute, §18 of the Public Health Law, generally grants rights of access to medical records to the subjects of the records. As such, that statute may provide greater access to medical records than the Freedom of Information Law. It is suggested that you send your request to the hospital and make specific reference to §18 of the Public Health Law when seeking medical records.

To obtain additional information concerning access to medical records and the fees that may be charged for searching and copying those records, you may write to:

Mr. Vincent Bernardo
September 9, 1999
Page 2-

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,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:tt



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11678

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Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

September 9, 1999

Mr. John Lindsay
Transportation Alternatives
115 West 30th Street, Suite 1207
New York, NY 1001-4010

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Lindsay:

I have received your letter of August 5. You indicated that you sent requests to the New York City Department of Transportation on July 14 and July 27, but that as of the date of your letter to this office, you had neither been granted access to the records sought nor informed of the approximate date when the request would be granted. You wrote that "[t]his has been a long standing problem at NYCDOT" and asked that I inform that agency that is "not in compliance with law."

In this regard, §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 a case that described an experience that may be 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 stopped 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 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.

Lastly, in my view, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, if records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a lengthy delay in disclosure. As the Court of Appeals has asserted:

Mr. John Lindsay
September 9, 1999
Page - 3 -

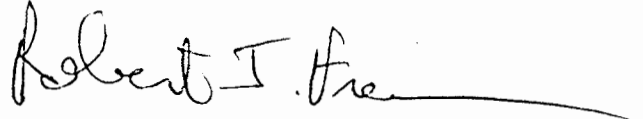
"...the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objectives cannot hope to be attained unless 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 a case in which it was found that an agency's "actions demonstrate an utter disregard for compliance set by FOIL", it was held that "[t]he records finally produced were not so voluminous as to justify any extension of time, much less an extension beyond that allowed by statute, or no response to appeals at all" (Inner City Press/Community on the Move, Inc. v. New York City Department of Housing Preservation and Development, Supreme Court, New York County, November 9, 1993).

In an effort to enhance compliance with and understanding of the Freedom of Information Law, a copy of this response will be forwarded to the Department's records access officer.

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-11679

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Alexander F. Treadwell

September 9, 1999

Executive Director

Robert J. Freeman

Mr. Hasheen Thompson
96-B-0919
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. Thompson:

I have received your letter of August 9 concerning an unanswered request under the Freedom of Information Law that you directed to the Attica Correctional Facility.

In this regard, first, having reviewed your request, some elements of the request are, in my view, inconsistent with the Freedom of Information Law. For instance, you wrote that you "would like to know what are the state laws and rules governing videotaping inmates being escorted to the S.H.U." In my view, that kind of inquiry involves a judgment or interpretation concerning the applicability of law; I do not believe that it constitutes a request for records as envisioned by the Freedom of Information Law. Any number of laws or rules might be pertinent, and individuals may disagree as to their application. In contrast, a request for a particular section of law or policy would, in my opinion, constitute a valid request.

Second, when a proper request is made, the Freedom of Information Law provides direction concerning the time and manner in which an agency must respond. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

Mr. Hasheen Thompson

September 9, 1999

Page -2-

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

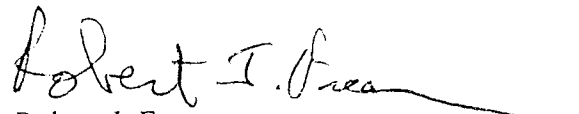
"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and extends across the width of the page.

Robert J. Freeman
Executive Director

RJF:jm

cc: Patricia Priestley



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Alexander F. Treadwell

September 9, 1999

Executive Director

Robert J. Freeman

Mr. Philip King
91-A-5926
Woodbourne Correctional Facility
Pouch No. 1
Woodbourne, NY 12788

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. King:

I have received your letter of August 8 in which you sought my views concerning two issues relating to the Freedom of Information Law.

With respect to the first, having received your parole summary, you read that it stated that you need drug counseling, even though you contend that you do not have a drug problem. When you asked the parole officer at your facility how he determined that drug treatment was warranted, you wrote that "after he reviewed [your] guidance folder, which is maintained by the Department of Corrections (DOCS), he found a document in which [you] stated [you] had 'panic attacks related to cocaine abuse'." You then "asked him under FOIL to identify the document and/or to send [you] a copy." He indicated that you should "take it up with the DOCS."

In my view, if the parole officer has possession of the record in question, even though it might have been prepared by a different agency, he would be obliged to respond to a request made under the Freedom of Information Law. That statute 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."

Mr. Philip King
September 9, 1999
Page -2-

Based on the foregoing, if two or more agencies possess the same record, each would be responsible for answering a request made under the Freedom of Information Law. On the other hand, if the parole officer merely read a record maintained by the Department of Correctional Services and does not possess a copy, he would have no obligation, in my opinion, to answer your question or obtain a copy for you.

The second area of inquiry relates to testimony by internal affairs officers at your trial regarding "the possible involvement of a police officer in your case." It appears that you are referring to the unit in the New York City Police Department.

I believe that requests for records concerning the activities of the Internal Affairs unit should be made to the New York City Police Department's records access officer, Sgt. Richard Evangelista at One Police Plaza.

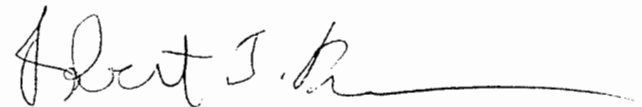
Assuming that the reports of your interest concern possible misconduct on the part of a police officer, it is likely in my view that they may be withheld.

As you may be aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

The 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. If my understanding of the matter is accurate, §50-a of the Civil Rights Law would serve to remove the records from the coverage of the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm



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Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

September 9, 1999

Ms. Dorothy M. Watson



The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Watson:

I have received your undated letter, which reached this office on August 13. You have sought an advisory opinion concerning a request made to the City of Tonawanda School District.

In an appeal submitted on July 14, you wrote that the records that "were not provided" are as follows:

"...I want the grades of students grouped by teacher who have passed the regents, failed the course, the course that was failed, the specific teacher, and the marks given the student each quarter for the past three years. In addition I want every individual regent grade, the corresponding quarterly marks, the final average corresponding to each regent grade by teacher for the high school."

You specified that you did not want students' names, and you provided a table to be filled out that would include the information sought. The original request was apparently denied based on a contention that the records sought do not exist, which you find "impossible to believe."

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 states in relevant part that an agency is not required to create a record in response to a request. Therefore, District officials would not be obliged to prepare a new record by completing the table that you provided. Further, I would conjecture that the information in which you are interested exists, but not in the format or with the combination of items in which you requested it. It is suggested that you confer with District officials to ascertain the manner in which

Second, as you inferred in your appeal, insofar as District records are identifiable to students, they must be withheld. 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).

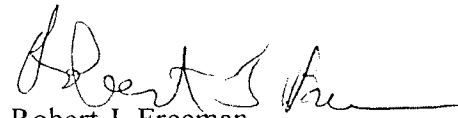
Based upon the foregoing, references to students' names or other aspects of records that would make a student's identity easily traceable must in my view be withheld in order to comply with federal law.

In a case dealing with a request that may be 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.

Ms. Dorothy M. Watson
September 9, 1999
Page - 3 -

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman".

Robert J. Freeman
Executive Director

RJF:tt

cc: Diana Greene
Kenneth Dyl



STATE OF NEW YORK
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Alexander F. Treadwell

Executive Director

Robert J. Freeman

September 9, 1999

Mr. William McKissick
97-A-7216-A-4-14
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. McKissick:

I have received your letter of August 5. As I understand your remarks, you are interested in obtaining records relating to certain judicial proceedings.

It appears that the primary source of the records of your interest would be the court in which the proceedings were conducted. 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

Mr. William McKissick

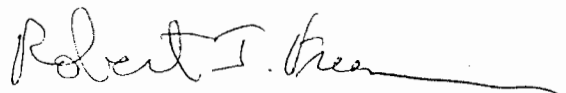
September 9, 1999

Page - 2 -

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 I have been of assistance.

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and extends across the width of the page.

Robert J. Freeman
Executive Director

RJF:tt



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Alexander F. Treadwell

Executive Director

September 9, 1999

Robert J. Freeman

Ms. Josephine P. Dority
Clerk-Treasurer
Village of Ravena
15 Mountain Road
Ravena, NY 12143

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Dority:

I have received your letter of August 9 and a copy of correspondence sent to you by Mr. Laszlo Polyak on August 6 concerning his requests under the Freedom of Information Law. You wrote that you "do not know what to do and do not know exactly what he is asking for." You asked that I provide guidance "[i]f [I] can figure out what he is trying to say."

Having reviewed Mr. Polyak's letter, I offer the following comments.

In his first paragraph, Mr. Polyak indicated that he has not yet received all of the zoning and Planning Board minutes that he requested and suggested that in one request, he sought minutes of the Zoning Board rather than the Planning Board. In this regard, as you are aware, minutes of meetings of public bodies are clearly available under the Freedom of Information Law. If the minutes of the two boards are maintained in a manner in which they can be reviewed or easily copied, i.e. if they are kept in chronological order in a looseleaf binder, a file drawer, a minute book, etc., it is suggested that you enable Mr. Polyak to inspect them. Based on such a review, he could identify those for which he might want copies, and you could then make copies following his payment of the proper fee.

The second paragraph appears to refer to an opinion that I prepared in which it was advised, based on a judicial decision, that records must be made available for inspection during regular business hours. This is not to suggest that you or others are required to suspend your other work to instantly accommodate a person seeking records under the Freedom of Information Law. If records are in use by staff or if you are unable to make records available on a certain day or during a certain period of time, access may in my view be delayed to a date that is mutually convenient to you and the applicant. On that date, however, I do not believe that there could be a limitation on the time to review records to less than regular business hours.

In the third paragraph, reference is made to questions relating to variances. While I am unfamiliar with the questions, it is noted that the Freedom of Information Law pertains to existing records, and that §89 (3) of the Law provides in relevant part that an agency is not required to create a record in response to a request. As such, the obligation of an agency under the Freedom of Information Law involves providing access to existing records; it does not require that agency officials answer questions or prepare new records in an effort to respond to questions.

As I understand his comments, Mr. Polyak is seeking "hard copies of the public notices as published" relative to hearings and variances, as well as "cover letter" indicating when legal notices were placed and when variances were filed after being granted. In my view, you would not be required by the Freedom of Information Law to prepare a "cover letter" containing the information sought. Again, your obligation under the Freedom of Information Law involves providing existing records. If existing records include the information sought, I believe that they should be disclosed. If the Village does not maintain the information in its records, Mr. Polyak should be so informed.

The fourth paragraph in my view consists of a commentary rather than a request for records, and in the fifth, the only clear reference to a request for records pertains to "ZBA maps." Again, if the maps in question exist and can be found, I believe that they should be made available.

Mr. Polyak has suggested that responses to his requests have been delayed. 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.

Another issue appears to involve the clarity or perhaps absence of clarity of his requests. Here I point out 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

Ms. Josephine P. Dority
September 9, 1999
Page - 3 -

a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

The Court in Konigsberg found that the agency could not reject the request due to its breadth and also stated that:

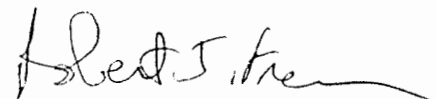
"respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency'])" (id. at 250).

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping system. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number.

While I am unfamiliar with the Village's recordkeeping systems, to the extent that the records sought can be located with reasonable effort, I believe that the 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 perhaps hundreds or 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.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Mr. Polyak



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Executive Director

Robert J. Freeman

September 9, 1999

Ms. Lorraine O. Taylor

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Taylor:

I have received your letter of August 20 and the materials attached to it. As a member of the Institutional Review Board (IRB) for Hutchings Psychiatric Center, you have questioned the legality and scope of a confidentiality agreement that IRB members are apparently required to sign. The agreement includes examples of information characterized as or "reasonably understood" to be confidential and provides that members "agree not to discuss, disclose, or reproduce any confidential information except to carry out [their] functions as an IRB member, or as otherwise required by law." In addition, a memorandum from the Research Foundation for Mental Hygiene, Inc. concerning confidentiality states that "IRB members have a legal and ethical duty to maintain the confidentiality of all information they receive in their capacity as members of the IRB."

You raised questions concerning the need to sign the agreement.

In this regard, the general functions of the Committee on Open Government involve offering advice and opinions concerning public access to and the disclosure of government information, primarily under the Freedom of Information and Personal Privacy Protection Laws. Consequently, the question of whether you "need to sign this confidentiality agreement" is beyond the jurisdiction of this office. However, I offer the following comments relating to the agreement and the notion of "confidentiality."

First, in general, I believe that the records and other information that come into the possession of IRB members are acquired in the performance of their official duties that are carried out directly or otherwise for the Office of Mental Health. By means of example, the letter that you sent to me may be in my physical possession, but it is in the legal custody of the Department of State. In the same vein, the information acquired by IRB members in the performance of their duties is, in my view, the property of the state, and outside the authority of the members to disclose in their discretion.

The Freedom of Information Law, in terms of its coverage, is consistent with the foregoing, for it pertains to "agency records." 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."

In a decision rendered by the state's highest court, the Court of Appeals, the matter involved records in possession of a not-for-profit corporation that carried out certain functions for the State University pursuant to contract and it was held that the records were held *for* the University and, therefore, were agency records that fell within the coverage of the Freedom of Information Law, even though they were not in the physical custody of the University [see Encore College Bookstores, Inc. v. Auxiliary Services Corporation of the State University, 87 NY2d 410 (1995)]. In like manner, materials acquired or prepared by IRB members would be maintained *for* the Office of Mental Health and would constitute agency records.

While I believe that the Research Foundation of Mental Hygiene, Inc. is an agency that falls within the requirements of the Freedom of Information Law [see e.g., Buffalo News v. Buffalo Enterprise Development Corp., 84 NY2d 488 (1994)], irrespective of that issue, my understanding is that its functions are performed for one or more agencies, such as the Office of Mental Health, and that, therefore, its records are maintained *for* an agency and are subject to rights conferred by the Freedom of Information Law.

In short, I believe that the records that come into the possession of IRB members are in the legal custody and control of an agency.

Second, although the use of the term "confidentiality" in the agreement is not entirely clear, the agreement, in general, does not appear to be inconsistent with law. Insofar as there may be inconsistency, I do not believe that it would be valid or enforceable. I note, too, that a statement cited earlier in the memorandum is broader, in my opinion, than the agreement itself. As indicated previously, the memorandum states in part that "IRB members have legal and ethical duty to maintain the confidentiality of *all information* they receive in their capacity as members..." The agreement itself, however, involves the discussion, disclosure, or reproduction of "*confidential information*". The term "confidential" is not defined, but examples of information "reasonably understood" to be confidential are described, such as human subject identifying data, proprietary information, medical information and the like.

From my perspective, based on judicial decisions, an assertion or promise of confidentiality, unless it is based upon a statute, is generally meaningless. When confidentiality is conferred by a statute, an act of the State Legislature or Congress, records fall outside the scope of rights of access pursuant to §87(2)(a) of the Freedom of Information Law, which states that an agency may withhold

records that "are specifically exempted from disclosure by state or federal statute". If there is no statute upon which an agency can rely to characterize records as "confidential" or "exempted from disclosure", the records are subject to whatever rights of access exist under the Freedom of Information Law [see Doolan v. BOCES, 48 NY 2d 341 (1979); Washington Post v. Insurance Department, 61 NY 2d 557 (1984); Gannett News Service, Inc. v. State Office of Alcoholism and Substance Abuse, 415 NYS 2d 780 (1979)]. As such, an assertion or promise of confidentiality, without more, would not in my view serve to enable an agency to withhold a record.

In the context of the kinds of records that may be pertinent to the duties of the Foundation, the IRB's and the Office of Mental Health, a statute that requires confidentiality is §33.13 of the Mental Hygiene Law. That statute essentially prohibits the disclosure of clinical records identifiable to a person receiving treatment except in circumstances that it prescribes. When records fall within the confidentiality requirements imposed by §33.13, they would be "specifically exempted from disclosure by...statute" in accordance with §87(2)(a) of the Freedom of Information Law.

Also pertinent to the duties of those concerned may be the Personal Privacy Protection Law, which deals in part with the disclosure of records or personal information by state agencies concerning data subjects. A "data subject" is "any natural person about whom personal information has been collected by an agency" [Personal Privacy Protection Law, §92(3)]. "Personal information" is defined to mean "any information concerning a data subject which, because of name, number, symbol, mark or other identifier, can be used to identify that data subject" [§92(7)]. For purposes of 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, when 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.

When either §33.13 of the Mental Hygiene Law or the Personal Privacy Protection Law applies, there is essentially no discretion to disclose to the public. In other circumstances, however, although records *may* be withheld, there is no obligation to do so.

Reference is made in the materials to "proprietary rights." Depending on the effects of disclosure, so-called "proprietary" information might properly be withheld under §87(2)(d) of the Freedom of Information Law. Nevertheless, unlike the provisions cited above, under §87(2)(d) and the remaining grounds for denial in the Freedom of Information Law, there is nothing in law that

would prohibit disclosure. Section 87(2)(d) permits (but does not require) an agency to withhold records or portions 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...”

The mere characterization of a record as “proprietary” or as a trade secret, like a claim of confidentiality, may be without substance unless there is a provision of law upon which it can be based; the capacity to deny access involves the extent to which disclosure “would cause substantial injury to the competitive position” of a commercial enterprise.

As I interpret the memorandum, a key element involves the “standards and procedures” that have been implemented to deal with requests for and the disclosure of records. Section 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 head or governing body of an agency 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.

From my perspective, it is routine to limit the authority of agency personnel and others to make disclosures on their own initiative or in response to requests. In many agencies, requests for records are forwarded as a matter of policy to the designated records access officer in order that he or she can make an initial determination to grant or deny access in accordance with applicable law. The direction given in the memorandum appears to be consistent with that kind of procedure.

In sum, it is likely that many of the records used or maintained by IRB members may be confidential”, but that would be so only when a statute prohibits disclosure. In other instances, there may be discretion to withhold under the Freedom of Information Law, but no legal obligation to do so. Perhaps most importantly, the Freedom of Information Law requires agencies to adopt

Ms. Lorraine O. Taylor

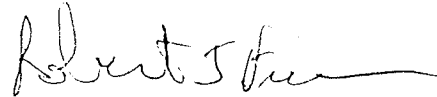
September 9, 1999

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regulations regarding the procedural implementation of the law. In accordance with such a procedure, one or more "records access officers" may be given the duty of coordinating an agency's response to requests and disclosure practices. Unless authority to disclose is otherwise granted to persons other than the records access officer, limiting the ability of those other persons to disclose is, in my opinion, within the discretion of an agency. I note, too, that there is nothing in the agreement which, in my view, limits access by IRB members or which in any way limits public rights of access in a manner inconsistent with law.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman".

Robert J. Freeman
Executive Director

RJF:tt

cc: Susan J. Delano
Robin Goldman
Roger Clingman



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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FOIL-AO - 11685

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Alexander F. Treadwell

Executive Director

Robert J. Freeman

September 9, 1999

Ms. Carole Hayes Collier



The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Collier:

I have received your letter of August 20 and the materials attached to it. As a member of the Institutional Review Board (IRB) for Hutchings Psychiatric Center, you have questioned the legality and scope of a confidentiality agreement that IRB members are apparently required to sign. The agreement includes examples of information characterized as or "reasonably understood" to be confidential and provides that members "agree not to discuss, disclose, or reproduce any confidential information except to carry out [their] functions as an IRB member, or as otherwise required by law." In addition, a memorandum from the Research Foundation for Mental Hygiene, Inc. concerning confidentiality states that "IRB members have a legal and ethical duty to maintain the confidentiality of all information they receive in their capacity as members of the IRB."

You asked that I advise "as to whether [you] need to sign this confidentiality statement or challenge it as being too restrictive."

In this regard, the general functions of the Committee on Open Government involve offering advice and opinions concerning public access to and the disclosure of government information, primarily under the Freedom of Information and Personal Privacy Protection Laws. Consequently, the question of whether you "need to sign this confidentiality agreement" is beyond the jurisdiction of this office. However, I offer the following comments relating to the agreement and the notion of "confidentiality."

First, in general, I believe that the records and other information that come into the possession of IRB members are acquired in the performance of their official duties that are carried out directly or otherwise for the Office of Mental Health. By means of example, the letter that you sent to me may be in my physical possession, but it is in the legal custody of the Department of State. In the same vein, the information acquired by IRB members in the performance of their duties is, in my view, the property of the state, and outside the authority of the members to disclose in their discretion.

The Freedom of Information Law, in terms of its coverage, is consistent with the foregoing, for it pertains to "agency records." 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."

In a decision rendered by the state's highest court, the Court of Appeals, the matter involved records in possession of a not-for-profit corporation that carried out certain functions for the State University pursuant to contract and it was held that the records were held *for* the University and, therefore, were agency records that fell within the coverage of the Freedom of Information Law, even though they were not in the physical custody of the University [see Encore College Bookstores, Inc. v. Auxiliary Services Corporation of the State University, 87 NY2d 410 (1995)]. In like manner, materials acquired or prepared by IRB members would be maintained *for* the Office of Mental Health and would constitute agency records.

While I believe that the Research Foundation of Mental Hygiene, Inc. is an agency that falls within the requirements of the Freedom of Information Law [see e.g., Buffalo News v. Buffalo Enterprise Development Corp., 84 NY2d 488 (1994)], irrespective of that issue, my understanding is that its functions are performed for one or more agencies, such as the Office of Mental Health, and that, therefore, its records are maintained *for* an agency and are subject to rights conferred by the Freedom of Information Law.

In short, I believe that the records that come into the possession of IRB members are in the legal custody and control of an agency.

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From my perspective, based on judicial decisions, an assertion or promise of confidentiality, unless it is based upon a statute, is generally meaningless. When confidentiality is conferred by a statute, an act of the State Legislature or Congress, records fall outside the scope of rights of access

pursuant to §87(2)(a) of the Freedom of Information Law, which states that an agency may withhold records that "are specifically exempted from disclosure by state or federal statute". If there is no statute upon which an agency can rely to characterize records as "confidential" or "exempted from disclosure", the records are subject to whatever rights of access exist under the Freedom of Information Law [see Doolan v. BOCES, 48 NY 2d 341 (1979); Washington Post v. Insurance Department, 61 NY 2d 557 (1984); Gannett News Service, Inc. v. State Office of Alcoholism and Substance Abuse, 415 NYS 2d 780 (1979)]. As such, an assertion or promise of confidentiality, without more, would not in my view serve to enable an agency to withhold a record.

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Also pertinent to the duties of those concerned may be the Personal Privacy Protection Law, which deals in part with the disclosure of records or personal information by state agencies concerning data subjects. A "data subject" is "any natural person about whom personal information has been collected by an agency" [Personal Privacy Protection Law, §92(3)]. "Personal information" is defined to mean "any information concerning a data subject which, because of name, number, symbol, mark or other identifier, can be used to identify that data subject" [§92(7)]. For purposes of 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)].

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When either §33.13 of the Mental Hygiene Law or the Personal Privacy Protection Law applies, there is essentially no discretion to disclose to the public. In other circumstances, however, although records *may* be withheld, there is no obligation to do so.

Reference is made in the materials to "proprietary rights." Depending on the effects of disclosure, so-called "proprietary" information might properly be withheld under §87(2)(d) of the Freedom of Information Law. Nevertheless, unlike the provisions cited above, under §87(2)(d) and

the remaining grounds for denial in the Freedom of Information Law, there is nothing in law that would prohibit disclosure. Section 87(2)(d) permits (but does not require) an agency to withhold records or portions 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...”

The mere characterization of a record as “proprietary” or as a trade secret, like a claim of confidentiality, may be without substance unless there is a provision of law upon which it can be based; the capacity to deny access involves the extent to which disclosure “would cause substantial injury to the competitive position” of a commercial enterprise.

As I interpret the memorandum, a key element involves the “standards and procedures” that have been implemented to deal with requests for and the disclosure of records. Section 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 head or governing body of an agency 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.

From my perspective, it is routine to limit the authority of agency personnel and others to make disclosures on their own initiative or in response to requests. In many agencies, requests for records are forwarded as a matter of policy to the designated records access officer in order that he or she can make an initial determination to grant or deny access in accordance with applicable law. The direction given in the memorandum appears to be consistent with that kind of procedure.

In sum, it is likely that many of the records used or maintained by IRB members may be confidential”, but that would be so only when a statute prohibits disclosure. In other instances, there may be discretion to withhold under the Freedom of Information Law, but no legal obligation to do

Ms. Carole Hayes Collier

September 9, 1999

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so. Perhaps most importantly, the Freedom of Information Law requires agencies to adopt regulations regarding the procedural implementation of the law. In accordance with such a procedure, one or more "records access officers" may be given the duty of coordinating an agency's response to requests and disclosure practices. Unless authority to disclose is otherwise granted to persons other than the records access officer, limiting the ability of those other persons to disclose is, in my opinion, within the discretion of an agency. I note, too, that there is nothing in the agreement which, in my view, limits access by IRB members or which in any way limits public rights of access in a manner inconsistent with law.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script, reading "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:tt

cc: Susan J. Delano
Robin Goldman
Roger Clingman



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September 9, 1999

Executive Director

Robert J. Freeman

Ms. Shawn Schultz
Citizen's Against the Dump
P.O. Box 93
Pattersonville, NY 12137

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Schultz:

I have received your undated letter, which reached this office on August 10.

You have sought an advisory opinion concerning a request made to the Town of Rotterdam on July 12 for the "Draft of the Sterling/Spectra Leachate investigation and remediation study of the Rotterdam MSW Landfill." You wrote that the request was denied on July 30 and that you appealed "on that same day." On August 2, you were informed that the Town Engineer, in your words, "had destroyed the draft since it was a draft and not a finalized report." You added that "[s]he was well aware this draft was under foil as [you] and the records access officer had been in touch with her on repeated occasions."

You have raised the following questions in relation to the foregoing:

- a) Did the town have the obligation to provide all or certain parts of the draft?
- b) Is this draft covered by attorney client privilege since a lawyer hired by the town reviewed it?
- c) What document is needed to prove the record no longer exists?
- d) If the record was destroyed what remedies are available to us?"

In this regard, I offer the following comments.

First, questions (a) and (b) will be considered together, for they both deal essentially with whether or the extent to which the draft should have been made available.

It is emphasized at the outset that the Freedom of Information Law, as a general matter, is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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, I point out that the Freedom of Information Law pertains to all agency records, and that §86(4) defines the term "record" expansively to mean:

"any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, I believe that the draft clearly constituted a town record that fell within the coverage of the Freedom of Information Law.

With respect to the attorney-client privilege, the fact that an attorney may have been retained to review a record would not alter the character of the record or transform it into privileged material. By means of example, if an attorney is hired to review public records, such as minutes of meetings, a developer's plans to construct a new building, or assessment records, his or her review of those records would in no way affect the public's right to obtain them under the Freedom of Information Law; again, the content, the character and the purpose for which the records were prepared would not change.

As I understand the matter, the draft was not prepared by or at the direction of an attorney retained by the Town. If that is so, the attorney client privilege would not be pertinent.

If records are prepared by or for an attorney, as in the case of a report prepared for litigation by an expert, they may be beyond the scope 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." When records are subject to the attorney-client privilege, they would be exempted from disclosure under §4503 of the Civil Practice Law and Rules (CPLR). Another statute that exempts records from disclosure is §3101(d) of the Civil Practice Law and Rules, which exempts material prepared for litigation from disclosure. It is emphasized, however, that it has been determined judicially that if records are prepared for multiple purposes, one of which includes eventual use in litigation, §3101(d) does not serve as a basis for withholding records; only when records are prepared solely for litigation can §3101(d) be properly asserted to deny access to records [see e.g., Westchester-Rockland Newspapers v. Mosczydlowski, 58 AD 2d 234 (1977)].

Again, as I interpret your comments, the draft was not prepared by or at the direction of an attorney, nor was it prepared solely for litigation. If that is so, neither §87(2)(a) nor the attorney-client privilege would in my view have authorized the Town to withhold the draft.

If Sterling/Spectra served as a consultant for the Town, another ground for denial would be relevant to an analysis of rights of access. Due to its structure, however, that provision would likely have required 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, 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.

In sum, assuming that the draft was prepared by a consultant retained by the Town, those portions of the draft consisting of statistical or factual information would, in my opinion, have been available.

If Sterling/Spectra did not serve as a consultant, it does not appear that any ground for denial would have applied. In that event, I believe that the report would have been available in its entirety.

Next, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

I point out that in Key v. Hynes [613 NYS 2d 926, 205 AD 2d 779 (1994)], it was found that a court could not validly accept conclusory allegations as a substitute for proof that an agency could not locate a record after having made a "diligent search". However, in another decision, such an allegation was found to be sufficient when "the employee who conducted the actual search for the documents in question submitted an affidavit which provided an adequate basis upon which to

conclude that a 'diligent search' for the documents had been made" [Thomas v. Records Access Officer, 613 NYS 2d 929, 205 AD 2d 786 (1994)].

It is also suggested that you inquire as to whether Sterling/Spectra maintains a copy of the draft. As indicated earlier, the definition of "record" includes information produced *for* an agency. Therefore, if that firm maintains a copy of the draft or has stored the draft electronically, I believe that the Town would be required to acquire a copy for the purpose of reviewing it and disclosing its contents to the extent required by the Freedom of Information Law.

With respect to the destruction of the draft, pertinent 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 suggested that you contact that agency to ascertain the applicable retention period concerning the draft.


Finally, §240.65 entitled "Unlawful prevention of public access to records" and §89(8) of the Freedom of Information Law deal with the destruction of records requested pursuant to the Freedom of Information 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. As in the case of any violation of the Penal Law, such violation may be prosecuted by a district attorney.

I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Town Clerk
Town Engineer



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIA AO - 11687

Committee Members

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Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

September 9, 1999

Executive Director

Robert J. Freeman

Mr. Douglas Hewitt

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Hewitt:

I have received your letter of August 9, as well as the materials attached to it.

On June 21, you sent a request to the Office of the Oneida County District Attorney for "[a]ll information regarding...the investigation into the Village of Yorkville, Its Employees and the Yorkville Police Department including Past and Present employees' regarding [your] complaint to the Oneida County District Attorneys Office." Although you indicated that you had seen some of the records in the presence of the District Attorney, the request was denied "pursuant to Public Officers Law §87(2)(a), (b), (e) i, (e) ii, (e) iii, (e) iv, (g) i, (g) ii and (g) iii." In addition, you were informed that the request was "overly broad, vague and not readily identifiable..." Although you appealed the denial in a letter received by the Office of the District Attorney on July 7, as of the date of your letter to this office, you had received no further response.

You asked that this office investigate the matter.

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee has neither the jurisdiction nor the staff to conduct an investigation. As such, the following remarks will involve the treatment of your request under the Freedom of Information Law.

First, although the Freedom of Information Law as originally enacted required that an applicant seek "identifiable" records, since 1978, §89(3) of that statute has stated that an applicant must "reasonably describe" the records sought. In considering that standard, the State's highest court has found that requested records need not be "specifically designated", that to meet the standard, the terms of a request must be adequate to enable the agency to locate the records, and that an agency

must "establish that 'the descriptions were insufficient for purposes of locating and identifying the documents sought'...before denying a FOIL request for reasons of overbreadth" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

Although it was found in the decision cited above that the agency could not reject the request due to its breadth, it was also stated that:

"respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency']" (id. at 250).

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping systems. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number.

In the context of your request, I am unaware of the means by which the Office of the District Attorney maintains records falling within the scope of your request. If that agency 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.

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 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.

Insofar as records were disclosed to you in the past, I do not believe that the Office of the District Attorney could now choose to withhold those same records.

With respect to the remainder of the records falling within the scope of your request, the Court of Appeals expressed its general view of the intent of the Freedom of Information Law most recently in 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 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 Office of the District Attorney engaged in a blanket denial alluding to 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 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 some of the records sought constitute inter-agency or 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."

Only to the extent that the harmful effects of disclosure described in subparagraphs (i) through (iv) of §87(2)(e) does an agency have the authority to deny access to records. It would appear that any investigation of your complaint has been terminated. If that is so, the primary exception in §87(2)(e), the provision dealing with interference with an investigation, would likely be irrelevant.

Section 87(2)(b) permits an agency to withhold records insofar as disclosure would result in "an unwarranted invasion of personal privacy." Frequently, names or other personally identifying details may be deleted to protect privacy, in which case the remainder of a record may be available.

Section 87(2)(a) pertains to records that "are specifically exempted from disclosure by state or federal statute." The denial merely referred to that provision; it does not cite any statute that would exempt the records of your interest from disclosure.

Lastly, §89(4)(a) of the Freedom of Information Law pertains to the right to appeal a denial of access to records and states in relevant part that:

"any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

It has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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: Kurt D. Hameline
Paul J. Hernon



STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11688

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Executive Director

Robert J. Freeman

September 9, 1999

Mr. Nathan McBride
95-A-6015
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. McBride:

I have received your letter of August 9. You referred to denials of your requests for records by the office of a district attorney on the ground that the records had previously been furnished to your attorney. You wrote, however, that your requests made under the Freedom of Information Law to your attorney have not been answered.

In this regard, first, the records maintained by your attorney are likely not subject to the Freedom of Information Law. That statute pertains to agency records, and §86 (3) defines the term "agency" to mean:

"any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, the Freedom of Information Law generally applies to records maintained by governmental entities. Unless your attorney is a public defender, i.e., a county employee, it is unlikely that the attorney would be subject to the Freedom of Information Law.

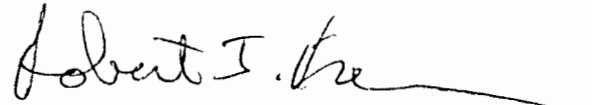
Second, as indicated to you in a letter of December 8, 1997, based on the decision rendered in Moore v. Santucci [151 AD2d 677 (1989)], if a record was made available to you or your attorney, there must be a demonstration that neither you nor your attorney possesses the record in order to successfully 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. Alternatively, if your attorney fails to answer, it is suggested that you document such failure and present it to the office of its district attorney as by means of demonstrating that you have no way of obtaining the records previously disclosed to 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-11689

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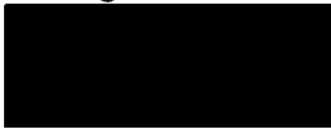
Mary O. Donohue
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Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

September 9, 1999

Executive Director

Robert J. Freeman

Ms. Regina LaNoce



The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. LaNoce:

As you are aware, your letter of August 9 addressed to Attorney General Spitzer 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.

According to your correspondence, you wrote to Assemblyman Jeffrion Aubry, Chairman of the Assembly Committee on Corrections, and requested certain minutes of meetings of the Committee. As of the date of your letter to the Attorney General, you had received no response and you asked whether Assemblyman Aubry is "required, by law, to provide [you] with the information...within a reasonable amount of time."

In this regard, pursuant to the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), each agency is required to designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests, and requests should generally be made to that person. Although the Assembly is not an "agency" (see Freedom of Information Law, §86), it has adopted rules and procedures that include the designation of a records access officer. In my view, the Assemblyman should either have responded to your request directly or forwarded the request to the Assembly's records access officer, Ms. Sharon Walsh. With this response to you, I will forward a copy of your request to her.

For future reference, I note that the Freedom of Information Law provides direction concerning the time and manner in which an entity must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

Ms. Regina LaNoce

September 9, 1999

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"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

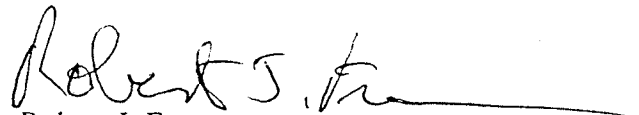
If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an entity delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Jeffrion Aubry
Sharon Walsh



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-A0-11690

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September 9, 1999

Executive Director

Robert J. Freeman

Mr. Harvey M. Elentuck

The staff of the Committee on Open 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 postcard in which you sought advice.

According to your correspondence, the records access officer at the Office of Labor Relations of the New York City Board of Education has granted your request to inspect records, "138,000 pages of one type of record category and 30,000 pages of a different type of record category." However, you wrote that "he is seeking to impose a time limit of 4 additional sessions at 4 hours per session." You wrote that you "want a reasonable amount of time to finish reading the material" (emphasis yours).

In this regard, in my experience relating to the Freedom of Information Law, I have not encountered a situation in which a request has been made and granted with respect to so large a volume of material. From my perspective, the primary issue involves the reasonableness of the response in conjunction with attendant facts. I am unaware of the manner in which the records are maintained, whether you have been given the authority to browse through all of the two categories of records, whether they must be physically retrieved for you on each occasion in which you seek to read them, whether they may be in use by agency staff, etc. In short, whether the limitation in terms of the number of "sessions" during which you may read the records is valid is in my view dependent on the reasonableness of the agency's response in conjunction with the kinds of factors mentioned.

Notwithstanding the foregoing, when a date that is mutually convenient to you and the agency for your inspection of the records, I believe that you may read them during the entirety of the agency's regular business hours.

By way of background, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee to promulgate regulations concerning the procedural implementation of the Law (see 21 NYCRR Part 1401). In turn, §87(1) requires agencies to adopt rules and regulations consistent with the Law and the Committee's regulations.

Section 1401.2 of the regulations, provides in relevant part that:

"(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so..."

Section 1401.4 of the regulations, entitled "Hours for public inspection", states that:

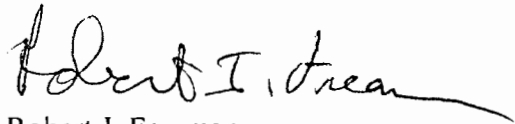
"(a) Each agency shall accept requests for public access to records and produce records during all hours they are regularly open for business."

Relevant to your inquiry and the foregoing is a decision rendered by the Appellate Division, Second Department. Among the issues was the validity of a similar limitation regarding the time permitted to inspect records established by a village pursuant to regulation. The Court held that the village was required to enable the public to inspect records during its regular business hours, stating that:

"...to the extent that Regulation 6 has been interpreted as permitting the Village Clerk to limit the hours during which public documents can be inspected to a period of time less than the business hours of the Clerk's office, it is violative of the Freedom of Information Law..."
[Murtha v. Leonard, 620 NYS 2d 101 (1994), 210 AD 2d 411].

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm
cc: Thomas a. Liese



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

7076-AO-11676

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Executive Director

Robert J. Freeman

September 7, 1999

Mr. Darrel Isaac
96-A-4523
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. Isaac:

I have received your letters of August 3 and August 26 concerning the certification of records obtained from the New York City Police Department.

In my view, the Freedom of Information Law does not require that an agency provide a certification as envisioned by that statute unless asked to do so. As you are likely 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. 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 contents of the record.

In short, whether to seek a certification in accordance with §89(3) is your choice.

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

7076-DO-11677

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Alexander F. Treadwell

Executive Director

Robert J. Freeman

September 9, 1999

Mr. Vincent Bernardo
98-A-6573
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. Bernardo:

I have received your letter of August 5 in which you sought guidance in your efforts in obtaining your medical records from Harlem Hospital.

In this regard, since Harlem Hospital is part of the New York City Health and Hospitals Corporation, I believe that its records are subject to the Freedom of Information Law. In terms of rights granted by that statute, it is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

With regard to medical records, the Freedom of Information Law, in my view, likely permits that some of those records may be withheld in whole or in part, depending upon their contents. For instance, medical records prepared by hospital personnel could be characterized as "intra-agency materials" that fall within the scope of §87(2)(g) of the Freedom of Information Law. To the extent that such materials consist of advice, opinion, recommendation and the like, I believe that the Freedom of Information Law would permit a denial.

Nevertheless, a different statute, §18 of the Public Health Law, generally grants rights of access to medical records to the subjects of the records. As such, that statute may provide greater access to medical records than the Freedom of Information Law. It is suggested that you send your request to the hospital and make specific reference to §18 of the Public Health Law when seeking medical records.

To obtain additional information concerning access to medical records and the fees that may be charged for searching and copying those records, you may write to:

Mr. Vincent Bernardo
September 9, 1999
Page 2-

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,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:tt



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11678

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Executive Director

Robert J. Freeman

September 9, 1999

Mr. John Lindsay
Transportation Alternatives
115 West 30th Street, Suite 1207
New York, NY 1001-4010

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Lindsay:

I have received your letter of August 5. You indicated that you sent requests to the New York City Department of Transportation on July 14 and July 27, but that as of the date of your letter to this office, you had neither been granted access to the records sought nor informed of the approximate date when the request would be granted. You wrote that "[t]his has been a long standing problem at NYCDOT" and asked that I inform that agency that is "not in compliance with law."

In this regard, §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 a case that described an experience that may be 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 stopped 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 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.

Lastly, in my view, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, if records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a lengthy delay in disclosure. As the Court of Appeals has asserted:

Mr. John Lindsay
September 9, 1999
Page - 3 -

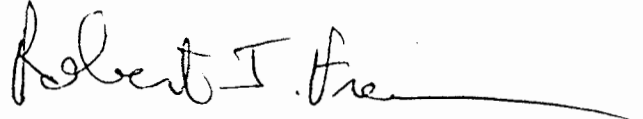
"...the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objectives cannot hope to be attained unless 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 a case in which it was found that an agency's "actions demonstrate an utter disregard for compliance set by FOIL", it was held that "[t]he records finally produced were not so voluminous as to justify any extension of time, much less an extension beyond that allowed by statute, or no response to appeals at all" (Inner City Press/Community on the Move, Inc. v. New York City Department of Housing Preservation and Development, Supreme Court, New York County, November 9, 1993).

In an effort to enhance compliance with and understanding of the Freedom of Information Law, a copy of this response will be forwarded to the Department's records access officer.

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-11679

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Joseph J. Seymour
Alexander F. Treadwell

September 9, 1999

Executive Director

Robert J. Freeman

Mr. Hasheen Thompson
96-B-0919
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. Thompson:

I have received your letter of August 9 concerning an unanswered request under the Freedom of Information Law that you directed to the Attica Correctional Facility.

In this regard, first, having reviewed your request, some elements of the request are, in my view, inconsistent with the Freedom of Information Law. For instance, you wrote that you "would like to know what are the state laws and rules governing videotaping inmates being escorted to the S.H.U." In my view, that kind of inquiry involves a judgment or interpretation concerning the applicability of law; I do not believe that it constitutes a request for records as envisioned by the Freedom of Information Law. Any number of laws or rules might be pertinent, and individuals may disagree as to their application. In contrast, a request for a particular section of law or policy would, in my opinion, constitute a valid request.

Second, when a proper request is made, the Freedom of Information Law provides direction concerning the time and manner in which an agency must respond. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

Mr. Hasheen Thompson

September 9, 1999

Page -2-

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

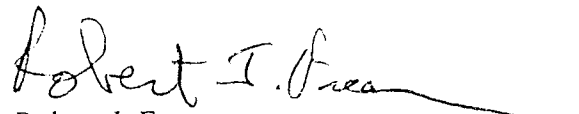
"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and extends across the width of the page.

Robert J. Freeman
Executive Director

RJF:jm

cc: Patricia Priestley



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Alexander F. Treadwell

September 9, 1999

Executive Director

Robert J. Freeman

Mr. Philip King
91-A-5926
Woodbourne Correctional Facility
Pouch No. 1
Woodbourne, NY 12788

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. King:

I have received your letter of August 8 in which you sought my views concerning two issues relating to the Freedom of Information Law.

With respect to the first, having received your parole summary, you read that it stated that you need drug counseling, even though you contend that you do not have a drug problem. When you asked the parole officer at your facility how he determined that drug treatment was warranted, you wrote that "after he reviewed [your] guidance folder, which is maintained by the Department of Corrections (DOCS), he found a document in which [you] stated [you] had 'panic attacks related to cocaine abuse'." You then "asked him under FOIL to identify the document and/or to send [you] a copy." He indicated that you should "take it up with the DOCS."

In my view, if the parole officer has possession of the record in question, even though it might have been prepared by a different agency, he would be obliged to respond to a request made under the Freedom of Information Law. That statute 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."

Mr. Philip King
September 9, 1999
Page -2-

Based on the foregoing, if two or more agencies possess the same record, each would be responsible for answering a request made under the Freedom of Information Law. On the other hand, if the parole officer merely read a record maintained by the Department of Correctional Services and does not possess a copy, he would have no obligation, in my opinion, to answer your question or obtain a copy for you.

The second area of inquiry relates to testimony by internal affairs officers at your trial regarding "the possible involvement of a police officer in your case." It appears that you are referring to the unit in the New York City Police Department.

I believe that requests for records concerning the activities of the Internal Affairs unit should be made to the New York City Police Department's records access officer, Sgt. Richard Evangelista at One Police Plaza.

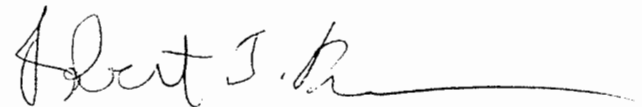
Assuming that the reports of your interest concern possible misconduct on the part of a police officer, it is likely in my view that they may be withheld.

As you may be aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

The 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. If my understanding of the matter is accurate, §50-a of the Civil Rights Law would serve to remove the records from the coverage of the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman", followed by a long horizontal line extending to the right.

Robert J. Freeman
Executive Director

RJF:jm



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COMMITTEE ON OPEN GOVERNMENT

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Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

September 9, 1999

Ms. Dorothy M. Watson

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Watson:

I have received your undated letter, which reached this office on August 13. You have sought an advisory opinion concerning a request made to the City of Tonawanda School District.

In an appeal submitted on July 14, you wrote that the records that "were not provided" are as follows:

"...I want the grades of students grouped by teacher who have passed the regents, failed the course, the course that was failed, the specific teacher, and the marks given the student each quarter for the past three years. In addition I want every individual regent grade, the corresponding quarterly marks, the final average corresponding to each regent grade by teacher for the high school."

You specified that you did not want students' names, and you provided a table to be filled out that would include the information sought. The original request was apparently denied based on a contention that the records sought do not exist, which you find "impossible to believe."

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 states in relevant part that an agency is not required to create a record in response to a request. Therefore, District officials would not be obliged to prepare a new record by completing the table that you provided. Further, I would conjecture that the information in which you are interested exists, but not in the format or with the combination of items in which you requested it. It is suggested that you confer with District officials to ascertain the manner in which

Second, as you inferred in your appeal, insofar as District records are identifiable to students, they must be withheld. 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).

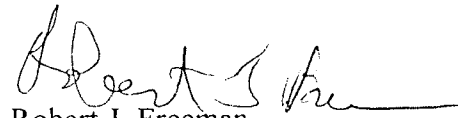
Based upon the foregoing, references to students' names or other aspects of records that would make a student's identity easily traceable must in my view be withheld in order to comply with federal law.

In a case dealing with a request that may be 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.

Ms. Dorothy M. Watson
September 9, 1999
Page - 3 -

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman".

Robert J. Freeman
Executive Director

RJF:tt

cc: Diana Greene
Kenneth Dyl



STATE OF NEW YORK
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Alexander F. Treadwell

Executive Director

Robert J. Freeman

September 9, 1999

Mr. William McKissick
97-A-7216-A-4-14
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. McKissick:

I have received your letter of August 5. As I understand your remarks, you are interested in obtaining records relating to certain judicial proceedings.

It appears that the primary source of the records of your interest would be the court in which the proceedings were conducted. 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

Mr. William McKissick

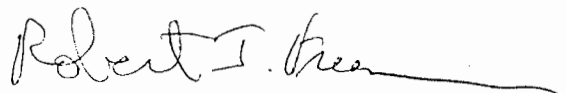
September 9, 1999

Page - 2 -

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 I have been of assistance.

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and extends across the width of the page.

Robert J. Freeman
Executive Director

RJF:tt



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Alexander F. Treadwell

Executive Director

September 9, 1999

Robert J. Freeman

Ms. Josephine P. Dority
Clerk-Treasurer
Village of Ravena
15 Mountain Road
Ravena, NY 12143

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Dority:

I have received your letter of August 9 and a copy of correspondence sent to you by Mr. Laszlo Polyak on August 6 concerning his requests under the Freedom of Information Law. You wrote that you "do not know what to do and do not know exactly what he is asking for." You asked that I provide guidance "[i]f [I] can figure out what he is trying to say."

Having reviewed Mr. Polyak's letter, I offer the following comments.

In his first paragraph, Mr. Polyak indicated that he has not yet received all of the zoning and Planning Board minutes that he requested and suggested that in one request, he sought minutes of the Zoning Board rather than the Planning Board. In this regard, as you are aware, minutes of meetings of public bodies are clearly available under the Freedom of Information Law. If the minutes of the two boards are maintained in a manner in which they can be reviewed or easily copied, i.e. if they are kept in chronological order in a looseleaf binder, a file drawer, a minute book, etc., it is suggested that you enable Mr. Polyak to inspect them. Based on such a review, he could identify those for which he might want copies, and you could then make copies following his payment of the proper fee.

The second paragraph appears to refer to an opinion that I prepared in which it was advised, based on a judicial decision, that records must be made available for inspection during regular business hours. This is not to suggest that you or others are required to suspend your other work to instantly accommodate a person seeking records under the Freedom of Information Law. If records are in use by staff or if you are unable to make records available on a certain day or during a certain period of time, access may in my view be delayed to a date that is mutually convenient to you and the applicant. On that date, however, I do not believe that there could be a limitation on the time to review records to less than regular business hours.

In the third paragraph, reference is made to questions relating to variances. While I am unfamiliar with the questions, it is noted that the Freedom of Information Law pertains to existing records, and that §89 (3) of the Law provides in relevant part that an agency is not required to create a record in response to a request. As such, the obligation of an agency under the Freedom of Information Law involves providing access to existing records; it does not require that agency officials answer questions or prepare new records in an effort to respond to questions.

As I understand his comments, Mr. Polyak is seeking "hard copies of the public notices as published" relative to hearings and variances, as well as "cover letter" indicating when legal notices were placed and when variances were filed after being granted. In my view, you would not be required by the Freedom of Information Law to prepare a "cover letter" containing the information sought. Again, your obligation under the Freedom of Information Law involves providing existing records. If existing records include the information sought, I believe that they should be disclosed. If the Village does not maintain the information in its records, Mr. Polyak should be so informed.

The fourth paragraph in my view consists of a commentary rather than a request for records, and in the fifth, the only clear reference to a request for records pertains to "ZBA maps." Again, if the maps in question exist and can be found, I believe that they should be made available.

Mr. Polyak has suggested that responses to his requests have been delayed. 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.

Another issue appears to involve the clarity or perhaps absence of clarity of his requests. Here I point out 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

Ms. Josephine P. Dority
September 9, 1999
Page - 3 -

a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

The Court in Konigsberg found that the agency could not reject the request due to its breadth and also stated that:

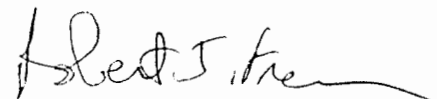
"respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency'])" (id. at 250).

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping system. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number.

While I am unfamiliar with the Village's recordkeeping systems, to the extent that the records sought can be located with reasonable effort, I believe that the 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 perhaps hundreds or 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.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Mr. Polyak



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FOI-AO-11684

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Executive Director

Robert J. Freeman

September 9, 1999

Ms. Lorraine O. Taylor

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Taylor:

I have received your letter of August 20 and the materials attached to it. As a member of the Institutional Review Board (IRB) for Hutchings Psychiatric Center, you have questioned the legality and scope of a confidentiality agreement that IRB members are apparently required to sign. The agreement includes examples of information characterized as or "reasonably understood" to be confidential and provides that members "agree not to discuss, disclose, or reproduce any confidential information except to carry out [their] functions as an IRB member, or as otherwise required by law." In addition, a memorandum from the Research Foundation for Mental Hygiene, Inc. concerning confidentiality states that "IRB members have a legal and ethical duty to maintain the confidentiality of all information they receive in their capacity as members of the IRB."

You raised questions concerning the need to sign the agreement.

In this regard, the general functions of the Committee on Open Government involve offering advice and opinions concerning public access to and the disclosure of government information, primarily under the Freedom of Information and Personal Privacy Protection Laws. Consequently, the question of whether you "need to sign this confidentiality agreement" is beyond the jurisdiction of this office. However, I offer the following comments relating to the agreement and the notion of "confidentiality."

First, in general, I believe that the records and other information that come into the possession of IRB members are acquired in the performance of their official duties that are carried out directly or otherwise for the Office of Mental Health. By means of example, the letter that you sent to me may be in my physical possession, but it is in the legal custody of the Department of State. In the same vein, the information acquired by IRB members in the performance of their duties is, in my view, the property of the state, and outside the authority of the members to disclose in their discretion.

The Freedom of Information Law, in terms of its coverage, is consistent with the foregoing, for it pertains to "agency records." 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."

In a decision rendered by the state's highest court, the Court of Appeals, the matter involved records in possession of a not-for-profit corporation that carried out certain functions for the State University pursuant to contract and it was held that the records were held *for* the University and, therefore, were agency records that fell within the coverage of the Freedom of Information Law, even though they were not in the physical custody of the University [see Encore College Bookstores, Inc. v. Auxiliary Services Corporation of the State University, 87 NY2d 410 (1995)]. In like manner, materials acquired or prepared by IRB members would be maintained *for* the Office of Mental Health and would constitute agency records.

While I believe that the Research Foundation of Mental Hygiene, Inc. is an agency that falls within the requirements of the Freedom of Information Law [see e.g., Buffalo News v. Buffalo Enterprise Development Corp., 84 NY2d 488 (1994)], irrespective of that issue, my understanding is that its functions are performed for one or more agencies, such as the Office of Mental Health, and that, therefore, its records are maintained *for* an agency and are subject to rights conferred by the Freedom of Information Law.

In short, I believe that the records that come into the possession of IRB members are in the legal custody and control of an agency.

Second, although the use of the term "confidentiality" in the agreement is not entirely clear, the agreement, in general, does not appear to be inconsistent with law. Insofar as there may be inconsistency, I do not believe that it would be valid or enforceable. I note, too, that a statement cited earlier in the memorandum is broader, in my opinion, than the agreement itself. As indicated previously, the memorandum states in part that "IRB members have legal and ethical duty to maintain the confidentiality of *all information* they receive in their capacity as members..." The agreement itself, however, involves the discussion, disclosure, or reproduction of "*confidential information*". The term "confidential" is not defined, but examples of information "reasonably understood" to be confidential are described, such as human subject identifying data, proprietary information, medical information and the like.

From my perspective, based on judicial decisions, an assertion or promise of confidentiality, unless it is based upon a statute, is generally meaningless. When confidentiality is conferred by a statute, an act of the State Legislature or Congress, records fall outside the scope of rights of access pursuant to §87(2)(a) of the Freedom of Information Law, which states that an agency may withhold

records that "are specifically exempted from disclosure by state or federal statute". If there is no statute upon which an agency can rely to characterize records as "confidential" or "exempted from disclosure", the records are subject to whatever rights of access exist under the Freedom of Information Law [see Doolan v. BOCES, 48 NY 2d 341 (1979); Washington Post v. Insurance Department, 61 NY 2d 557 (1984); Gannett News Service, Inc. v. State Office of Alcoholism and Substance Abuse, 415 NYS 2d 780 (1979)]. As such, an assertion or promise of confidentiality, without more, would not in my view serve to enable an agency to withhold a record.

In the context of the kinds of records that may be pertinent to the duties of the Foundation, the IRB's and the Office of Mental Health, a statute that requires confidentiality is §33.13 of the Mental Hygiene Law. That statute essentially prohibits the disclosure of clinical records identifiable to a person receiving treatment except in circumstances that it prescribes. When records fall within the confidentiality requirements imposed by §33.13, they would be "specifically exempted from disclosure by...statute" in accordance with §87(2)(a) of the Freedom of Information Law.

Also pertinent to the duties of those concerned may be the Personal Privacy Protection Law, which deals in part with the disclosure of records or personal information by state agencies concerning data subjects. A "data subject" is "any natural person about whom personal information has been collected by an agency" [Personal Privacy Protection Law, §92(3)]. "Personal information" is defined to mean "any information concerning a data subject which, because of name, number, symbol, mark or other identifier, can be used to identify that data subject" [§92(7)]. For purposes of 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, when 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.

When either §33.13 of the Mental Hygiene Law or the Personal Privacy Protection Law applies, there is essentially no discretion to disclose to the public. In other circumstances, however, although records *may* be withheld, there is no obligation to do so.

Reference is made in the materials to "proprietary rights." Depending on the effects of disclosure, so-called "proprietary" information might properly be withheld under §87(2)(d) of the Freedom of Information Law. Nevertheless, unlike the provisions cited above, under §87(2)(d) and the remaining grounds for denial in the Freedom of Information Law, there is nothing in law that

would prohibit disclosure. Section 87(2)(d) permits (but does not require) an agency to withhold records or portions 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...”

The mere characterization of a record as “proprietary” or as a trade secret, like a claim of confidentiality, may be without substance unless there is a provision of law upon which it can be based; the capacity to deny access involves the extent to which disclosure “would cause substantial injury to the competitive position” of a commercial enterprise.

As I interpret the memorandum, a key element involves the “standards and procedures” that have been implemented to deal with requests for and the disclosure of records. Section 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 head or governing body of an agency 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.

From my perspective, it is routine to limit the authority of agency personnel and others to make disclosures on their own initiative or in response to requests. In many agencies, requests for records are forwarded as a matter of policy to the designated records access officer in order that he or she can make an initial determination to grant or deny access in accordance with applicable law. The direction given in the memorandum appears to be consistent with that kind of procedure.

In sum, it is likely that many of the records used or maintained by IRB members may be confidential”, but that would be so only when a statute prohibits disclosure. In other instances, there may be discretion to withhold under the Freedom of Information Law, but no legal obligation to do so. Perhaps most importantly, the Freedom of Information Law requires agencies to adopt

Ms. Lorraine O. Taylor

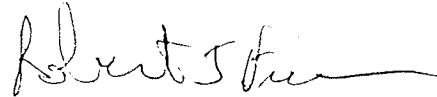
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regulations regarding the procedural implementation of the law. In accordance with such a procedure, one or more "records access officers" may be given the duty of coordinating an agency's response to requests and disclosure practices. Unless authority to disclose is otherwise granted to persons other than the records access officer, limiting the ability of those other persons to disclose is, in my opinion, within the discretion of an agency. I note, too, that there is nothing in the agreement which, in my view, limits access by IRB members or which in any way limits public rights of access in a manner inconsistent with law.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman".

Robert J. Freeman
Executive Director

RJF:tt

cc: Susan J. Delano
Robin Goldman
Roger Clingman



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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Executive Director

Robert J. Freeman

September 9, 1999

Ms. Carole Hayes Collier



The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Collier:

I have received your letter of August 20 and the materials attached to it. As a member of the Institutional Review Board (IRB) for Hutchings Psychiatric Center, you have questioned the legality and scope of a confidentiality agreement that IRB members are apparently required to sign. The agreement includes examples of information characterized as or "reasonably understood" to be confidential and provides that members "agree not to discuss, disclose, or reproduce any confidential information except to carry out [their] functions as an IRB member, or as otherwise required by law." In addition, a memorandum from the Research Foundation for Mental Hygiene, Inc. concerning confidentiality states that "IRB members have a legal and ethical duty to maintain the confidentiality of all information they receive in their capacity as members of the IRB."

You asked that I advise "as to whether [you] need to sign this confidentiality statement or challenge it as being too restrictive."

In this regard, the general functions of the Committee on Open Government involve offering advice and opinions concerning public access to and the disclosure of government information, primarily under the Freedom of Information and Personal Privacy Protection Laws. Consequently, the question of whether you "need to sign this confidentiality agreement" is beyond the jurisdiction of this office. However, I offer the following comments relating to the agreement and the notion of "confidentiality."

First, in general, I believe that the records and other information that come into the possession of IRB members are acquired in the performance of their official duties that are carried out directly or otherwise for the Office of Mental Health. By means of example, the letter that you sent to me may be in my physical possession, but it is in the legal custody of the Department of State. In the same vein, the information acquired by IRB members in the performance of their duties is, in my view, the property of the state, and outside the authority of the members to disclose in their discretion.

The Freedom of Information Law, in terms of its coverage, is consistent with the foregoing, for it pertains to "agency records." 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."

In a decision rendered by the state's highest court, the Court of Appeals, the matter involved records in possession of a not-for-profit corporation that carried out certain functions for the State University pursuant to contract and it was held that the records were held *for* the University and, therefore, were agency records that fell within the coverage of the Freedom of Information Law, even though they were not in the physical custody of the University [see Encore College Bookstores, Inc. v. Auxiliary Services Corporation of the State University, 87 NY2d 410 (1995)]. In like manner, materials acquired or prepared by IRB members would be maintained *for* the Office of Mental Health and would constitute agency records.

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From my perspective, based on judicial decisions, an assertion or promise of confidentiality, unless it is based upon a statute, is generally meaningless. When confidentiality is conferred by a statute, an act of the State Legislature or Congress, records fall outside the scope of rights of access

pursuant to §87(2)(a) of the Freedom of Information Law, which states that an agency may withhold records that "are specifically exempted from disclosure by state or federal statute". If there is no statute upon which an agency can rely to characterize records as "confidential" or "exempted from disclosure", the records are subject to whatever rights of access exist under the Freedom of Information Law [see Doolan v. BOCES, 48 NY 2d 341 (1979); Washington Post v. Insurance Department, 61 NY 2d 557 (1984); Gannett News Service, Inc. v. State Office of Alcoholism and Substance Abuse, 415 NYS 2d 780 (1979)]. As such, an assertion or promise of confidentiality, without more, would not in my view serve to enable an agency to withhold a record.

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Reference is made in the materials to "proprietary rights." Depending on the effects of disclosure, so-called "proprietary" information might properly be withheld under §87(2)(d) of the Freedom of Information Law. Nevertheless, unlike the provisions cited above, under §87(2)(d) and

the remaining grounds for denial in the Freedom of Information Law, there is nothing in law that would prohibit disclosure. Section 87(2)(d) permits (but does not require) an agency to withhold records or portions 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...”

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As I interpret the memorandum, a key element involves the “standards and procedures” that have been implemented to deal with requests for and the disclosure of records. Section 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 head or governing body of an agency 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.

From my perspective, it is routine to limit the authority of agency personnel and others to make disclosures on their own initiative or in response to requests. In many agencies, requests for records are forwarded as a matter of policy to the designated records access officer in order that he or she can make an initial determination to grant or deny access in accordance with applicable law. The direction given in the memorandum appears to be consistent with that kind of procedure.

In sum, it is likely that many of the records used or maintained by IRB members may be confidential”, but that would be so only when a statute prohibits disclosure. In other instances, there may be discretion to withhold under the Freedom of Information Law, but no legal obligation to do

Ms. Carole Hayes Collier

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so. Perhaps most importantly, the Freedom of Information Law requires agencies to adopt regulations regarding the procedural implementation of the law. In accordance with such a procedure, one or more "records access officers" may be given the duty of coordinating an agency's response to requests and disclosure practices. Unless authority to disclose is otherwise granted to persons other than the records access officer, limiting the ability of those other persons to disclose is, in my opinion, within the discretion of an agency. I note, too, that there is nothing in the agreement which, in my view, limits access by IRB members or which in any way limits public rights of access in a manner inconsistent with law.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:tt

cc: Susan J. Delano
Robin Goldman
Roger Clingman



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COMMITTEE ON OPEN GOVERNMENT

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September 9, 1999

Executive Director

Robert J. Freeman

Ms. Shawn Schultz
Citizen's Against the Dump
P.O. Box 93
Pattersonville, NY 12137

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Schultz:

I have received your undated letter, which reached this office on August 10.

You have sought an advisory opinion concerning a request made to the Town of Rotterdam on July 12 for the "Draft of the Sterling/Spectra Leachate investigation and remediation study of the Rotterdam MSW Landfill." You wrote that the request was denied on July 30 and that you appealed "on that same day." On August 2, you were informed that the Town Engineer, in your words, "had destroyed the draft since it was a draft and not a finalized report." You added that "[s]he was well aware this draft was under foil as [you] and the records access officer had been in touch with her on repeated occasions."

You have raised the following questions in relation to the foregoing:

- a) Did the town have the obligation to provide all or certain parts of the draft?
- b) Is this draft covered by attorney client privilege since a lawyer hired by the town reviewed it?
- c) What document is needed to prove the record no longer exists?
- d) If the record was destroyed what remedies are available to us?"

In this regard, I offer the following comments.

First, questions (a) and (b) will be considered together, for they both deal essentially with whether or the extent to which the draft should have been made available.

It is emphasized at the outset that the Freedom of Information Law, as a general matter, is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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, I point out that the Freedom of Information Law pertains to all agency records, and that §86(4) defines the term "record" expansively to mean:

"any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, I believe that the draft clearly constituted a town record that fell within the coverage of the Freedom of Information Law.

With respect to the attorney-client privilege, the fact that an attorney may have been retained to review a record would not alter the character of the record or transform it into privileged material. By means of example, if an attorney is hired to review public records, such as minutes of meetings, a developer's plans to construct a new building, or assessment records, his or her review of those records would in no way affect the public's right to obtain them under the Freedom of Information Law; again, the content, the character and the purpose for which the records were prepared would not change.

As I understand the matter, the draft was not prepared by or at the direction of an attorney retained by the Town. If that is so, the attorney client privilege would not be pertinent.

If records are prepared by or for an attorney, as in the case of a report prepared for litigation by an expert, they may be beyond the scope 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." When records are subject to the attorney-client privilege, they would be exempted from disclosure under §4503 of the Civil Practice Law and Rules (CPLR). Another statute that exempts records from disclosure is §3101(d) of the Civil Practice Law and Rules, which exempts material prepared for litigation from disclosure. It is emphasized, however, that it has been determined judicially that if records are prepared for multiple purposes, one of which includes eventual use in litigation, §3101(d) does not serve as a basis for withholding records; only when records are prepared solely for litigation can §3101(d) be properly asserted to deny access to records [see e.g., Westchester-Rockland Newspapers v. Mosczydlowski, 58 AD 2d 234 (1977)].

Again, as I interpret your comments, the draft was not prepared by or at the direction of an attorney, nor was it prepared solely for litigation. If that is so, neither §87(2)(a) nor the attorney-client privilege would in my view have authorized the Town to withhold the draft.

If Sterling/Spectra served as a consultant for the Town, another ground for denial would be relevant to an analysis of rights of access. Due to its structure, however, that provision would likely have required 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, 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.

In sum, assuming that the draft was prepared by a consultant retained by the Town, those portions of the draft consisting of statistical or factual information would, in my opinion, have been available.

If Sterling/Spectra did not serve as a consultant, it does not appear that any ground for denial would have applied. In that event, I believe that the report would have been available in its entirety.

Next, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

I point out that in Key v. Hynes [613 NYS 2d 926, 205 AD 2d 779 (1994)], it was found that a court could not validly accept conclusory allegations as a substitute for proof that an agency could not locate a record after having made a "diligent search". However, in another decision, such an allegation was found to be sufficient when "the employee who conducted the actual search for the documents in question submitted an affidavit which provided an adequate basis upon which to

conclude that a 'diligent search' for the documents had been made" [Thomas v. Records Access Officer, 613 NYS 2d 929, 205 AD 2d 786 (1994)].

It is also suggested that you inquire as to whether Sterling/Spectra maintains a copy of the draft. As indicated earlier, the definition of "record" includes information produced *for* an agency. Therefore, if that firm maintains a copy of the draft or has stored the draft electronically, I believe that the Town would be required to acquire a copy for the purpose of reviewing it and disclosing its contents to the extent required by the Freedom of Information Law.

With respect to the destruction of the draft, pertinent 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 suggested that you contact that agency to ascertain the applicable retention period concerning the draft.

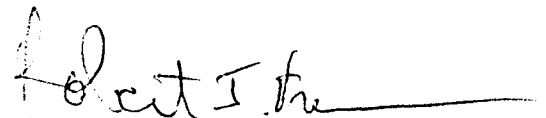
Finally, §240.65 entitled "Unlawful prevention of public access to records" and §89(8) of the Freedom of Information Law deal with the destruction of records requested pursuant to the Freedom of Information Law. The former states that:

"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. As in the case of any violation of the Penal Law, such violation may be prosecuted by a district attorney.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Town Clerk
Town Engineer



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIA AO - 11687

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Alexander F. Treadwell

September 9, 1999

Executive Director

Robert J. Freeman

Mr. Douglas Hewitt

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Hewitt:

I have received your letter of August 9, as well as the materials attached to it.

On June 21, you sent a request to the Office of the Oneida County District Attorney for "[a]ll information regarding...the investigation into the Village of Yorkville, Its Employees and the Yorkville Police Department including Past and Present employees' regarding [your] complaint to the Oneida County District Attorneys Office." Although you indicated that you had seen some of the records in the presence of the District Attorney, the request was denied "pursuant to Public Officers Law §87(2)(a), (b), (e) i, (e) ii, (e) iii, (e) iv, (g) i, (g) ii and (g) iii." In addition, you were informed that the request was "overly broad, vague and not readily identifiable..." Although you appealed the denial in a letter received by the Office of the District Attorney on July 7, as of the date of your letter to this office, you had received no further response.

You asked that this office investigate the matter.

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee has neither the jurisdiction nor the staff to conduct an investigation. As such, the following remarks will involve the treatment of your request under the Freedom of Information Law.

First, although the Freedom of Information Law as originally enacted required that an applicant seek "identifiable" records, since 1978, §89(3) of that statute has stated that an applicant must "reasonably describe" the records sought. In considering that standard, the State's highest court has found that requested records need not be "specifically designated", that to meet the standard, the terms of a request must be adequate to enable the agency to locate the records, and that an agency

must "establish that 'the descriptions were insufficient for purposes of locating and identifying the documents sought'...before denying a FOIL request for reasons of overbreadth" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

Although it was found in the decision cited above that the agency could not reject the request due to its breadth, it was also stated that:

"respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency']" (id. at 250).

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping systems. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number.

In the context of your request, I am unaware of the means by which the Office of the District Attorney maintains records falling within the scope of your request. If that agency 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.

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 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.

Insofar as records were disclosed to you in the past, I do not believe that the Office of the District Attorney could now choose to withhold those same records.

With respect to the remainder of the records falling within the scope of your request, the Court of Appeals expressed its general view of the intent of the Freedom of Information Law most recently in 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 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 Office of the District Attorney engaged in a blanket denial alluding to 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 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 some of the records sought constitute inter-agency or 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."

Only to the extent that the harmful effects of disclosure described in subparagraphs (i) through (iv) of §87(2)(e) does an agency have the authority to deny access to records. It would appear that any investigation of your complaint has been terminated. If that is so, the primary exception in §87(2)(e), the provision dealing with interference with an investigation, would likely be irrelevant.

Section 87(2)(b) permits an agency to withhold records insofar as disclosure would result in "an unwarranted invasion of personal privacy." Frequently, names or other personally identifying details may be deleted to protect privacy, in which case the remainder of a record may be available.

Section 87(2)(a) pertains to records that "are specifically exempted from disclosure by state or federal statute." The denial merely referred to that provision; it does not cite any statute that would exempt the records of your interest from disclosure.

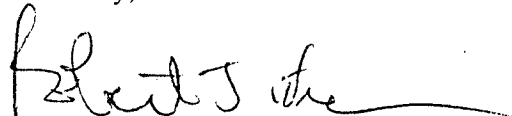
Lastly, §89(4)(a) of the Freedom of Information Law pertains to the right to appeal a denial of access to records and states in relevant part that:

"any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

It has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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: Kurt D. Hameline
Paul J. Hernon



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11688

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Alexander F. Treadwell

Executive Director

Robert J. Freeman

September 9, 1999

Mr. Nathan McBride
95-A-6015
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. McBride:

I have received your letter of August 9. You referred to denials of your requests for records by the office of a district attorney on the ground that the records had previously been furnished to your attorney. You wrote, however, that your requests made under the Freedom of Information Law to your attorney have not been answered.

In this regard, first, the records maintained by your attorney are likely not subject to the Freedom of Information Law. That statute pertains to agency records, and §86 (3) defines the term "agency" to mean:

"any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, the Freedom of Information Law generally applies to records maintained by governmental entities. Unless your attorney is a public defender, i.e., a county employee, it is unlikely that the attorney would be subject to the Freedom of Information Law.

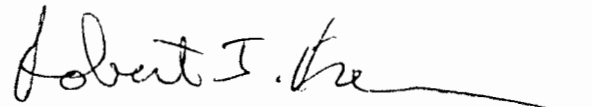
Second, as indicated to you in a letter of December 8, 1997, based on the decision rendered in Moore v. Santucci [151 AD2d 677 (1989)], if a record was made available to you or your attorney, there must be a demonstration that neither you nor your attorney possesses the record in order to successfully 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. Alternatively, if your attorney fails to answer, it is suggested that you document such failure and present it to the office of its district attorney as by means of demonstrating that you have no way of obtaining the records previously disclosed to your attorney.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and extends across the width of the page.

Robert J. Freeman
Executive Director

RJF:tt



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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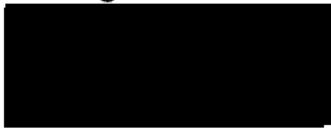
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Joseph J. Seymour
Alexander F. Treadwell

September 9, 1999

Executive Director

Robert J. Freeman

Ms. Regina LaNoce



The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. LaNoce:

As you are aware, your letter of August 9 addressed to Attorney General Spitzer 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.

According to your correspondence, you wrote to Assemblyman Jeffrion Aubry, Chairman of the Assembly Committee on Corrections, and requested certain minutes of meetings of the Committee. As of the date of your letter to the Attorney General, you had received no response and you asked whether Assemblyman Aubry is "required, by law, to provide [you] with the information...within a reasonable amount of time."

In this regard, pursuant to the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), each agency is required to designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests, and requests should generally be made to that person. Although the Assembly is not an "agency" (see Freedom of Information Law, §86), it has adopted rules and procedures that include the designation of a records access officer. In my view, the Assemblyman should either have responded to your request directly or forwarded the request to the Assembly's records access officer, Ms. Sharon Walsh. With this response to you, I will forward a copy of your request to her.

For future reference, I note that the Freedom of Information Law provides direction concerning the time and manner in which an entity must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

Ms. Regina LaNoce

September 9, 1999

Page -2-

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

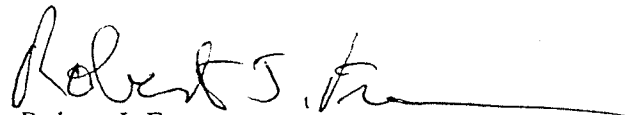
If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an entity delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Jeffrion Aubry
Sharon Walsh



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-A0-11690

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Alexander F. Treadwell

September 9, 1999

Executive Director

Robert J. Freeman

Mr. Harvey M. Elentuck



The staff of the Committee on Open 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 postcard in which you sought advice.

According to your correspondence, the records access officer at the Office of Labor Relations of the New York City Board of Education has granted your request to inspect records, "138,000 pages of one type of record category and 30,000 pages of a different type of record category." However, you wrote that "he is seeking to impose a time limit of 4 additional sessions at 4 hours per session." You wrote that you "want a reasonable amount of time to finish reading the material" (emphasis yours).

In this regard, in my experience relating to the Freedom of Information Law, I have not encountered a situation in which a request has been made and granted with respect to so large a volume of material. From my perspective, the primary issue involves the reasonableness of the response in conjunction with attendant facts. I am unaware of the manner in which the records are maintained, whether you have been given the authority to browse through all of the two categories of records, whether they must be physically retrieved for you on each occasion in which you seek to read them, whether they may be in use by agency staff, etc. In short, whether the limitation in terms of the number of "sessions" during which you may read the records is valid is in my view dependent on the reasonableness of the agency's response in conjunction with the kinds of factors mentioned.

Notwithstanding the foregoing, when a date that is mutually convenient to you and the agency for your inspection of the records, I believe that you may read them during the entirety of the agency's regular business hours.

Mr. Harvey M. Elentuck

September 9, 1999

Page -2-

By way of background, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee to promulgate regulations concerning the procedural implementation of the Law (see 21 NYCRR Part 1401). In turn, §87(1) requires agencies to adopt rules and regulations consistent with the Law and the Committee's regulations.

Section 1401.2 of the regulations, provides in relevant part that:

"(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so..."

Section 1401.4 of the regulations, entitled "Hours for public inspection", states that:

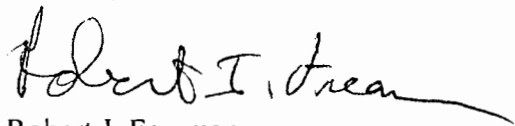
"(a) Each agency shall accept requests for public access to records and produce records during all hours they are regularly open for business."

Relevant to your inquiry and the foregoing is a decision rendered by the Appellate Division, Second Department. Among the issues was the validity of a similar limitation regarding the time permitted to inspect records established by a village pursuant to regulation. The Court held that the village was required to enable the public to inspect records during its regular business hours, stating that:

"...to the extent that Regulation 6 has been interpreted as permitting the Village Clerk to limit the hours during which public documents can be inspected to a period of time less than the business hours of the Clerk's office, it is violative of the Freedom of Information Law..."
[Murtha v. Leonard, 620 NYS 2d 101 (1994), 210 AD 2d 411].

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Thomas a. Liese



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11691

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September 13, 1999

Executive Director

Robert J. Freeman

Mr. Pedro Vega III
77-B-1532
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. Vega:

I have received your letter of August 8 concerning a partial denial of access to records by the Division of Parole. It appears that you have appealed to this office.

In this regard, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to determine appeals and cannot 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 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 noted that the state's highest court has held that a failure to inform a person denied access to records of the right to appeal enables that person to seek judicial review of a denial. Citing the Committee's regulations and the Freedom of Information Law, the Court of Appeals in Barrett v. Morgenthau held that:

"[i]nasmuch as the District Attorney failed to advise petitioner of the availability of an administrative appeal in the office (see, 21 NYCRR 1401.7[b]) and failed to demonstrate in the proceeding that the procedures for such an appeal had, in fact, even been established (see, Public Officers Law [section] 87[1][b], he cannot be heard to complain that petitioner failed to exhaust his administrative remedies" [74 NY 2d 907, 909 (1989)].

For your information and future reference, the person designated by the Division of Parole to determine appeals is Terrence X. Tracy, Counsel to the Division.

Next, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Since I am unaware of the contents of the records in which you are interested, or the effects of their disclosure, I cannot offer specific guidance. Nevertheless, the following paragraphs will review the provisions that may be significant in determining rights of access to the records in question.

Of potential significance is §87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". That provision might be applicable relative to the deletion of identifying details in a variety of situations, i.e., where a record identifies a confidential source or a witness, for example.

Perhaps the most relevant provision concerning access to records maintained by law enforcement agencies is §87(2)(e), which permits an agency to withhold records that:

"are compiled for law enforcement purposes and which, if disclosed, would:

- i. interfere with law enforcement investigations or judicial proceedings;
- ii. deprive a person of a right to a fair trial or impartial adjudication;
- iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
- iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in sub- paragraphs (i) through (iv) of §87(2)(e).

Another possible ground for denial is §87(2)(f), which permits withholding to the extent that disclosure "would endanger the life or safety of any person". The capacity to withhold on that basis is dependent upon the facts and circumstances concerning an event.

The last relevant ground for denial is §87(2)(g). The cited provision permits an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations; or
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government... "


It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial applies. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

Records prepared by employees of an agency and communicated within the agency or to another agency would in my view fall within the scope of §87(2)(g). Those records might include opinions or recommendations, for example, that could be withheld.

Pedro Vega III
September 13, 1999
Page -4-

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: FPO II Gibbons
Steven H. Philbrick



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AD-11692

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Joseph J. Seymour
Alexander F. Treadwell

September 13, 1999

Executive Director

Robert J. Freeman

Ms. Anita Rubin
Camp Paradise Road
P.O. Box 744
Fleischmanns, NY 12430

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Rubin:

I have received your letter of August 12, as well as a variety of materials relating to it, all of which pertain to the efforts of yourself and others to stop a proposal to site a junkyard in the Village of Fleischmanns. Part of those efforts have involved requests for records, and you have asked that I advise with respect to your "legal rights and actions [you] can pursue."

In this regard, it is emphasized at the outset that the authority of the Committee on Open Government is limited to matters involving the statutes within its advisory jurisdiction. I am not an expert with respect to election or election law related issues or civil rights matters. Consequently, the ensuing comments will be restricted to issues involving the Freedom of Information Law and the relationship between that statute and other provisions of law. I note, too, that some of my remarks may reiterate statements or opinions offered to you or others in previous correspondence.

First, the Freedom of Information Law pertains to existing records, and §89(3) of that statute provides in relevant part that an agency need not create a record in response to a request for information. If, for example, there is no record identifying the person or organization that challenged your vote, there would be no obligation on the part of Village officials to prepare a record containing that information to comply with the Freedom of Information Law.

Second, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

I point out that in Key v. Hynes [613 NYS 2d 926, 205 AD 2d 779 (1994)], it was found that a court could not validly accept conclusory allegations as a substitute for proof that an agency could not locate a record after having made a "diligent search". However, in another decision, such an allegation was found to be sufficient when "the employee who conducted the actual search for the documents in question submitted an affidavit which provided an adequate basis upon which to conclude that a 'diligent search' for the documents had been made" [Thomas v. Records Access Officer, 613 NYS 2d 929, 205 AD 2d 786 (1994)].

Pertinent in my view may be 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 regard 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.

Section 240.65 of the Penal Law entitled "Unlawful prevention of public access to records" and §89(8) of the Freedom of Information Law deal with the destruction of records requested pursuant to the Freedom of Information 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. As in the case of any violation of the Penal Law, such violation may be prosecuted by a district attorney.

Third, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I 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).

Next, since you referred to categorical denials of access to records, 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.*).

You also wrote that the Village Clerk stated that records could not be made available due to the pendency of litigation. In this regard, as stated by the Court of Appeals in a case involving a request made under the Freedom of Information Law by a person involved in litigation against an agency: "Access to records of a government agency under the Freedom of Information Law (FOIL) (Public Officers Law, Article 6) is not affected by the fact that there is pending or potential litigation between the person making the request and the agency" [*Farbman v. NYC Health and Hospitals Corporation*, 62 NY 2d 75, 78 (1984)]. Similarly, in an earlier decision, the Court of Appeals determined that "the standing of one who seeks access to records under the Freedom of Information Law is as a member of the public, and is neither enhanced...nor restricted...because he is also a litigant or potential litigant" [*Matter of John P. v. Whalen*, 54 NY 2d 89, 99 (1980)]. The Court in *Farbman, supra*, discussed the distinction between the use of the Freedom of Information Law as opposed to the use of discovery in Article 31 of the Civil Practice Law and Rules (CPLR). Specifically, it was found that:

"FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on governmental decision-making, its ambit is not confined to records actually used in the decision-making process (*Matter of Westchester Rockland Newspapers v. Kimball*, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request.

"CPLR article 31 proceeds under a different premise, and serves quite different concerns. While speaking also of 'full disclosure' article 31 is plainly more restrictive than FOIL. Access to records under CPLR depends on status and need. With goals of promoting both the ascertainment of truth at trial and the prompt disposition of actions (*Allen v. Crowell-Collier Pub. Co.*, 21 NY 2d 403, 407), discovery is at the outset limited to that which is 'material and necessary in the prosecution or defense of an action'" [see *Farbman, supra*, at 80].

Based upon the foregoing, the pendency of litigation would not, in my opinion, affect either the rights of the public or a litigant under the Freedom of Information Law.

Lastly, as I understand the Election Law, absentee ballots and ballot envelopes are beyond the coverage of the Freedom of Information Law and may be examined only pursuant to court order. Relevant with regard to those records are §87(2)(a) of the Freedom of Information Law and §3-222(3) of the Election Law. The former pertains to records that are "specifically exempted from disclosure by state or federal statute." The latter is such a statute, for it and provides in relevant part that:

"Except as hereinafter provided, packages of protested, void and wholly blank ballots, packages of unused ballots and all absentee and military, special federal, special presidential and emergency ballots and ballot envelopes, if any, opened or unopened, shall be preserved for two years after the election. Except as hereinafter provided, boxes contained voted paper ballots shall be preserved inviolate for four months after the election, or until one month before the next election occurring within five months after a preceding election if such boxes are needed for use at such next election and if the officer or board in charge of such voted paper ballots is required by law to furnish ballot boxes therefor. Provided, however, that such ballot boxes and such packages may be opened, and their contents and the absentee and military, special federal, special presidential and emergency ballots and ballot envelopes may be examined, upon the order of any court or justice of competent jurisdiction" (emphasis added).

Based on the foregoing, absentee ballots and ballot envelopes must be "preserved inviolate", unless a court order is issued authorizing their examination.

On the other hand, however, in a statute dealing with absentee ballot applications, Election Law, §8-402, subdivision (7) states that:

"The board shall keep a record of applications for absentee ballots as they are received, showing the names and residences of the applicants, and their party enrollment in the case of primary elections, and, as soon as practicable shall, when requested, give to the chairman of each political party or independent body in the county, and shall make available for inspection to any qualified voter upon request, a complete list of all applicants to whom absentee voters' ballots have been delivered or mailed, containing their names and places of residence as they appear on the registration record, including the election district and ward, if any..."

Similarly, §3-220(1) of the Election Law states in part that: "All registration records, certificates, lists and inventories referred to in, or required by, this chapter shall be public records..."

Based on the foregoing, it is clear in my view that the names and address of applicants for absentee ballots and voter registration lists identifying those who voted should be readily available.


Ms. Anita Rubin
September 13, 1999
Page -8-

I recognize that the provisions referenced above involve county boards of elections. However, I am unaware of any provision of the Election Law, Article 15, which pertains to villages elections, that would provide direction to the contrary.

With respect to the content of the applications, I believe that the Freedom of Information Law would govern in determining rights of access, and depending on their contents, portions of those documents might justifiably be withheld. For example, if the applicant includes reference to a medical condition or disability, that portion of the record could in my opinion be withheld as an unwarranted invasion of personal privacy [see Freedom of Information Law, §87(2)(b)]. If, however, such a record indicates that the absentee is a student, that kind of detail would not in my opinion be so intimate as to constitute an unwarranted invasion of personal privacy if disclosed.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees
Lorraine DeMarfio, Clerk



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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David A. Schulz
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Alexander F. Treadwell

Executive Director

Robert J. Freeman

September 13, 1999

Mr. Thomas Revander
97-A-4447
Clinton Correctional Facility
P.O. Box 2001
Dannemora, NY 12929

Dear Mr. Revander:

I have received your letter of September 9 in which you appealed an apparent denial of access to records maintained by courts and a legal aid organization.

In this regard, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. It is not authorized to determine appeals or to compel an agency to grant or deny access to records. For future reference, the provision in the Freedom of Information Law pertaining to the right to appeal, §89(4)(a), states in relevant part that:

"any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Notwithstanding the foregoing, I do not believe that the Freedom of Information Law would apply in the situations that you described. That statute 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:

Mr. Thomas Revander
September 13, 1999
Page -2-

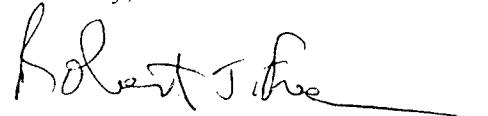
"the courts of the state, including any municipal or district court,
whether or not of record."

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 statute as the basis for the request.

Lastly, access to pre-sentence reports is governed by the provisions of §390.50 of the Criminal Procedure Law, and it is suggested that you review that statute.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal line extending to the right.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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September 13, 1999

Executive Director

Robert J. Freeman

Mr. Delano Brown
81-A-4887
Bare Hill Road
P.O. Box 10
Malone, NY 12953

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Brown:

I have received your letter of August 10 in which you raised issues concerning an unanswered request for records made to your facility and sought information "on how to get a community physician and dentist to proofread [your] medical and dental records and to be used at [your] trial as an expert witness..."

In this regard, the function of the Committee on Open Government involves providing advice and guidance concerning the Freedom of Information Law. Consequently, I have no information relating to the use of expert witnesses. As your remarks pertain to the Freedom of Information Law, I offer the following comments.

First, that statute provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges

that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

For your information, the person designated at the Department of Correctional Services is Anthony J. Annucci, Counsel to the Department.

Second, your request involves a variety of records relating to hearings precipitated by an incident leading to the preparation of a misbehavior report and other documentation. Some aspects of the records sought would likely be available; others could likely 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. Since I am unaware of the contents of the records in which you are interested, or the effects of their disclosure, I cannot offer specific guidance. Nevertheless, the following paragraphs will review the provisions that may be significant in determining rights of access to the records in question.

Of potential significance is §87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". That provision might be applicable relative to the deletion of identifying details in a variety of situations, i.e., where a record identifies an informant 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.

The last relevant ground for denial is §87(2)(g). The cited provision permits an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

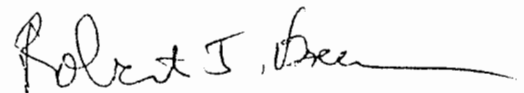
- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations; or
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government... "

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial applies. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

Records prepared by employees of an agency and communicated within the agency or to another agency would in my view fall within the scope of §87(2)(g). Those records might include opinions or recommendations, for example, that could be withheld.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Inmate Records Coordinator



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COMMITTEE ON OPEN GOVERNMENT

FOIL - AD - 11695

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September 13, 1999

Executive Director

Robert J. Freeman

Mr. Matthew Schneider
New York Legal Assistance Group
130 East 59th St. - 14th Floor
New York, NY 10022

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Schneider:

I have received your letter of August 13. You wrote that you received "an adequate response to a FOIL request from a NYC agency about 3 months ago, but have not responded to the invitation to submit a check or make an appointment for an inspection of the documents." You have asked whether "there [is] any statute of limitations type issue related to response time."

In this regard, there is nothing in the Freedom of Information Law that deals directly with the issue, and I know of no judicial decision that addresses it. In response to similar questions raised by agencies that have complied with law by retrieving requested records that have not been inspected by an applicant, it has been suggested that the agency inform the applicant that unless the records are inspected by a certain date, the request will be considered to have been withdrawn.

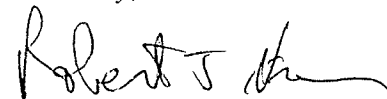
As a general matter, I believe that when a request for copies of records is served upon an agency, both the agency and the applicant bear a responsibility. The agency is responsible for compliance with the Freedom of Information Law by retrieving the records sought and disclosing them to the extent required by law. The agency is also required to produce copies of records "[u]pon payment of, or offer to pay, the fee prescribed therefor" [see Freedom of Information Law, §89(3)]. Concurrently, if the applicant requests copies, I believe that he or she bears the responsibility of paying the appropriate fee.

If an agency has prepared copies of records in good faith and the applicant fails or refuses to pay the fee, I do not believe that the agency would be required to make available those copies that have been prepared. Further, 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.

Mr. Matthew Schneider
September 13, 1999
Page -2-

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11696

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Alexander F. Treadwell

September 13, 1999

Executive Director

Robert J. Freeman

Mr. Michael Paulk
99-R-1086
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. Paulk:

I have received your undated letter, which reached this office on August 16. You complained that a court clerk, the office of a district attorney, a police department and your attorney have not responded to requests made under the Freedom of Information 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 resubmit your request to the clerk of the court, citing an applicable provision of law as the basis for your request.

For the same reason, a private attorney would not be subject to the Freedom of Information Law.

On the other hand, however, an office of a district attorney or a police department would constitute an agency, and I note that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

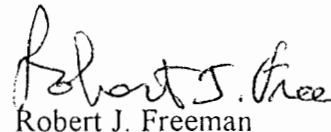
"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Mr. Michael Paulk
September 13, 1999
Page -3-

I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:jm



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FOIL-AO 11697

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Alexander F. Treadwell

September 13, 1999

Executive Director

Robert J. Freeman

Mr. Micheal Ross
93-A-1664
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. Ross:

I have received your letter of August 12. In brief, in response to a request made to the Division of State Police for a copy of a criminal complaint made against you that led to your arrest and indictment, you were informed that "[y]ou may wish to contact the courts for copies of the complaint." It is your belief that the Division maintains a copy of the record in question and that the response does not "sound right."

In this regard, if the Division of State Police maintains a copy of the record, I believe that it is obliged to grant or deny access to that record, even if another copy or the original record is available elsewhere. The Freedom of Information Law pertains to all agency records, and §86(4) of that statute defines the term "record" broadly to mean:

"any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, whether a record is an original or a copy, if it is kept by an agency, I believe that it would constitute a "record" that fall within the requirements of the Freedom of Information Law.

Mr. Micheal Ross
September 13, 1999
Page -2-

In the alternative, a request may be made to the court in which the proceeding was conducted. Should you choose to do so, I point out that the Freedom of Information Law would not apply. As indicated earlier, that statute 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:

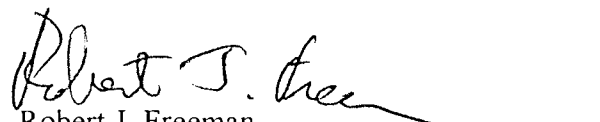
"the courts of the state, including any municipal or district court, whether or not of record."

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 might submit your request to the clerk of the court, citing an applicable provision of law as the basis for your request.

I hope that the foregoing serves to clarify your understanding of the matter and that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:jm

cc: Sandra J. Croote-Fluno, Technical Sergeant



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

707C-AD-11698

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Executive Director

September 14, 1999

Robert J. Freeman

Mr. Ronald Logan

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Logan:

I have received your letter of August 10 relating to a request made to the Commission of Correction for "[a]ll information in regard to directive 6910 (Criminal Prosecution of Inmates), not limited to proposal, amendments and promulgation." You were informed by the Commission's Acting Records Access Officer, Scott E. Steinhardt, that the records sought would be made available upon payment of the requisite fee. It appears that you believe that your request encompasses a greater number of records than is suggested by the fee.

Having reviewed the correspondence, in which you made your request clear, and in which, in my view, Mr. Steinhardt clearly expressed his understanding of your request, I believe that his response was fully appropriate. It is noted that the Freedom of Information Law pertains to existing records. If no records exist or were prepared in relation to directive 6910 other than those to which Mr. Steinhardt alluded in his response, the response in my opinion represented compliance with law.

I note, too, that it has been held that an agency may require payment of the fee for copying records in advance of making the copies (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: Scott E. Steinhardt



STATE OF NEW YORK
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FOIL-AO-11699

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Alexander F. Treadwell

Executive Director

Robert J. Freeman

September 14, 1999

Mr. William Quinones
98-R-5530
Riverview Correctional Facility
P.O. Box 247
Ogdensburg, NY 13669

Dear Mr. Quinones:

I have received your letter of August 10. You have sought an opinion concerning whether your attorney should furnish you "all pertinent data" so that you can prepare your "own defense in an appeal."

In this regard, the Committee on Open Government is authorized to provide advice relating to the Freedom of Information Law, and it is unlikely that your attorney would be required to comply with that statute.

The Freedom of Information Law pertains to agency records, and §86(3) of the Law defines the term "agency" to mean:

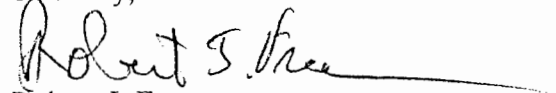
"any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, the Freedom of Information Law generally applies to records of entities of state and local government. Unless your attorney is a public defender who is a public employee, I do not believe that he or she would be obliged to disclose records to you under that statute. Whether he or she should do so pursuant to different laws or rules involves a matter beyond the jurisdiction or expertise of this office.

Mr. William Quinones
September 14, 1999
Page - 2 -

I regret that I cannot be of greater assistance.

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and extends to the right with a long horizontal flourish.

Robert J. Freeman
Executive Director

RJF:tt



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11700

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Alexander F. Treadwell

September 14, 1999

Executive Director

Robert J. Freeman

Mr. D. Duamutef
84-A-1026
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. Duamutef:

I have received your letter of August 9. In brief, you indicated that you were informed by the Department of Correctional Services that records that you requested would be made available by a certain date, but that it had failed to make the records available as of the date of your letter to this office.

In this regard, while you did not describe the nature of the records sought, 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,

Mr. D. Duamutef
September 14, 1999
Page -2-

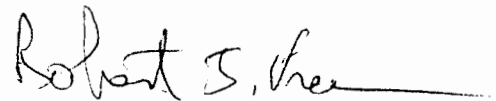
who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and extends across the width of the name.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11701

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Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

September 14, 1999

Mr. Jarvis Grubbs
98-R-2322
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. Grubbs:

I have received your letter of August 12 and the correspondence attached to it. You have asked that I review and comment with respect to it.

In this regard, first, you referred to a section of the New York Code of Rules and Regulations (NYCRR) and contended that the response to your request for records by the New York City Police Department is inconsistent with those regulations. In this regard, the regulations to which you referred involve procedures promulgated by the Division of Criminal Justice Services in relation to requests that it receives under the Freedom of Information Law; those regulations do not apply to the New York City Police Department or any other agency.

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.

However, in my opinion, if, as a matter of practice or policy, an agency acknowledges the receipt of requests and indicates in every instance that it will determine to grant or deny access to records "within 120 days" or some other particular period, following the date of acknowledgement, such a practice or policy would be contrary to the thrust of the Freedom of Information Law. If a request is voluminous and a significant amount of time is needed to locate records and review them to determine rights of access, 120 days, in view of those and perhaps the other kinds of factors mentioned earlier, might be reasonable. On the other hand, if a record or report is clearly public and can be found easily, there would appear to be no rational basis for delaying disclosure for as much as 120 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).

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Since I am unaware of the contents of the records in which you are interested, or the effects of their disclosure, I cannot offer specific guidance. Nevertheless, the following paragraphs will review the provisions that may be significant in determining rights of access to the records in question.

Of potential significance is §87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". That provision might be applicable relative to the deletion of identifying details in a variety of situations, i.e., where a record identifies a confidential source or a witness, for example.

Perhaps the most relevant provision concerning access to records maintained by law enforcement agencies is §87(2)(e), which permits an agency to withhold records that:

"are compiled for law enforcement purposes and which, if disclosed, would:

i. interfere with law enforcement investigations or judicial proceedings;

- ii. deprive a person of a right to a fair trial or impartial adjudication;
- iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
- iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in sub- paragraphs (i) through (iv) of §87(2)(e).

Another possible ground for denial is §87(2)(f), which permits withholding to the extent that disclosure "would endanger the life or safety of any person". The capacity to withhold on that basis is dependent upon the facts and circumstances concerning an event.

The last relevant ground for denial is §87(2)(g). The cited provision permits an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations; or
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government... "

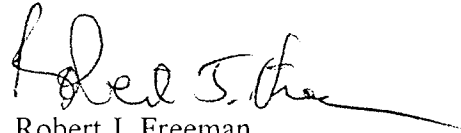
It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial applies. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

Records prepared by employees of an agency and communicated within the agency or to another agency would in my view fall within the scope of §87(2)(g). Those records might include opinions or recommendations, for example, that could be withheld.

Mr. Jarvis Grubbs
September 14, 1999
Page -4-

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOTL-40-11702

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Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

September 14, 1999

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.

Dear Mr. Fitzgerald:

I have received your letter of August 13, as well as the correspondence attached to it. In brief, you have sought assistance in relation to delays that you have encountered in your efforts in gaining access to records of the town of Yorktown.

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:

Mr. Dennis M. Fitzgerald

September 14, 1999

Page - 2 -

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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)].

With regard to the right to appeal a denial of access to records, 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 Court of Appeals 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, having reviewed your requests, some appear to be relatively simple, such as those involving forms. In others, there may be an issue involving the extent to which the requests have met the requirement 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,

Mr. Dennis M. Fitzgerald

September 14, 1999

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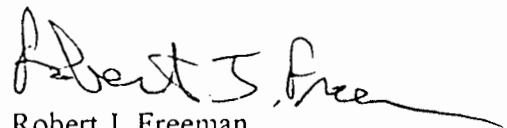
potentially requiring a search of every file in the possession of the agency']" (id. at 250).

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 requests would have met the requirement of reasonably describing the records. On the other hand, if the records are not maintained in a manner that permits their retrieval except by reviewing perhaps hundreds or 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. For instance, you requested "[a]ll summons, complaints, stop work orders, and court decisions, issued from January 1, 1995 to date for any alleged violations of chapter 178 of the Town Code". Again, I am unaware of the manner in which the Town maintains its records. If the records in question are filed by means of the nature or a violation, it may not be difficult to locate them, in which case the request would reasonably describe the records. However, if the Town maintains records concerning all violations of the Town Code chronologically, by the names of violators or by address, for example, rather than by means of the section of the Code that may have been violated or similar identifier, there may be no means of locating the records of your interest without reviewing all such records. In that event, the requests, to that extent, likely would not in my opinion reasonably describe the records.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Linda G. Cooper, Supervisor
Hon. Alice Roker, Clerk



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11703

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Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

September 15, 1999

Mr. Maurice J. Hurd
Director of Personnel
County of Oswego
Department of Personnel
county Building
46 East Bridge Street
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 Mr. Hurd:

I have received your letter of August 16 in which you sought my views concerning "the public accessibility of exam scores prior to the establishment of the official eligible list." You indicated that you "are uncertain whether [you] must provide the score of passing candidates prior to the official establishment of the eligible list."

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to all agency records, and §86(4) of the Law defines the term "record" expansively to mean:

"any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, once an eligible list exists, either in paper or electronic form, and irrespective of whether it is characterized as "official", I believe that it would constitute a "record" that falls within the coverage of the Freedom of Information Law.

Mr. Maurice J. Hurd
September 15, 1999
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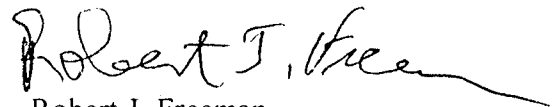
Second, as you are aware, the Regulations of the Department of Civil Service, §71.3, indicate that eligible lists "may be published with the standing of persons named in them". There is no provision of law of which I am aware that focuses directly on records identifying those who passed civil service exams prior to the establishment of the official eligible list. That being so, 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. From my perspective, only one of the grounds for denial is pertinent to the issue, and I do not believe that it could be asserted to withhold a record identifying those who passed an exam.

Specifically, §87(2)(b) authorizes an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." In my opinion, disclosure of the fact that individuals have passed a civil service exam would not fall within the exception, for essentially the same information is later made available in a record characterized as "official", the eligible list. I agree with your practice of withholding records insofar as they identify persons who failed an exam; a failure would be embarrassing, it would denote ineligibility to serve in a position and would, in my view, be nobody's business. Consequently, it has consistently been advised that the identities of those who failed an exam may be withheld as an unwarranted invasion of personal privacy. It has also been advised that a list of those who took an exam may be withheld, for it could later be compared with the eligible list, thereby enabling the recipient of those records to ascertain who may have failed. In contrast, I do not believe that there would be any similar harm associated with passing an exam, especially when the same information will later be part of a record that is clearly accessible to the public.

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-11704

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Alexander F. Treadwell

Executive Director

Robert J. Freeman

September 15, 1999

Mr. Delano McClain
96-A-3841
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. McClain:

I have received your letter of August 13 in which you sought an opinion concerning access to a variety of records relating to your arrest.

In this regard, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Since I am unaware of the contents of 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

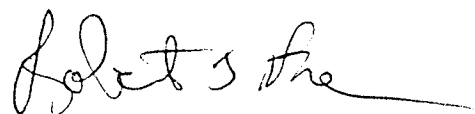
Mr. Delano McClain
September 15, 1999
Page - 5 -

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,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:tt



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11705

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

September 15, 1999

Mr. Anthony Cook
90-T-1693
Great Meadow Correctional Facility
P.O. Box 51
Comstock, NY 12821-0051

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Cook:

I have received your letter of August 16. You referred to a situation in which you "merely wish to inspect/review...documents", but "the officials at Great Meadow adamantly refuse to provide [you] access to the same...[and] instead insist that [you] pay \$.25 per page for the same." You have asked that this office "investigate this matter and cause the New York State Department of Correctional Services and Great Meadow Correctional Facility to allow [you] access to inspect/review the requested documents."

In this regard, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee has neither the resources nor the jurisdiction to "investigate". Further, it is not empowered to enforce the Freedom of Information Law or compel an agency to comply with law. Nevertheless, I offer the following comments.

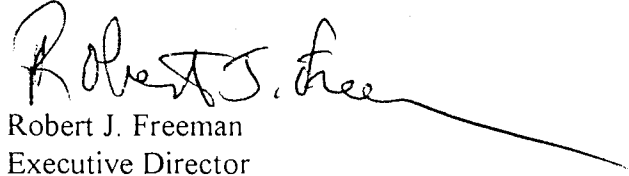
As a general matter, when a record is available in its entirety under the Freedom of Information Law, any person has the right to inspect the record at no charge. However, there may often be situations in which some aspects of a record, but not the entire record, may properly be withheld in accordance with the ground for denial appearing in §87 (2). In that event, I do not believe that an applicant would have the right to inspect the record. In order to obtain the accessible information, upon payment of the established fee, I believe that the agency would be obliged to disclose those portions of the records after having made appropriate deletions from a copy of the record.

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 justifiable.

Mr. Anthony Cook
September 15, 1999
Page - 2 -

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and extends across the right side of the page with a long horizontal flourish.

Robert J. Freeman
Executive Director

RJF:tt

cc: Inmate Records Coordinator
Anthony J. Annucci



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI-AO-11706

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Alexander F. Treadwell

Executive Director

Robert J. Freeman

September 16, 1999

Mr. Karim Duvall
96-A-1528
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. Duvall:

I have received your letter of August 16. In brief, you have sought assistance concerning your unanswered request for records of the New York City Police Department that relate to your arrest and conviction.

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)].

As you are aware, 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 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:

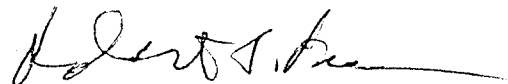
"...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of 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).

Mr. Karim Duvall
September 16, 1999
Page - 6 -

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

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 - 11707

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Gary Lewi
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Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

September 16, 1999

Mr. Richard L. Gumo
Attorney and Counselor at Law
363A Hempstead Avenue
Malverne, NY 11565

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence, unless otherwise indicated.

Dear Mr. Gumo:

I have received your letter of August 20 in which you sought guidance concerning delays in the disclosure of records that you have requested from the Village of Malverne.

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.

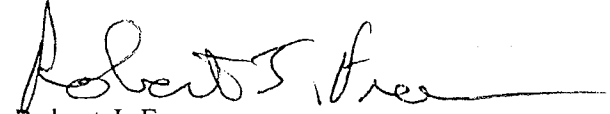
Having spoken with the Village Clerk concerning your requests, she indicated that some are repeated, that you have sought the same records more than once. Based on the decision rendered in Moore v. Santucci [151 AD2d 677 (1989)], if a record was made available to you or your representative, there must be a demonstration that neither you nor that person 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).

Mr. Richard L. Gumo
September 16, 1999
Page - 3 -

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman". The signature is written in a cursive style with a long horizontal flourish at the end.

Robert J. Freeman
Executive Director

RJF:tt

cc: Claire L. Sallie, Village Clerk-Treasurer



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-NO - 11708

Committee Members

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Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

September 16, 1999

Ms. M. Pauline Carter
Town Clerk
Town of Vienna
P.O. Box 250, 2083 State Route 49
North Bay, NY 13123

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Carter:

I have received your letter of August 20. You have questioned the propriety of a charge of \$35 imposed by the Oneida County Board of Elections for a copy of a disk containing the County's voter registration list.

In this regard, that issue was considered at length in Schultz v. New York State Board of Elections (Supreme Court, Albany County, September 7, 1995). 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, sct. 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 mor 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 produces. 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:

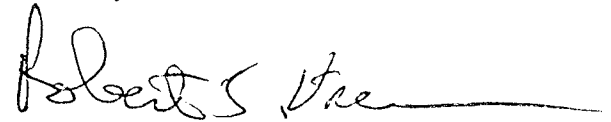
Ms. M. Pauline Carter
September 16, 1999
Page - 2 -

“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.”

If reproduction of the voter list involves a simple transfer of data from one storage medium to another, i.e., from a computer to one or more disks, I would conjecture that the time and effort to do so would be minimal. If that is so, in consideration of the cost of a disk, which is generally less than a dollar, the fee of \$35 would appear to be inconsistent with law.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:tt

cc: Oneida County Board of Elections



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI/AO - 11709

Committee Members

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Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

September 16, 1999

Executive Director

Robert J. Freeman

Mr. Dominic Brett
80-C-0511
Box 500
Elmira, NY 13350

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Brett:

I have received your letter of August 18. You have asked whether records of public trials maintained in the office of a county clerk "are exempt from disclosure under the Freedom of Information Law."

In this regard, the Freedom of Information Law is applicable to agency records, and §86(3) defines the term "agency" to include:

"any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines the term "judiciary" to mean:

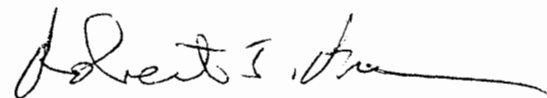
"the courts of the state, including any municipal or district court, whether or not of record."

Based on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law (see e.g., Judiciary Law, §255) may grant broad public access to those records. Even though other statutes may deal with access to court records, the procedural provisions associated with the Freedom of Information Law (i.e., those involving the designation of a records access officer or the right to appeal a denial) would not ordinarily be applicable.

Mr. Dom Bretti
September 16, 1999
Page -2-

I hope that the foregoing serves to clarify your understanding of the matter and that I have been of assistance.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-140-
FOIL-140-11710

Committee Members

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September 17, 1999

Executive Director

Robert J. Freeman

E-Mail

TO:

[REDACTED]

FROM: Robert J. Freeman, Executive

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

I have received your e-mail of September 16 in which you contend that the freedom of information and privacy acts would appear to enable an employee to gain access to his or her personnel files. Nevertheless, having requested a copy from your employer, you were informed that those records are the company's property.

In this regard, first, I am unaware of the location from which you have communicated. That may be significant, because the law may differ from one jurisdiction to another.

Second, as a general matter, the freedom of information and privacy laws apply to records maintained by government agencies. Records maintained by privacy companies are indeed the property of those companies and that is ordinarily no right on the part of the employees of private companies to obtain their personnel files. This is not to suggest that those records cannot be disclosed, but rather that a private company has the discretion to disclose personnel records to employees or to withhold them.

If your employer is a government agency, since every state has enacted some sort of statute dealing with public access to government records, it is likely that you would have rights of access to at least some personnel files pertaining to you.

I hope that I have been of assistance.

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI L-AO-11711

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Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

September 22, 1999

Executive Director

Robert J. Freeman

Mr. Randy Cahill



Dear Mr. Cahill:

I have received your letter of September 20 and the materials attached to it. You asked:

“What happens when some monopolized New York City business entity attempts to use the City’s Charter & Laws to compromise by constitutional rights while claiming to be trying to protect itself?”

In this regard, I cannot answer the question, for it involves matters unrelated to the jurisdiction of the Committee on Open Government.

I have, however, reviewed your request of September 20 to the Department of Environmental Protection. In this regard, I point out that the statute to which you referred, 5 USC §552(a), is the federal Freedom of Information Act. That act pertains to records maintained by federal agencies. The applicable statute concerning access to records of units of state and local government in New York is the New York Freedom of Information Law.

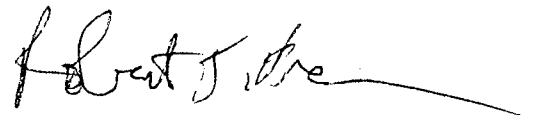
In addition, you asked for “a complete list of all records held and the specific exemption[s] being claimed for the withholding of each.” While there are cases under the federal Freedom of Information Act that require that such a list be prepared, there is no obligation to do so under the New York Freedom of Information Law. An agency is required by provide the reasons for a denial, but it is not obligated to prepare a list of the records withheld with justifications for denials of access to each.

Lastly, I note 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 there are no records that indicate the reasons “for the complete replacement of city drainpipes”, an agency would not be required to prepare new records containing that information on your behalf.

Mr. Randy Cahill
September 22, 1999
Page -2-

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal line extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Frank Feighery



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11012

Committee Members

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Walter Grunfeld
Robert L. King
Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

September 24, 1999

Executive Director

Robert J. Freeman

Mr. Jeffrey Shankman
J.M.J. Associates, Inc.
P.O. Box 3338
New York, NY 10163

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Shankman:

I have received your letter of August 11 and apologize for the delay in response. You have asked whether an agency "can take over six months to respond completely to a FOIL request."

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Mr. Jeffrey Shankman
September 24, 1999
Page -2-

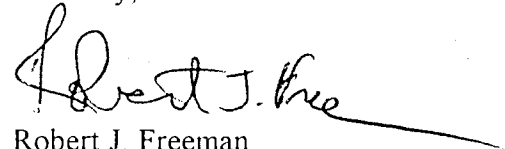
In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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 short, 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.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Judith Lee
Steven Blow



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOTL AO-11713

Committee Members

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

September 24, 1999

Executive Director

Robert J. Freeman

Mr. Albert A. Barone



Dear Mr. Barone:

As you are aware, your letter of September 15 addressed to the Attorney General has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State, is authorized to provide advice concerning the Freedom of Information Law.

In your letter to the Attorney General, you appealed a decision under the Freedom of Information Law by the Orange County Attorney. In this regard, neither the Attorney General nor the Committee on Open Government is empowered to determine such appeals. The provision in the Freedom of Information Law pertaining to the right to appeal, §89(4)(a), states in relevant part that:

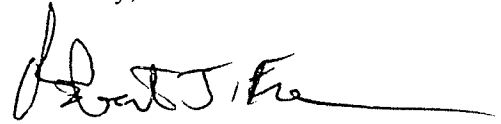
"any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

As I understand the matter, you already appealed to the Orange County Attorney, who rendered a determination on June 30. That being so, there is no additional administrative appeal. However, when an appeal is denied pursuant to the Freedom of Information Law, §89(4)(b) indicates that the person denied access may seek judicial review of the denial by initiating a proceeding under Article 78 of the Civil Practice Law and Rules.

Mr. Albert A. Barone
September 24, 1999
Page -2-

I hope that the foregoing serves to clarify your understanding of the matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL AO - 11714

Committee Members

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Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

September 24, 1999

Executive Director

Robert J. Freeman

Mr. Sean Fitzgerald
91-A-2372
Clinton Correctional Facility
P.O. Box 2001
Dannemora, NY 12929

Dear Mr. Fitzgerald:

As you are aware, your letter of September 13 addressed to the Attorney General has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State, is authorized to provide advice concerning the Freedom of Information Law.

In your letter to the Attorney General, you appealed a denial of a request made under the Freedom of Information Law by a representative of the Division of Parole at your facility. In this regard, neither the Attorney General nor the Committee on Open Government is empowered to determine such appeals. The provision in the Freedom of Information Law pertaining to the right to appeal, §89(4)(a), states in relevant part that:

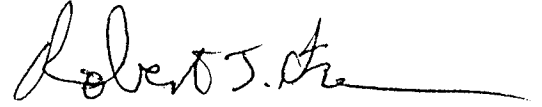
"any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

For your information, the person designated by the Division of Parole to determine appeals is Terrence X. Tracy, Counsel to the Division.

Mr. Sean Fitzgerald
September 24, 1999
Page -2-

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal line extending to the right.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11715

Committee Members

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Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

September 24, 1999

Ms. Jo Ann Stone



The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Stone:

As you are aware, I have received a variety of materials from you relating to concerns "about the confidentiality and handling of [y]our daughter's file" and your efforts in obtaining information from the Fayetteville-Manlius School District pursuant to the Freedom of Information Law and the federal Family Educational Rights and Privacy Act ("FERPA", 20 USC §1232g). Based on our conversation, some of the information sought has been disclosed; other aspects of your request have not been answered.

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to existing records, and §89(3) of that statute states in part that an agency is not required to create a record in response to a request for information. By means of example, one of your requests involves whether "any details of [y]our daughter's situation have been discussed with representatives" of certain groups that you later identified. The Freedom of Information Law would not require the preparation of records containing the information sought. Nevertheless, the regulations promulgated by the U.S. Department of Education (34 CFR Part 99) pursuant to FERPA impose recordkeeping requirements relative to the disclosure of information that is personally identifiable to a student.

By way of background, as you are likely aware, the focal point of the FERPA 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 the right to confidentiality, or unless a student eighteen years or over 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 § 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 unless an exception authorizes disclosure.

I note, too, that a "disclosure" is defined in §99.3 if the regulations to include not only the dissemination or reproduction of an education record, but also information contained in the record that is disclosed orally. Section 99.3 of the regulations defines the term "disclosure" to mean:

"to permit access to or the release, transfer, or other communication of personally identifiable information contained in education records to any party, by any means, including oral, written or electronic means."

As such, a disclosure includes the oral communication of information contained in education records pertaining to a student.

There are limited situations in which prior consent from parents of a minor student is not required prior to disclosure. Those that may be pertinent to the matter involve situations described in §99.31 of the regulations in which:

- "(1) The disclosure is to other school officials, including teachers, within the agency or institution whom the agency or institution has determined to have legitimate educational interests.
- (2) The disclosure is, subject to the requirements of §99.34, to officials of another school, school system, or institution of postsecondary education where the student seeks or intends to enroll."

Perhaps most important in view of the concerns that you expressed is §99.32, entitled "What recordkeeping requirements exist concerning requests and disclosures?" Subdivision (a) of that provision states that:

- "(a)(1) An educational agency or institution shall maintain a record of each request for access to and each disclosure of personally identifiable information from the education records of each student.

- (2) The agency or institution shall maintain the record with the education records of the student as long as the records are maintained.
- (3) For each request or disclosure the record must include:
 - (i) The parties who have requested or received personally identifiable information from the education records; and
 - (ii) The legitimate interests the parties had in requesting or obtaining the information.”

Subdivision (b) pertains to the redisclosure of student information in conjunction with §99.33 “only on the condition that the party to whom the information is disclosed will not disclose the information to any other party without the prior consent of the parent...” and states that:

- “(b) If an educational agency or institution discloses personally identifiable information from an education record with the understanding authorized under §99.33(b), the record of the disclosure required under this section must include:
- (1) The names of the additional parties to which the receiving party may disclose the information on behalf of the educational agency or institution; and
 - (2) The legitimate interests under §99.31 which each additional parties has in requesting or obtaining the information.”

Based on the foregoing, it is clear that the District is required to maintain a record of each request for and disclosure of personally identifiable pertaining to a student. Moreover, subdivision (c) of §99.32 specifies that the record of such disclosures must be maintained with the education records and that the parent of a student has the right to inspect such records.

Second, you indicated that the District has not responded to other aspects of your request. Specifically, you identified the following as not having been answered:

- “5.) Records indicating the dates and/or number of times Impartial Hearing Officers have been used by F.M. from 1996 to present time.
- 6.) Records indicating the number of times and/or the dates that F.M. prevailed during the Impartial Hearings between 1996 and the present time.
- 7.) Records indicating the number of times and/or number of times F.M. went before the State Review Officer from 1996 to the present time.

- 8.) Records indicating the number of times and/or dates F.M. prevailed during hearings before the State Review Officer between 1996 and the present time.
- 9.) Records indicating the dates and/or number of times any student or employee has filed any type of discrimination action against F.M. between 1995 and the present time."

As indicated earlier, FERPA prohibits the District from disclosing information personally identifiable to students without the consent of their parents. Consequently, insofar as the records sought described above would identify students if disclosed, the District may withhold those portions of the records. The records might also include names of employees, but as I understand the request, you are not interested in their names. Consequently, those aspects of the records may be deleted if disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)]. The remaining information that you have requested, essentially the dates and number of times that the District has been involved in certain proceedings or claims, would in my opinion be available. Those items would consist of factual information accessible under §87(2)(g)(i) of the Freedom of Information Law.

It is reiterated that §89(3) of the Freedom of Information Law states in part that an agency is not required to create or prepare a record in response to a request. Therefore, the District would not be required to review records and prepare a total number hearings or a list of dates to accommodate you. However, I believe that it would be required to provide access to records containing the information sought, perhaps after the deletion of identifying details, in order that you could ascertain the dates or number of various proceedings or claims. For instance, if a substantial record or report has been prepared in relation to a matter, perhaps the cover sheet or similar document could be disclosed to enable you to obtain the information of you interest. With the appropriate copies, you could ascertain the numbers and dates of such proceedings. Similarly, brief portions of records indicating the outcomes of proceedings could be made available, again, following the deletion of identifying details where appropriate.

Lastly, the Freedom of Information Law provides direction concerning the time and manner in which an agency must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been

Ms. Jo Ann Stone
September 24, 1999
Page - 5 -

constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

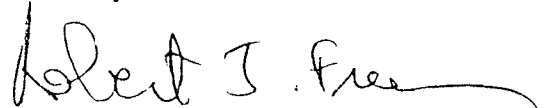
"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

In an effort to enhance compliance with and understanding of applicable law, copies of this response will be forwarded to District officials.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Dr. Philip Martin
Lisa A. Miori-Dinneen



STATE OF NEW YORK
DEPARTMENT OF STATE
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FOIL-DO-11716

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Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

September 24, 1999

Executive Director

Robert J. Freeman

Hon. Robert G. Prentiss
Member of the Assembly
Room 523
Legislative Office Building
Albany, NY 12248

Dear Assemblyman Prentiss:

I have received your letter of September 10 concerning the propriety of a denial of a request by Carol W. LaGrasse, President of The Property Rights Foundation of America, Inc. and yourself for the names and address of landowners referenced by an official of the Department of Environmental Conservation at a public hearing "as having requested that DEC (walk their land) to evaluate the proposed remapped wetlands."

In this regard, I have received a copy of a determination of an appeal of the denial by Ms. LaGrasse. In short, the Department determined to disclose the information sought, so long as Ms. LaGrasse indicates in writing that the names and addresses will not be used for commercial or fund-raising purposes.

As you may be aware, the Freedom of Information Law permits an agency to withhold records when disclosure would constitute "an unwarranted invasion of personal privacy." Section 89(2)(b)(iii) states that an unwarranted invasion of personal privacy includes "sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes." Having spoken with Ms. LaGrasse, she informed me that she would be agreeable to asserting in writing that the materials in question would not be used for any commercial or fund-raising purpose. As such, I believe that the matter has been resolved in a manner favorable to you and Ms. LaGrasse.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Carol W. LaGrasse



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September 24, 1999

Executive Director

Robert J. Freeman

Mr. Robert Board

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Board:

I have received your letter of September 22 in which you appealed a denial of access to records by the New York City Transit Authority. The correspondence accompanying your letter indicates that the Authority denied access to "disciplinary records" relating to three of its employees.

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 dealing with the right to appeal, §89(4)(a), states in relevant part that:

"any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person 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)].

Rather than initiating litigation, it is suggested that you contact Gail Rogers, the Authority's freedom of information officer, to ascertain the identity of the person designated by the Authority to determine appeals.

With respect to the substance of the matter, insofar as records indicate a finding misconduct or the nature of a penalty imposed, I believe that they must be made available.

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, two of the grounds for denial are relevant in consideration of rights of access to the records in question.

Relevant to an analysis 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.

Other decisions have dealt with 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 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.2d 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:

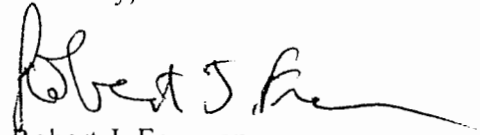
"The Freedom of Information Law expresses this State's strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies (see, Matter of Farbman & Sons v New York City Health and Hosps. Corp., 62 NY 2d 75, 79). The statute, enacted 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 records indicating the names of the public employees and the nature of disciplinary action or sanction imposed against them must be disclosed.

Mr. Robert Board
September 24, 1999
Page -7-

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Gail Rogers



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DEPARTMENT OF STATE
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FOIL-AO-11718

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Executive Director

Robert J. Freeman

September 27, 1999

E-MAIL

TO: "Robert Lee" <robertlee@exotrope.net>

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 Mr. Lee:

I have received your letter of August 24. You have asked whether you "have the right to know how much interest was charged on an Urban Renewal Loan."

In this regard, 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 constitute an unwarranted invasion of personal privacy, for such a disclosure would indicate that a particular individual has an income or economic means below a certain level. In some circumstances, individuals might be embarrassed by such disclosure. Further, the New York State Tax Law contains provisions that require the confidentiality of records reflective of the particulars of a person's income or payment of taxes (see e.g., section 697, Tax Law). As such, it would appear that the Legislature felt that disclosure of records concerning personal income would constitute an improper or "unwarranted"

Mr. Robert Lee
September 27, 1999
Page - 2 -

invasion of person privacy, and, therefore, that the information sought could be withheld from the public under the Freedom of Information Law.

Consequently, if your interest involves knowing the interest charged to a particular individual, such as a homeowner, I do not believe that you would have the right to know the identity of the homeowner if his or her participation is based on having an income below a certain level.

On the other hand, if a loan was given to a business or to a person acting in a business capacity, there would be nothing "personal" about the interest charged. In that circumstance, I believe that you would have the right to review records containing the information of your interest.

I hope that I have been of assistance.

RJF:tt

From: Robert Freeman
To: Internet:kquinn@star-gazette.com
Date: Fri, Oct 1, 1999 9:03 AM
Subject: Good Morning Ms. Quinn:

Good Morning Ms. Quinn:

As a general matter, the Freedom of Information Law pertains to records of governmental entities; usually it does not apply to not-for-profit organizations, even though they may receive government funding. I say "usually" because there have been circumstances in which not-for-profit corporations have been formed by government or are subject to substantial control and, therefore, have been found by the courts to be subject to the requirements of the Freedom of Information and Open Meetings Laws. We should discuss the facts involved here to ascertain the extent of any governmental connection.

Also, in some instances, as a condition for the receipt of government money, there may be reporting requirements under which one or more government agencies receive records from the no-for-profit recipients of funding. When those records are produced for or come into the possession of a government agency subject to the Freedom of Information Law, they are subject to rights of access conferred by that statute.

I will be in the office today, Friday, until about 12:30 and all day Monday if you would like to discuss the matter further.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518 - Phone
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Executive Director

Robert J. Freeman

October 1, 1999

Mr. Delroy Ross
15016-054
P.O. Box 444
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. Ross:

I have received your letter of September 26 in which you requested your pre-sentence report from this office.

In this regard, the Committee on Open Government is authorized to provide advice concerning rights of access to government records, primarily under the Freedom of Information Law. The Committee does not have possession or control of records generally. Further, in this instance, a different statute governs access.

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

Mr. Delroy Ross
October 1, 1999
Page - 2 -

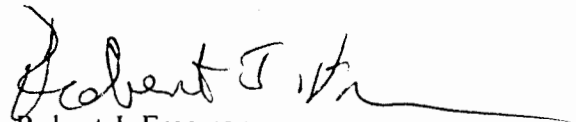
governed by the same rules of confidentiality. Any person, public or private agency receiving such material must retain it under the same conditions of confidentiality as apply to the probation department that made it available."

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,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman", with a long horizontal line extending to the right.

Robert J. Freeman
Executive Director

RJF:tt



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

October 1, 1999

Mr. Nathaniel Walker



The staff of the Committee on Open 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 September 26 in which you requested your pre-sentence report from this office.

In this regard, the Committee on Open Government is authorized to provide advice concerning rights of access to government records, primarily under the Freedom of Information Law. The Committee does not have possession or control of records generally. Further, in this instance, a different statute governs access.

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

Mr. Nathaniel Walker

October 1, 1999

Page - 2 -

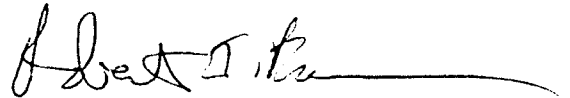
private agency receiving such material must retain it under the same conditions of confidentiality as apply to the probation department that made it available."

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,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman", with a long horizontal line extending to the right.

Robert J. Freeman
Executive Director

RJF:tt



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-190-11722

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Alexander F. Treadwell

Executive Director

Robert J. Freeman

October 1, 1999

Mr. Donald Palmer
94-A-4351
Gouverneur Correctional Facility
P.O. Box 480
Scotch Settlement Road
Gouverneur, NY 13642-0370

Dear Mr. Palmer:

I have received your undated letter, which reached this office on September 29. You have appealed to this office following a failure by your facility to respond to a request made 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 determine appeals or compel an agency to grant or deny access to records. When a request is denied either in writing or by means of a failure to respond, an appeal may be made pursuant to §89(4)(a) of the Freedom of Information Law, which states in relevant part that:

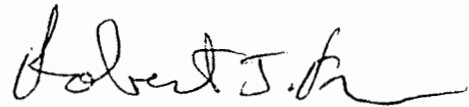
"any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought.

For your information, the person designated by the Department of Correctional Services to determine appeals is Anthony J. Annucci, Counsel to the Department.

Mr. Donald Palmer
October 1, 1999
Page - 2 -

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman".

Robert J. Freeman
Executive Director

RJF:tt



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

7021-AD-11723

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Executive Director

Robert J. Freeman

October 4, 1999

Mr. Jerry Brixner

The staff of the Committee on Open 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:

As you are aware, I have received your letter of August 18 and the materials attached to it. Please accept my apologies for the delay in response.

You referred initially to what appears to be an excerpt from the Town of Chili code that deals with public access to records and asked whether the Code provisions "may restrict or expand the Provisions of the Freedom of Information Law."

Having reviewed the excerpt from the code, it appears to be essentially a verbatim adoption of the regulations and model regulations issued by the Committee on Open Government. As such, I do not believe that it "restricts" or "expands" the Freedom of Information Law; rather it is fully consistent with that statute and the regulations promulgated thereunder.

One of the attachments to your letter is a request made under the Freedom of Information Law for certain communications between Town officials and the New York State Department of Environmental Conservation and Monroe County. The provision that would appear to govern rights of access to the records in question is §87 (2)(g), of the Freedom of Information Law, which enables an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations; or

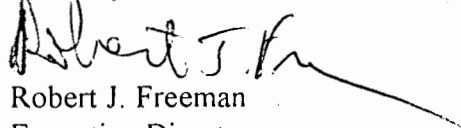
Mr. Jerry Brixner
October 4, 1999
Page - 2 -

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Carol O'Connor, Records Access Officer



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11724

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Alexander F. Treadwell

October 12, 1999

Executive Director

Robert J. Freeman

Mr. Robert Reale
Albany County Jail
840 Albany Shaker Road
Albany, NY 12211-1088

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Reale:

I have received your letter of August 25 and the materials attached to it. The focus of your comments involves your inability to pay for copies of records, and a refusal by the State Commission of Correction to waive the fee.

In this regard, for purposes of clarification, as you may be aware, the federal Freedom of Information Act (5 USC §552) includes provisions concerning the waiver of fees in certain circumstances. That statute, however, applies only to records maintained by federal agencies. The applicable statute in the context of your requests is the New York Freedom of Information Law, which is silent with respect to fee waivers. In view of the absence of any provision pertaining to the waiver of fees, it has consistently been advised that there is no obligation on the part of an agency to waive its fees for copies, even if the applicant is an indigent inmate. Further, since all members of the public have the same rights under the Freedom of Information Law, there is no basis for distinguishing between an inmate in a state prison and a person incarcerated in a county jail.

I note that the decision cited in the correspondence, Whitehead v. Morgenthau [552 NYS2d 518 (1990)] dealt with the issue exhaustively and reached the conclusion suggested in the preceding paragraph.

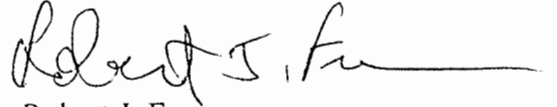
Mr. Robert Reale

October 12, 1999

Page -2-

I hope that the foregoing serves to clarify your understanding of the matter and that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Scott C. Steinhardt



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL NO - 11725

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Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

October 12, 1999

Executive Director

Robert J. Freeman

E-Mail

TO:



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 Elena:

I have received your letter concerning the ability to obtain court records under the Freedom of Information 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.

Elena
October 12, 1999
Page -2-

It is suggested that a request for court records be made to the clerk of the appropriate court, citing an applicable provision of law as the basis for the request.

I hope that I have been of assistance.

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

7076-AO-11726

Committee Members

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Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

October 13, 1999

Mr. Thomas J. Rybaltowski
Business Administrator
North Colonie Central Schools
543 Loudon Road
P.O. Box 708
Newtonville, NY 12128-0708

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Rybaltowski:

I have received your letter of August 30 in which you asked that I review the "Application for Public Access to Records" used by the North Colonie Central School District.

While I do not believe that the form is inconsistent with the Freedom of Information Law or the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), I offer the following comments.

First, although many agencies have developed forms, it has consistently been advised that a failure by an applicant for records to use an agency's prescribed form cannot serve as a valid basis for either delaying response to a request or denying a request. In short, it has been advised that any request made in writing that reasonably describes the records sought as required by §89(3) of the Freedom of Information Law should suffice.

Second, although I am not suggesting that that aspect of the form be altered, I point out that there several grounds for denial appearing in §87(2) of the Freedom of Information Law; allusion is made in the form only to the first, §87(2)(a), which pertains to the ability to withhold records that "are specifically exempted from disclosure by state or federal statute." The box marked "other", however, appears to be adequate to indicate reasons for denial distinct from those identified on the form.

Lastly, the statement at the bottom of the form pertains to the right to appeal a denial of access to records. Here I point out that §89(4)(a) of the Freedom of Information Law states that a

Mr. Thomas J. Rybaltowski
October 13, 1999
Page - 2 -

person denied access has thirty days to appeal. It is suggested that reference to that limitation be included in the statement, i.e., "You have a right to appeal a denial of this application *within thirty days* to...."

I hope that I have been of assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman", followed by a long horizontal line extending to the right.

Robert J. Freeman
Executive Director

RJF:tt



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11727

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

October 13, 1999

Executive Director

Robert J. Freeman

Mr. Janusz Muszak
President
CompHelp Company
P.O. Box 296
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 Mr. Muszak:

I have received your letter of August 28 in which you complained that you received a tape recording of a fair hearing from the Office of Temporary and Disability Assistance rather than a transcript as you had requested. You have contended that Commissioner Wing "is in violation of the Freedom of Information Law" and asked that I "instruct him to provide [you] with the requested information or explanation why it cannot be provided."

In this regard, first, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to compel or "instruct" a person or agency to follow a certain course of action.

Second, it is emphasized that 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. If, for instance, no transcript of the proceeding was prepared, there would be no obligation on the part of the agency to create such a record on your behalf. If a tape recording is the only verbatim account of the proceeding, it would have been the only record maintained by the agency that would have served to enable you to obtain the information sought. On the other hand, if a transcript was prepared, I believe that the agency would be required to make a photocopy upon payment of the requisite fee in an effort to satisfy your request.

Mr. Janusz Muszak
October 13, 1999
Page -2-

Copies of this response will be forwarded to Commissioner Wing and Mr. Lacivita.

I hope that the foregoing serves to clarify your understanding of the Freedom of Information Law and that I have been of assistance.

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman".

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Brian Wing, Commissioner
Mark Lacivita



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL AO -
FOIL AO - 11728

Committee Members

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Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

October 13, 1999

Ms. Shirley J. Motyl



The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Motyl:

I have received your letter of August 24. You wrote that you are an employee of a state agency and that an evaluation of your performance is "filled with false statements". You indicated that you do not want the documentation disclosed when it is sought pursuant to a subpoena, and you have requested assistance in the matter.

In this regard, I offer the following comments.

First, because the evaluation pertains to you, you are a "data subject" for purposes of the Personal Privacy Protection Law. Under §95(2) of that statute, if you believe that the content of a record about yourself is "not accurate, relevant, timely or complete", you may attempt to correct or amend the record. If your initial request to do so is rejected, you have the right to appeal under subdivision (3) of §95. If the appeal is denied, you have the right to prepare a statement of disagreement, which would become part of the record.

Second, some aspects of your evaluation would be available to any person under the Freedom of Information Law. I note that there is nothing in the Freedom of Information Law that deals specifically with personnel records or personnel files. The nature and content of so-called personnel files may differ from one agency to another and from one employee to another. Neither the characterization of documents as personnel records nor their placement in personnel files would necessarily render those documents confidential or deniable under the Freedom of Information Law (see Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980). On the contrary, the contents of those documents are the factors used in determining the extent to which they are available or deniable under the Freedom of Information Law.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions

thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. 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].

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.

Lastly, under §96 of the Personal Privacy Protection Law, 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.

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 a subpoena served on the agency is considered to be compulsory legal process, the agency may have no choice but to disclose.

Ms. Shirley J. Motyl
October 13, 1999
Page - 4 -

As suggested earlier, you might want to attempt to correct or amend the portions of the evaluation that you consider to be inaccurate.

Enclosed for your review are copies of the Personal Privacy Protection and Freedom of Information Laws.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:tt

cc: Jude Mullins



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL NO - 11729

Committee Members

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

October 13, 1999

Mr. Vincent J. Fabbo



The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Fabbo:

I have received your letter of August 25 in which you sought assistance in obtaining the name of the person who submitted a complaint to the Town of Smithtown alleging that you were maintaining an illegal apartment in your dwelling.

It is noted that you referred to 5 USC section 552 and the Privacy Act as the basis of your request. Those statutes are, respectively, the federal Freedom of Information and Privacy Acts, and they pertain only to records maintained by federal agencies; they do not apply to the Town of Smithtown. The applicable statute in my view is the New York Freedom of Information Law, which pertains to records maintained by entities of state and local government in New York.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 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 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

Mr. Vincent J. Fabbo

October 13, 1999

Page - 2 -

such information is not relevant to the work of the agency requesting or maintaining it; or

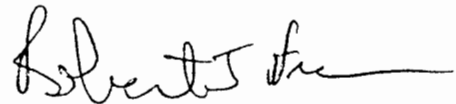
v. disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency."

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.

In short, I believe that the Town has the authority to withhold those portions of records which if disclosed would identify the person who made the complaint.

I hope that the foregoing serves to enhance your understanding of the matter and that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:tt

cc: John B. Zollo



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI#-190-11730

Committee Members

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Robert L. King
Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

October 13, 1999

Ms. Lisa Haarlander
The Buffalo News
One News Plaza
P.O. Box 100
Buffalo, NY 14240

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Haarlander:

I have received your letter of August 26 concerning your efforts in obtaining permits and variances approved by the Town of Orchard Park Zoning Board of Appeals.

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, permits and variances are clearly available, for none of the grounds for denial would be pertinent or applicable. Names and addresses of those to whom permits or variances have been granted by the Board would have been disclosed at one or more open meetings during which any person present would have had the ability to acquire those items of information. Further, building permits, even those issued without an action taken by a zoning board or other public body, would clearly be public. In short, licenses, permits and similar records that indicate that person or firm is authorized to engage in certain activity have long been accessible to the public

Second, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of

the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I note that although an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days, when such acknowledgement is given, there is no precise time period within which an agency must grant or deny access to records. The time needed to do so may be dependent upon the volume of a request, the possibility that other requests have been made, the necessity to conduct legal research, the search and retrieval techniques used to locate the records and the like. In short, when an agency acknowledges the receipt of a request because more than five business days may be needed to grant or deny a request, so long as it provides an approximate date indicating when the request will be granted or denied, and that date is reasonable in view of the attendant circumstances, I believe that the agency would be acting in compliance with law.

Notwithstanding the foregoing, in my view, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, if records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a lengthy delay in disclosure. 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

Ms. Lisa Haarlander

October 13, 1999

Page - 3 -

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)].

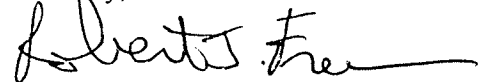
Further, in my opinion, if, as a matter of practice or policy, an agency acknowledges the receipt of requests and indicates in every instance that it will determine to grant or deny access to records within a particular period following the date of acknowledgement, such a practice or policy would be 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).

As I understand the circumstances and the nature of the records sought, there would be no basis for a delay in disclosure.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this response will be sent to Town officials.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Janis Colarusso
Joseph Campion



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL AO-11731

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Alexander F. Treadwell

Executive Director

Robert J. Freeman

October 13, 1999

Mr. Richard Burke

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Burke:

I have received your letter of August 20 in which you sought assistance in obtaining records from attorneys, hospitals or doctors, insurance companies, private agencies and courts and "law enforcement."

In this regard, the statute within the advisory jurisdiction of this office, 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.

Units of state and local government, including law enforcement agencies, such as police departments and offices of district attorneys, are required to comply with the Freedom of Information

Mr. Richard Burke
October 13, 1999
Page - 2 -

Law. Private entities, such as insurance companies, as well as private attorneys, hospitals and doctors, are not subject to that statute.

Lastly, while private hospitals and doctors are not subject to the Freedom of Information Law, under §18 of the Public Health Law, a patient may generally obtain medical or hospital records pertaining to himself.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in dark ink and is positioned above the printed name and title.

Robert J. Freeman
Executive Director

RJF:tt



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11732

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Executive Director

Robert J. Freeman

October 13, 1999

Mr. Stephen Perelson, Esq.
Shaw & Perelson, LLP
2-4 Austin Court
Poughkeepsie, NY 12603

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Perelson:

As you are aware, I have received your letter of August 25. Please accept my apologies for the delay in response. In your capacity as counsel to the Dobbs Ferry Union Free School District and its Board of Education, you have sought my views concerning the District's obligation to release a certain report.

In brief, following incidents in which crimes or misconduct were alleged on the part of District employees, the Board hired "special legal counsel" to investigate and report her findings. You added that "[t]he special counsel understood that her report could be subject to the attorney-client privilege and attorney work product privilege." One claim had been initiated against the District before the special counsel was retained; others have been filed since. The Board received the Special Counsel's report in June, and it "has been safeguarded with only Board members, Superintendent of Schools, and the District's counsel authorized to read it." However, you added that the Board "has released to the public each and every recommendation set forth by Special Counsel; and that many of the recommendations have been or in are in the process of being adopted."

You indicated that "[t]he report itself is the special counsel's narrative apparently drawing upon information culled from interviews of District employees, Board of Education members, parents and some students."

In considering the extent to which the report should be disclosed, you asked that I focus on "the distinctions and tests associated with the difference between 'factual data' as contrasted with material that would not qualify as factual data in a report such as described above."

In this regard, I offer the following comments.

Mr. Stephen Perelson, Esq.

October 13, 1999

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As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Had the recommendations in the report not been released, I believe that the report could likely have been withheld in its entirety. The first ground for denial, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute," and I believe that it would have properly been asserted in that circumstance.

Section 3101 of the Civil Practice Law and Rules (CPLR) pertains to disclosure in a context related to litigation, and subdivision (a) reflects the general principle that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action..." The Advisory Committee Notes pertaining to §3101 state that the intent is "to facilitate disclosure before trial of the facts bearing on a case while limiting the possibilities of abuse." The prevention of "abuse" is considered in the remaining provisions of §3101, which describe narrow limitations on disclosure. One of those limitations, §3101(c), states that "[t]he work product of an attorney shall not be obtainable." Another pertains to material prepared for litigation, and §3101(d)(2) states in relevant part that:

"materials otherwise discoverable under subdivision (a) of this section and prepared in anticipation of litigation or for trial by or for another party, or by or for the other party's representative (including an attorney, consultant, surety, indemnitor, insurer or agent), may be obtained only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of the materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation."

Both of the provisions cited above are intended to shield from an adversary records that would result in a strategic advantage or disadvantage, as the case may be. Reliance on both in the context of a request made under the Freedom of Information Law is in my view dependent upon a finding that the records have not been disclosed, particularly to an adversary. In a decision in which it was determined that records could justifiably be withheld as attorney work product, the "disputed documents" were "clearly work product documents which contain the opinions, reflections and thought process of partners and associates" of a law firm "which have not been communicated or shown to individuals outside of that law firm" [Estate of Johnson, 538 NYS 2d 173 (1989)].

Also pertinent is §4503 of the CPLR, which codifies the attorney-client privilege. In a decision in which the relationship between the attorney-privilege and the ability to withhold the work product of an attorney was discussed, and it was found that:

"The attorney-client privilege requires some showing that the subject information was disclosed in a confidential communication to an attorney for the purpose of obtaining legal advice (*Matter of Priest v. Hennessy*, 51 N.Y.2d 62, 68-69, 431 N.Y.S.2d 511, 409 N.E.2d 983). The work-product privilege requires an attorney affidavit showing that the information was generated by an attorney for the purpose of litigation (*see, Warren v. New York City Tr. Auth.*, 34 A.D.2d 749, 310 N.Y.S.2d 277). The burden of satisfying each element of the privilege falls on the party asserting it (*Priest v. Hennessy, supra*, 51 N.Y.2d at 69, 431 N.Y.S. 2d 511, 409 N.E.2d 983), and conclusory assertions will not suffice (*Witt v. Triangle Steel Prods. Corp.*, 103 A.D.2d 742, 477 N.Y.S.2d 210)" [Coastal Oil New York, Inc. v. Peck, [184 AD 2d 241 (1992)]].

In a discussion of the parameters of the attorney-client relationship and the conditions precedent to its initiation, it has been held that:

"In general, 'the privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client'" [People v. Belge, 59 AD 2d 307, 399 NYS 2d 539, 540 (1977)].

Once information contained in an attorney's work product, material prepared for litigation or which is subject to the attorney-client privilege is transmitted to an adversary or otherwise disclosed to parties other than the client, I believe that the capacity to claim exemptions from disclosure under §3101(c) or (d) or §4503 of the CPLR or, therefore, §87(2)(a) of the Freedom of Information Law, ends.

In short, insofar as the contents of the report of the special counsel have been disclosed, I do not believe that there would be any basis for a denial of access. The remainder of the report, however, would appear to remain privileged and could be withheld as the work product of an attorney or based on an assertion of the attorney-client privilege.

If the ability to withhold the remainder of the report could not properly be asserted based on the privileges described above, other grounds for denial would be pertinent to an analysis of the extent to which the report would be accessible.

For instance, the Family Educational Rights and Privacy Act ("FERPA"; 20 USC §1232g) 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 FERPA 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 §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.

In view of the facts of the matter, names of District employees and perhaps other information identifiable to them or those who were the subjects of allegations might be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, § 87(2)(b)]. The extent to which that exception might properly be asserted would be dependent on the nature and content of those portions of the report involving interviews or other information acquired from those persons.

The remaining ground for denial of significance, §87(2)(g), enables an agency to withhold records that

"are inter-agency or intra-agency materials which are not:

- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations; or
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

One of the contentions offered by the New York City Police Department in a 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)](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,

Mr. Stephen Perelson, Esq.

October 13, 1999

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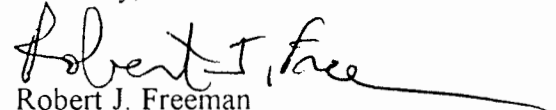
therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle 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, offered by District employees, they may be withheld; insofar as they consist of statistical or factual information, I believe that they must be disclosed.

I note that the Court in Gould also stressed that §87(2)(g) deals with communications between and among government officers and employees. Therefore, insofar as the report consists of statements by or interviews with parents, students or others who are not officers or employees of the District, §87(2)(g) would not serve as a basis for denial. Nevertheless, as suggested earlier, other grounds for denial, such as those associated with the attorney-client privilege, attorney work product, FERPA and unwarranted invasions of personal privacy, may be applicable.

I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:tt



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11733

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Executive Director

Robert J. Freeman

October 13, 1999

Mr. Christopher Lue-Shing
92-A-9582
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. Lue-Shing:

I have received your letter of August 19. You have sought an advisory opinion concerning whether an agency's failure to respond to an appeal may be construed as "an affirmation of denial of the original request for the purposes of instituting a proceeding pursuant to Article 78 of the Civil Practice Law and Rules."

In this regard, by way of background, 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,

Mr. Christopher Lue-Shing

October 13, 1999

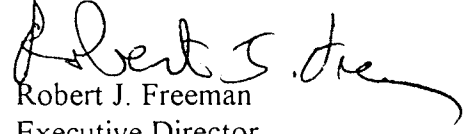
Page - 2 -

who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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-11734

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Executive Director

Robert J. Freeman

October 13, 1999

Mr. Benjamin Brooks
95-A-8669
Hudson Correctional Facility
P.O. Box 576
Hudson, NY 12534

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Brooks:

I have received your letter of August 19 in which you asked that I review correspondence concerning your efforts in acquiring information from the Division of Parole.

Citing the Freedom of Information Law, you asked that the Division of Parole produce records indicating the Division's "legal and statutorily binding definition of what constitutes "reasonable probability", "live and remain at liberty without violating the law", "incompatible with the welfare of society", and similar phrases. In a letter addressed to you by Ann C. Crowell, she indicated that "your request is not a proper request under the Freedom of Information Law", and I agree with her contention.

In this regard, 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 in response to a request for information. I would conjecture that the Division of Parole has not prepared or adopted "legal and statutorily binding" definitions of the phrases to which you referred. If that is so, the request would not involve existing records, and the Freedom of Information Law would not apply.

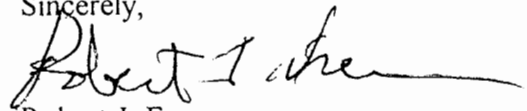
Similarly, your request for a "copy of the parole board commissioner's statutory authority to determine what programs an inmate should take before becoming eligible for release consideration" is not, in my view, a request for a record. In essence, it is a request for an interpretation of law requiring a judgment. Any number of provisions might be applicable, and a disclosure of some of them, based on one's knowledge, may be incomplete due to an absence of expertise regarding the content and interpretation of each such law. Further, two people, even or perhaps especially two attorneys, might differ as to the applicability of a given provision of law. In contrast, if a request is

Mr. Benjamin Brooks
October 13, 1999
Page - 2 -

made, for example, for "section 500 of the Correction Law", no interpretation or judgment is necessary, for sections of the law appear numerically and can readily be identified. That kind of request, in my opinion would involve a portion of a record that must be disclosed. Again, a request for laws that might be applicable is not, in my view, a request for a record as envisioned by the Freedom of Information Law.

I hope that the foregoing serves to clarify misunderstandings and that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:tt

cc: Ann C. Crowell



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11735

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October 13, 1999

Executive Director

Robert J. Freeman

Ms. Barbara J. Zitwer

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Zitwer:

I have received your letter of August 30 in which you sought assistance in relation to your efforts in obtaining records from the New York City Police Department. Based on your commentary, I offer the following remarks.

First, the Freedom of Information Law provides direction concerning the time and manner in which an agency must respond to requests and appeals. Specifically, section 89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with section 89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under section 89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Further, it is noted that a recent decision involved a situation in which requests were made, but the agency engaged in continual delays and failed to grant or deny access to the records sought. When the applicant initiated a judicial proceeding, the agency contended that petitioner had failed to exhaust her administrative remedies. In a discussion of the matter, the decision states that:

"The respondent contends that petitioner failed to appeal the denial of access to records within 30 days to the agency head as provided in Public Officers Law [section] 89(4)(a) and, therefore, may not bring this proceeding.

"The petitioner alleges that Public Officers Law [section] 89(4)(a) is not applicable as petitioner's FOIL requests has never been decided by respondent as respondent's only correspondence in response to petitioner's application indicates only that the matter is under investigation.

"While the papers, for both sides, in this proceeding fail to discuss the issue of constructive denial, it has been found that the failure of an agency to respond to a FOIL request, as provided for in Public Officers Law [section] 89(3), can be construed as a denial of said request. In the case of Mtr. Robertson v. Chairman, 122 Misc 2d 829, the court held the failure of the Division of Parole to respond within five days to a letter from petitioner requesting access to certain information contained in his parole records is properly construed as a denial of his request...

"It, therefore, appears that respondent's failure in this particular proceeding to neither grant nor deny the petitioner's request may be construed as a denial of access that may be appealed to the agency head" (Bernstein v. City of New York, Supreme Court, New York County, NYLJ, November 7, 1990).

In addition, by failing to provide an approximate date when the request would be granted or denied in its acknowledgement of the receipt of the request, the court found that the agency placed the applicant "in a 'Catch-22' position" (id.).

As you are aware, the person designated by the Department to determine appeals is Susan Petito, Special Counsel.

Ms. Barbara J. Zitwer
October 13, 1999
Page -3-

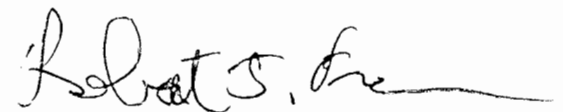
Second, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not 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, since you stressed that you want complete records, "all, not an edited version", I point out that there may be circumstances in which records may be withheld in whole or in part. While I am unfamiliar with the records of your interest, I point out as a general matter that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Susan Petito
Sgt. Richard Evangelista



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FOI-AD-11736

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October 13, 1999

Executive Director

Robert J. Freeman

Mr. Nafis Wright
97-A-1682 A4-473
Collins Correctional Facility
P.O. Box 340
Collins, NY 14034-0340

Dear Mr. Wright:

I have received your letter of September 30 addressed to the Department of State in which your requested certain court records from this office.

In this regard, the Committee on Open Government is authorized to provide advice concerning public access to government records, primarily under the Freedom of Information Law. The Committee does not have possession or control of records generally. In short, neither the Department of State nor the Committee can provide the records of your interest, because neither maintains the records.

It is noted that 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

Mr. Nafis Wright
October 13, 1999
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procedural provisions associated with the Freedom of Information Law (i.e., those involving the designation of a records access officer or the right to appeal a denial) would not ordinarily be applicable. It is suggested that a request be made to the clerk of the court, citing an applicable provision of law as the basis for the request.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm



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October 13, 1999

Executive Director

Robert J. Freeman

Mr. Harvey M. Elentuck

The staff of the Committee on Open 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 24 in which you raised questions in relation to your request made under the Freedom of Information Law to the Office of the Special Commissioner of Investigation for the New York City School District.

You asked initially whether you should have quoted a certain provision in the Freedom of Information Law rather than merely citing that provision. In my view, so long as the citation was given, there would have been no necessity or obligation to quote the provision.

With respect to the other matters to which you referred, the issue in my view involves the extent to which your request "reasonably described" the records as required by section 89(3) of the Freedom of Information Law. Although that standard has been the subject of other correspondence with you, I will reiterate guidance offered in the past.

As indicated previously, 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

Mr. Harvey M. Elentuck
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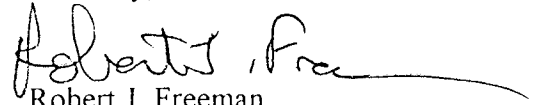
Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file 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 agency, 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.

I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:jm
cc: Susanna Chu
Laura Zuckerman

F11738

October 13, 1999

Mr. Merton Simpson
[REDACTED]
[REDACTED]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Simpson:

I have received your letter of August 19 and the materials attached to it.

Among the materials is a record apparently prepared by the Department of Civil Service entitled "Eligible List Scores Distribution by Race and Sex" in relation to a "battery exam." You have asked whether similar records "would have to be produced by Civil Service for all the Battery Exams and simulations of exams [you] have requested through previous FOIL's if they have the capability." In response to an appeal, you were informed that "eligible list scores distribution by race and sex are not available because the Battery Tests do not produce an eligible list" and that "an eligible list scores distribution report which had been released to you should not have been created."

From my perspective, the issue involves whether the Department has the ability to generate the records of your interest based on its existing computer programs. In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to existing records. Section 89(3) of that statute states in relevant part that an agency is not required to create a record in response to a request.

Second, §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."

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

Mr. Merton Simpson

October 13, 1999

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of "record" includes specific reference to computer tapes and discs, and it was held soon after the enactment of the current version 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, Szikszy 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)].

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.

Assuming that the information of your interest can be generated by means of the Department's existing computer programs, I believe that it would be available. In short, insofar as intra-agency materials consist of "statistical or factual tabulations or data", they must be disclosed pursuant to section 87(2)(g)(i), unless a different ground for denial applies. In my view, none of the grounds for denial would be applicable or pertinent.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Patricia Hite



STATE OF NEW YORK
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FOIL-AO-11739

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October 13, 1999

Executive Director

Robert J. Freeman

Mr. James Wright
97-R-3002
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. Wright:

I have received your letter of August 17. As I understand the matter, it is your view that a corrections counselor at your facility has acted inappropriately, and you asked that this office investigate. It also appears that you are interested in obtaining records pertaining to the counselor concerning "disciplinary sanctions for bizarre or abus[ive] behavior..."

In this regard, the Committee on Open Government is authorized to provide advice relating to public access to government records, primarily under the Freedom of Information Law. The Committee does not have the authority to conduct investigations concerning the conduct of public employees. It is suggested that you contact the proper officials at the Department of Correctional Services in relation to your allegations.

With respect to access to records involving "disciplinary sanctions", 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." 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 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,

cross-examination" [Capital Newspapers v. Burns, 67 NY2d 562, 568 (1986)]. In another decision which dealt with unsubstantiated complaints against correction officers, the Court of Appeals held that the purpose of §50-a "was to prevent the release of sensitive personnel records that could be used in litigation for purposes of harassing or embarrassing correction officers" [Prisoners' Legal Services v. NYS Department of Correctional Services, 73 NY 2d 26, 538 NYS 2d 190, 191 (1988)]. The Court in an opinion rendered earlier this year reiterated its view of §50-a, citing that decision and stating that:

“...we recognized that the decisive factor in determining whether an officer’s personnel record was exempted from FOIL disclosure under Civil Rights Law § 50-a was the potential use of the information contained therein, not the specific purpose of the particular individual requesting access, nor whether the request was actually made in contemplation of litigation.

‘Documents pertaining to misconduct or rules violations by corrections officers – which could well be used in various ways against the officers – are the very sort of record which *** was intended to be kept confidential. *** The legislative purpose underlying section 50-a *** was *** to protect the officers from the use of records *** as a means for harassment and reprisals and for the purpose of cross-examination’ (73 NY2d, at 31 [emphasis supplied])” (Daily Gazette v. City of Schenectady, 93 NY2d 145, 156- 157 (1999)).

If the person in question is a correction officer, I believe that the records of your interest would be exempt from disclosure pursuant to §50-a of the Civil Rights Law.

If the employee is not a correction officer, I believe that the Freedom of Information Law would be the governing statute, and that final determinations reflective of findings of misconduct would in my view be available. Pertinent to an analysis of rights of access would be two of the grounds for denial.

Section 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

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, 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 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

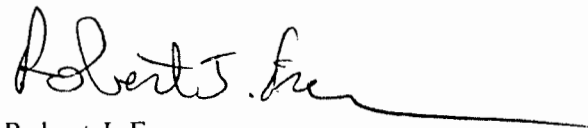
Mr. James Wright
October 13, 1999
Page -4-

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, if the person who is the subject of your inquiry is a correction officer, I believe that §50-a of the Civil Rights Law would govern, and that a court order would be needed to obtain the records. If, however, that person is not a correction officer, the Freedom of Information Law would govern, and the records would be accessible to the extent described above.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and extends across the width of the page.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
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707 L-AD-11740

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October 14, 1999

Executive Director

Robert J. Freeman

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, unless otherwise indicated.

Dear Mr. Henner:

I have received your letter of August 27 in which you sought an advisory opinion concerning a denial of access to records by the Office of Real Property Services (ORPS).

By way of background, in a request directed to ORPS, you sought records "which pertain or relate to the decision of the [ORPS] to accelerate the 1999 state equalization relate for 'several municipalities across the state because of recognized equalization problems,' including the City of Oswego School District." A variety of materials were made available to you, but ORPS denied access to "several statistical analyses provided by Niagara Mohawk Power Corporation [hereafter "NIMO"]." NIMO claimed that the record at issue maybe withheld pursuant to §87(2)(d) of the Freedom of Information Law and asked ORPS to keep it confidential in accordance with §89(5) of that statute. Based on a letter sent to ORPS by NIMO, the record consists of "a computer program" developed by NIMO to evaluate different taxation scenarios concerning NMPC's real property" that "projects future Niagara Mohawk property taxes as a component of its operating costs". NIMO contended that "release of the requested information could permit an unfair advantage to competitors and cause substantial injury to the competitive position of Niagara Mohawk." NIMO also contended that your request is "vague" and fails to indicate your purpose or the intended use of the computer program. ORPS honored NIMO's request for confidentiality and indicated that the latter's position creates "a triable issue of fact."

It is your view that NIMO "is not competing with any other entity generating electrical power and that:

"Prior to the approval of Niagara Mohawk's Power Choice plan by the Public Service Commission in 1998, Niagara Mohawk must divest itself of all of the property in question. Therefore, Niagara Mohawk never was competing with the owners of generation assets, nor does Niagara Mohawk presently compete with any other owner of real property. Consequently, disclosure of this information will not injure Niagara Mohawk's competitive position.

"Furthermore, information regarding the possible variations in assessment of real property cannot be compared to information pertaining to the pricing of insurance products. Insurance products are sold in a competitive market; in contrast, the assessment of property is not a competitive activity, and, in any event, Niagara Mohawk did not have any competitors who owned electrical generating facilities which were also paying real property taxes."

In this regard, I offer the following comments.

First, the purpose for which the request was made is, in my opinion, irrelevant. In brief, it has been held that when records are accessible under the Freedom of Information Law, they must be made equally available "to any person, without regard to status or interest" [Burke v. Yudelson, 51 AD2d 673 (1976); also Farbman v. New York City, 62 NY2d 75 (1984)]. As such, your intended use of the record is not pertinent to a determination of your 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. As suggested in the materials, the only ground of denial of significance is §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..."

Further, when a commercial entity is required to submit records to a state agency, pursuant to §89(5), it may request, at the time of submission, that the records or portions thereof be kept confidential in accordance with §87(2)(d), and ORPS, through its responses to you, has indicated that the record is being withheld on that basis.

In my opinion, the question under §87(2)(d) involves the extent, if any, to which disclosure would "cause substantial injury to the competitive position" of a commercial 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 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 do not have sufficient knowledge to suggest that §87(2)(d) would or would not be applicable, but it appears that certain of your contentions may be accurate, i.e., that NIMO may not be competing locally with generators of electrical power or with owners of real property. However, a representative of ORPS has indicated that the ability of that agency to function effectively on behalf of the public might be damaged if it could not obtain the record or the kind of record at issue. As indicated by the Court of Appeals, commercial information might properly be withheld if disclosure "would impair the government's ability to obtain necessary information in the future." The extent to which that would be so is unknown to me. Perhaps more importantly, while NIMO may not compete in the areas to which you referred, as stated earlier, it has contended that the computer program "projects future...property taxes as a component of its operating costs" and that, therefore, disclosure "could permit an unfair advantage to competitors and cause substantial injury to [its] competitive position..."

Without greater knowledge of the industry in which NIMO functions, I cannot evaluate the merits of its contentions. Nevertheless, I am in general agreement with your suggestion that "ORPS cannot properly deny a FOIL request based on an assertion that Niagara Mohawk's position creates 'a triable issue of fact,' but instead, can only deny access of ORPS believes that it can sustain the burden of proof with respect to any such 'triable issue of fact'". As I view §89(5) of the Freedom of Information Law, when a commercial enterprise seeks a guarantee that the agency to which its records are submitted will not disclose the records, and the agency confers confidentiality and upholds the guarantee of confidentiality following an appeal by a person whose request for the record has been denied, the agency has the burden of proof in its defense of the denial in any ensuing proceeding commenced for review of the denial. Stated differently, to continue the protection accorded by §89(5), and agency must believe that it can prove to a court that disclosure would, in fact, cause substantial injury to the competitive position of the commercial enterprise that submitted the record. If the agency does not believe that it can meet that burden proof or does not have sufficient knowledge or information to ascertain the merits of the commercial entity's contentions, I believe that it should indicate that the request to the person seeking the record will be granted, in which case, following the exhaustion of administrative remedies, the commercial entity that submitted the record has fifteen days to commence a proceeding for the purpose of demonstrating to a court that disclosure would cause substantial injury to its competitive position.

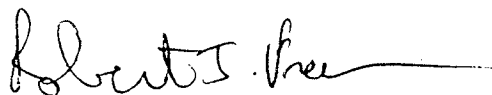
As indicated earlier, agency records are presumptively available under the Freedom of Information Law, including those submitted to an agency by a commercial enterprise. In my opinion, while §89(5) provides additional protection to commercial enterprises that are required to submit records to state agencies, its terms preserve the presumption of access and place the burden of defending secrecy either on a state agency based on its belief that disclosure would cause substantial injury to the competitive possession of a commercial enterprise, or on the commercial enterprise. It

Mr. Peter Henner
October 14, 1999
Page -6-

appears that the position taken by ORPS essentially forces the applicant for the record to expend time, effort and money to seek judicial review of the agency's denial of access. When the justification for the assertion of §87(2)(d) involves a "triable issue of fact", rather than the agency's assertion that the exception has been properly invoked and that it can meet the burden of proof, I believe that the agency, under §89(5), in recognition of the presumption of access, is obliged to conditionally grant the applicant's request. Thereafter, the commercial entity claiming that disclosure would cause substantial injury to its competitive position may choose to initiate a proceeding to defend against disclosure in which it would have the burden of proof. In that event, the commercial enterprise, rather than the person seeking the records, would bear the expense and burden of attempting to block disclosure and litigating the matter.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Richard J. Sinnott
Stephen J. Harrison
Lewis E. Gammon



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI LAO - 11741

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

October 14, 1999

Executive Director

Robert J. Freeman

Mr. H. Thompson
96-B-0910
Southport Correctional Facility
P.O. Box 2000
Pine City, NY 14871

Dear Mr. Thompson:

I have received a series of letters from you dated October 10 through 14 in which you wrote that you would "like to appeal" denials of access to information by various agencies.

In this regard, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to determine appeals or otherwise compel an agency to grant or deny access to records.

The provision in the Freedom of Information Law pertaining to the right to appeal, §89(4)(a), states in relevant part that:

"any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm



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Alexander F. Treadwell

October 14, 1999

Executive Director

Robert J. Freeman

Mr. Gilberto Cruz
97-A-5306
Great Meadow Correctional Facility
P.O. Box 51
Comstock, NY 12821

Dear Mr. Cruz:

I have received your undated letter which reached this office on October 13 in which you appealed a denial of access to records by an official at your 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 in the Freedom of Information Law pertaining to the right to appeal, §89(4)(a), states in relevant part that:

"any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

For your information, the person designated 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:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI-AO-11743

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David A. Schulz
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Alexander F. Treadwell

October 15, 1999

Executive Director

Robert J. Freeman

Mr. William Phelps
Lansing Faculty Association
Lansing High School
300 Ridge Road
Lansing, NY 14882

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Phelps:

I have received your letter of August 26 in which you wrote that the Lansing Central School District "has employed the district superintendent's secretary to take notes at all executive sessions." The District denied access to the notes based on a judicial decision, Wm. J. Kline & Sons, Inc. v. County of Hamilton [235 AD2d 44 (1997)], a contention that the notes constitute intra-agency materials that are exempt from disclosure, and its position that notes are not District records but rather are the personal property of the Superintendent.

In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to all agency records, and §86(4) of that statute defines the term "record" 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, I believe that the notes in question are "records" that fall 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.

I am mindful of the Kline decision, in which it was held that tape recordings of executive sessions are exempted from disclosure by statute in accordance with §87(2)(a) of the Freedom of Information Law. The court reasoned that executive sessions, and that, therefore, a verbatim account of the discussion during executive sessions are confidential. While I respect the Court's decision, I respectfully disagree. There is nothing in the Open Meetings Law that specifies that what is said or heard during an executive session is confidential. Significantly, even when a public body clearly has the authority to enter into an executive session, there is no obligation to do so; the ability to conduct an executive session must be preceded by a vote carried by a majority of the total membership of a public body. If the vote does not carry, a public body may discuss the matter in public. Again, very simply, while it may not be ethical, wise or in the best interest of the public to divulge what transpired during an executive session, I do not believe that the information acquired or shared during an executive session is statutorily exempt from disclosure.

The foregoing is not intended to suggest that the notes would be accessible, even if the Court in Kline had reached a different conclusion. As indicated in response to your request, the notes would constitute "intra-agency" materials that 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.

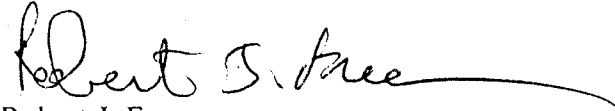
Further, there may be other grounds for denial that are pertinent. For instance, a record of a discussion regarding an employee's health condition would if disclosed constitute "an unwarranted invasion of personal privacy" and could be withheld under §87(2)(b). A record of a discussion of the Board's strategy in its negotiations with a union would likely impair collective bargaining negotiations and be deniable under §87(2)(c).

In sum, I believe that the notes are subject to rights conferred by the Freedom of Information Law, but that their contents could likely be withheld in great measure even if the Kline decision had not been rendered.

Mr. William Phelps
October 14, 1999
Page -4-

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink that reads "Robert J. Freeman". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Andrea Price
Thomas J. Jones



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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David A. Schulz
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Alexander F. Treadwell

Executive Director

Robert J. Freeman

October 18, 1999

Mr. Jack McAndrew



The staff of the Committee on Open 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 August 24. In brief, you asked whether the Orange-Ulster BOCES is required to maintain and make available a "subject matter list" and appoint an appeals officer.

In this regard, as you are aware, §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.

Since the subject matter list must be maintained on an ongoing basis, I do not believe that there is any basis for a delay in disclosure.

With respect to the designation of an appeals officer, 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 Boces 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 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).

Mr. Jack McAndrew

October 18, 1999

Page 3-

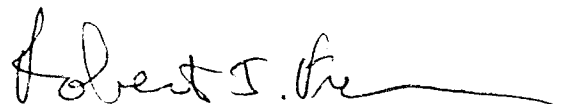
It is also noted that the state's highest court has held that a failure to inform a person denied access to records of the right to appeal enables that person to seek judicial review of a denial. Citing the Committee's regulations and the Freedom of Information Law, the Court of Appeals in Barrett v. 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 their obligations under the Freedom of Information Law, copies of this opinion will be forwarded to BOCES officials.

I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:tt

cc: BOCES

Records Access Officer

FOIL-AO-117415

From: Robert Freeman
To: Downen@SpringvilleGl.wnyric.org
Date: Tue, Oct 19, 1999 9:49 AM
Subject: Dear Ms. Owen:

Dear Ms. Owen:

I have received your letter in which you sought guidance concerning a situation in which a parent seeks copies of records pertaining to her child, you indicate that the fee for copies is 25 cents per page, but she says that she cannot afford to pay the fee.

In this regard, when records are accessible to an individual, he or she may inspect them at no charge. If copies are requested, §87(1)(b)(iii) of the Freedom of Information Law authorizes an agency to charge up to 25 cents per photocopy up to 9 by 14 inches. I note that it has been held that an agency may charge its established fee, even when the applicant for records is indigent [see *Whitehead v. Morgenthau*, 552 NYS2d 518 (1990)].

Notwithstanding the foregoing, there is nothing in the Freedom of Information Law that prohibits an agency from waiving the fee for copies. As such, you could choose to waive the fee. It is also noted that many agencies waive fees as a matter of policy when the request involves a minimal number of copies. Their finding is that it costs more to accomplish the administrative tasks associated with taking in a small amount of money than the amount of the fee.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518 - Phone
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October 19, 1999

Executive Director

Robert J. Freeman

Mr. Glenn Smith
99-A-0740
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. Smith:

I have received your letter of August 24 in which you sought assistance in obtaining records from the office of the Schenectady County Clerk and the Office of the District Attorney. The records in question are lab reports and analyses.

In this regard, it appears that you may be requesting court records from the County Clerk. If that is so, the Freedom of Information Law would not apply. That statute pertains to agency records, and §86(3) defines the term "agency" to include:

"any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines the term "judiciary" to mean:

"the courts of the state, including any municipal or district court, whether or not of record."

Based on the foregoing, while the office of a district attorney is clearly an "agency" required to comply with the Freedom of Information Law, the courts and court records are beyond the coverage of that law. This not to suggest that court records may not be accessible; on the contrary, court

records are generally available under other provisions of law (see e.g., Judiciary Law, §255). When seeking court records, it is recommended that a request be made to clerk of the appropriate court, citing an applicable provision of law as the basis for the request.

As the Freedom of Information Law pertains to agencies, such as the office of a district attorney, it is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, three of the grounds for denial are likely relevant to an analysis of rights of access to the records sought.

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.

Perhaps most relevant would be §87(2)(e)(iv), which states that an agency may withhold records compiled for law enforcement purposes when disclosure would "reveal criminal investigative techniques or procedures, except routine techniques and procedures."

The leading decision concerning §87(2)(e)(iv) 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...

"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)."

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.

The remaining ground for denial of possible significance, §87(2)(f), authorizes an agency to withhold records insofar as disclosure "would endanger the life or safety of any person." The facts and circumstances of the matter would determine the extent to which that provision might be applicable.

Lastly, the Freedom of Information Law provides direction concerning the time and manner in which an agency (not a court, because a court is not 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."

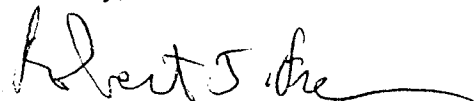
In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of

Mr. Glenn Smith
October 19, 1999
Page -4-

Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer, Office of the District Attorney
County Clerk



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11747

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Alexander F. Treadwell

October 19, 1999

Executive Director

Robert J. Freeman

Mr. Robert Sanchez
86-A-3762 A-0-59
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. Sanchez:

I have received your letter of August 23 and the correspondence attached to it. You have sought my views concerning a request for records relating to the discipline or dismissal of an employee of the Office of the Chief Medical Examiner of New York City.

In this regard, first, in consideration of the initial response to your request, I note that the Freedom of Information Law pertains to existing records. If the agency to which the request was made does not maintain the records of your interest, that statute would not apply.

Second, insofar as the records sought 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. In my view, two of the grounds for denial are relevant in consideration of rights of access to the records in question.

Relevant to an analysis 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, 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*].

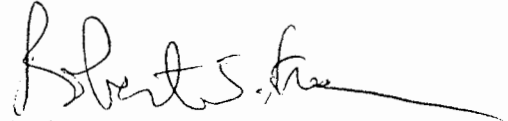
In contrast, when allegations or charges of misconduct have not yet been determined or did not result in disciplinary action or a finding of misconduct, the records relating to such allegations may, in my view, be withheld, for disclosure would result in an unwarranted invasion of personal privacy [see e.g., Herald Company v. School District of City of Syracuse, 430 NYS 2d 460 (1980)].

Mr. Robert Sanchez
October 19, 1999
Page -3-

Similarly, to the extent that charges are dismissed or allegations are found to be without merit, I believe that they may be withheld.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman", with a long horizontal line extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Sarah Scott
Ellen Borakove



STATE OF NEW YORK
DEPARTMENT OF STATE
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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

October 19, 1999

Executive Director

Robert J. Freeman

E-Mail

TO: Kris<KSKROP@webtv.net
FROM: Robert J. Freeman, Executive Director

RJF

Dear Kris:

Your inquiry sent to the Department of State has been forwarded to the Committee on Open Government. The Committee, a unit of the Department, is authorized to provide advice and opinions concerning the Freedom of Information Law.

You indicated that you are attempting to locate an uncle who has been "missing" for twenty-five years, and that his last known location was the Albany County Jail. In this regard, I offer the following comments.

First, there is no central source of information about individuals, and it may be difficult if not impossible to locate a missing person through entirely legal means. As a general matter, a request made under the Freedom of Information Law should be made to the "records access officer" at the agency or agencies that you believe would maintain the records of your interest. The records access officer has the duty of coordinating an agency's response to requests for records. I note, too, that an applicant seeking records under the Freedom of Information Law must "reasonably describe" the records sought. Therefore, a request must include sufficient detail to enable the staff at an agency to locate and identify records with reasonable effort. A request for records based on a name alone likely would not satisfy the requirement that it reasonably describe the records.

Second, since you referred to the Albany County Jail, I point out that it is required to permanently maintain a log containing information pertaining to every person who has been in its custody. Specifically, §500-f of the Correction Law, which pertains to county jails, states that:

"Each keeper shall keep a daily record, to be provided at the expense of the county, of the commitments and discharges of all prisoners delivered to his charge, which shall contain the date of entrance, name,

Kris
October 19, 1999
Page -2-

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."

It is suggested that you refer to that provision in an attempt to obtain information from the Jail.

Lastly, often individuals are incarcerated temporarily in county jails and later transferred to state correctional facilities. As such, it is also suggested that you contact the Department of Correctional Services to determine whether your uncle has been incarcerated in a state correctional facility. That agency has a website that includes inmates' conviction backgrounds, sentences and parole dates. I am unaware, however, of whether the site includes only relatively current information or older information as well. The address is: www.docs.state.ny.us.

I hope that I have been of assistance.

RJF:jm



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COMMITTEE ON OPEN GOVERNMENT

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

October 19, 1999

Executive Director

Robert J. Freeman

Mr. Glenn Smith
99-A-0740
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. Smith:

I have received your letter of August 24 in which you sought assistance in obtaining records from the office of the Schenectady County Clerk and the Office of the District Attorney. The records in question are lab reports and analyses.

In this regard, it appears that you may be requesting court records from the County Clerk. If that is so, the Freedom of Information Law would not apply. That statute pertains to agency records, and §86(3) defines the term "agency" to include:

"any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines the term "judiciary" to mean:

"the courts of the state, including any municipal or district court, whether or not of record."

Based on the foregoing, while the office of a district attorney is clearly an "agency" required to comply with the Freedom of Information Law, the courts and court records are beyond the coverage of that law. This not to suggest that court records may not be accessible; on the contrary, court

records are generally available under other provisions of law (see e.g., Judiciary Law, §255). When seeking court records, it is recommended that a request be made to clerk of the appropriate court, citing an applicable provision of law as the basis for the request.

As the Freedom of Information Law pertains to agencies, such as the office of a district attorney, it is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, three of the grounds for denial are likely relevant to an analysis of rights of access to the records sought.

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.

Perhaps most relevant would be §87(2)(e)(iv), which states that an agency may withhold records compiled for law enforcement purposes when disclosure would "reveal criminal investigative techniques or procedures, except routine techniques and procedures."

The leading decision concerning §87(2)(e)(iv) 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...

"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)."

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.

The remaining ground for denial of possible significance, §87(2)(f), authorizes an agency to withhold records insofar as disclosure "would endanger the life or safety of any person." The facts and circumstances of the matter would determine the extent to which that provision might be applicable.

Lastly, the Freedom of Information Law provides direction concerning the time and manner in which an agency (not a court, because a court is not 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."

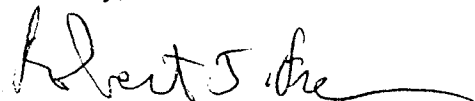
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Mr. Glenn Smith
October 19, 1999
Page -4-

Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer, Office of the District Attorney
County Clerk



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11747

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Alexander F. Treadwell

October 19, 1999

Executive Director

Robert J. Freeman

Mr. Robert Sanchez
86-A-3762 A-0-59
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. Sanchez:

I have received your letter of August 23 and the correspondence attached to it. You have sought my views concerning a request for records relating to the discipline or dismissal of an employee of the Office of the Chief Medical Examiner of New York City.

In this regard, first, in consideration of the initial response to your request, I note that the Freedom of Information Law pertains to existing records. If the agency to which the request was made does not maintain the records of your interest, that statute would not apply.

Second, insofar as the records sought 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. In my view, two of the grounds for denial are relevant in consideration of rights of access to the records in question.

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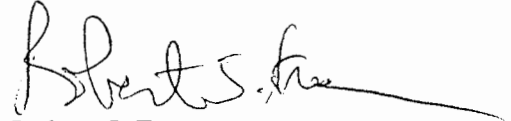
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Mr. Robert Sanchez
October 19, 1999
Page -3-

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Robert J. Freeman
Executive Director

RJF:jm

cc: Sarah Scott
Ellen Borakove



STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-117418

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Alexander F. Treadwell

October 19, 1999

Executive Director

Robert J. Freeman

E-Mail

TO: Kris<KSKROP@webtv.net
FROM: Robert J. Freeman, Executive Director

RJF

Dear Kris:

Your inquiry sent to the Department of State has been forwarded to the Committee on Open Government. The Committee, a unit of the Department, is authorized to provide advice and opinions concerning the Freedom of Information Law.

You indicated that you are attempting to locate an uncle who has been "missing" for twenty-five years, and that his last known location was the Albany County Jail. In this regard, I offer the following comments.

First, there is no central source of information about individuals, and it may be difficult if not impossible to locate a missing person through entirely legal means. As a general matter, a request made under the Freedom of Information Law should be made to the "records access officer" at the agency or agencies that you believe would maintain the records of your interest. The records access officer has the duty of coordinating an agency's response to requests for records. I note, too, that an applicant seeking records under the Freedom of Information Law must "reasonably describe" the records sought. Therefore, a request must include sufficient detail to enable the staff at an agency to locate and identify records with reasonable effort. A request for records based on a name alone likely would not satisfy the requirement that it reasonably describe the records.

Second, since you referred to the Albany County Jail, I point out that it is required to permanently maintain a log containing information pertaining to every person who has been in its custody. Specifically, §500-f of the Correction Law, which pertains to county jails, states that:

"Each keeper shall keep a daily record, to be provided at the expense of the county, of the commitments and discharges of all prisoners delivered to his charge, which shall contain the date of entrance, name,

Kris
October 19, 1999
Page -2-

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."

It is suggested that you refer to that provision in an attempt to obtain information from the Jail.

Lastly, often individuals are incarcerated temporarily in county jails and later transferred to state correctional facilities. As such, it is also suggested that you contact the Department of Correctional Services to determine whether your uncle has been incarcerated in a state correctional facility. That agency has a website that includes inmates' conviction backgrounds, sentences and parole dates. I am unaware, however, of whether the site includes only relatively current information or older information as well. The address is: www.docs.state.ny.us.

I hope that I have been of assistance.

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11749

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

October 19, 1999

Executive Director

Robert J. Freeman

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 August 25 in which you complained with respect to delays by the New York City Police Department in responding to your requests 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)].

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:

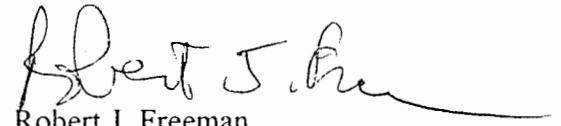
"...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of 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).

Mr. Curtis Mosley
October 19, 1999
Page -6-

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11750

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Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

October 19, 1999

Executive Director

Robert J. Freeman

Mr. Kenneth L. Gaston
77-C-0591
Collins Correctional Facility
P.O. Box 340
Collins, NY 14034-0340

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Gaston:

I have received your letter of August 22. You have sought my views concerning the propriety of an acknowledgment of the receipt of your request by the Office of the Erie County District Attorney in which you were informed that "you should expect an answer to your request within 45 days of the date of this letter."

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

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

Mr. Kenneth L. Gaston

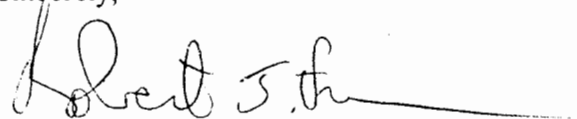
October 19, 1999

Page -2-

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,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman", with a long horizontal line extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Joseph A. Notaro



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11751

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Robert L. King
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Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

October 19, 1999

Executive Director

Robert J. Freeman

Mr. Christopher Bradford
82-A-5885
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. Bradford:

I have received your letter of August 30 in which you asked that I address seven "points", as well as your contentions offered in a memorandum of law.

In this regard, the authority of the Committee on Open Government to advise is limited to matters pertaining to the statutes within its jurisdiction. In the context of your correspondence, the only such statute is the Freedom of Information Law; this office has neither the jurisdiction nor the expertise to offer advice or opinions relating to the Criminal Procedure Law or a claim of a "liberty interest." That being so, 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, offices of district attorneys and the Division of Parole are "agencies."

Second, as described in your letter, "a statement (recommendation and or opinion) submitted by any N. Y. City Office of the District Attorney, to the New York State Division/Board of Parole" would constitute "inter-agency material" that falls within the coverage of §87(2)(g) of the Freedom of Information Law. That provision permits an agency to withhold records that:

Mr. Christopher Bradford
October 19, 1999
Page -2-

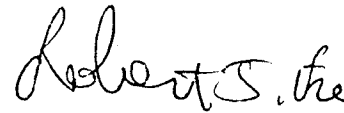
"are inter-agency or intra-agency materials which are not:

- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations; or
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those 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 clarifies 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-11752

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Robert L. King
Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

October 20, 1999

Executive Director

Robert J. Freeman

Mr. I. Serrano
93-R-0029
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. Serrano:

I have received your letter of September 1 in which you sought assistance in obtaining your medical records from SUNY Medical Center.

In this regard, since SUNY is a governmental entity, its records would be subject to the Freedom of Information Law. In terms of rights granted by that statute, it is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

With regard to medical records, the Freedom of Information Law, in my view, likely permits that some of those records may be withheld in whole or in part, depending upon their contents. For instance, medical records prepared by hospital personnel could be characterized as "intra-agency materials" that fall within the scope of §87(2)(g) of the Freedom of Information Law. To the extent that such materials consist of advice, opinion, recommendation and the like, I believe that the Freedom of Information Law would permit a denial.

Nevertheless, a different statute, §18 of the Public Health Law, generally grants rights of access to medical records to the subjects of the records. As such, that statute may provide greater access to medical records than the Freedom of Information Law. It is suggested that you send your request to the hospital and make specific reference to §18 of the Public Health Law when seeking medical records.

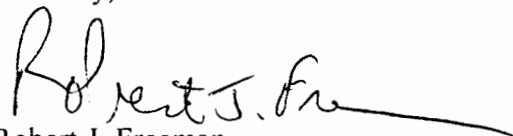
Mr. I. Serrano
October 20, 1999
Page -2-

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,

A handwritten signature in black ink that reads "Robert J. Freeman". The signature is written in a cursive style with a long horizontal line extending to the right.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOTL 90-11753

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Fax (518) 474-1927

Website Address: <http://www.dos.state.ny.us/coog/coogwww.html>

October 20, 1999

Executive Director

Robert J. Freeman

Mr. Philip King
91-A-5926
Woodbourne Prison
Pouch No. 1
Woodbourne, NY 12788

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. King:

I have received your letter of August 30 in which you sought my views concerning your right to gain access to records from the Office of the Queens County District Attorney relating to your arrest.

In this regard, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Since I am unaware of the contents of 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


Mr. Philip King
October 20, 1999
Page -5-

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,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal line extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL 90-11754

Committee Members

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Robert L. King
Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

October 20, 1999

Mr. Michael R. McCarthy
98-B-1992
Barè 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. McCarthy:

I have received your letter of August 31, as well as the correspondence attached to it. In brief, you requested a copy of a memorandum from your facility concerning "dispensing times of medication." In response to the request, you were informed that no such document exists, and you have raised a series of questions relating to the matter.

In this regard, in view of your questions, I point out that the advisory jurisdiction of the Committee on Open Government is limited to matters involving public access to government records, primarily under the Freedom of Information Law. As such, my comments will be restricted to that subject.

As you may be aware, the Freedom of Information Law pertains to existing records, and §89(3) of that statute provides in part that an agency is not required to create or prepare a record in response to a request. Therefore, if the memorandum of your interest does not exist, the Freedom of Information Law would not apply.

Second, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

I point out that in Key v. Hynes [613 NYS 2d 926, 205 AD 2d 779 (1994)], it was found that a court could not validly accept conclusory allegations as a substitute for proof that an agency could not locate a record after having made a "diligent search". However, in another decision, such an

Mr. Michael R. McCarthy

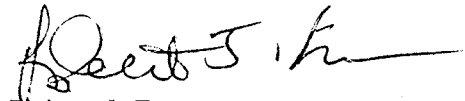
October 20, 1999

Page - 2 -

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,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:tt

cc: Anthony J. Annucci



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL 90-11755

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Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

October 20, 1999

Executive Director

Robert J. Freeman

Mr. Steven Reeves
98-R-3994
Orleans Correctional Facility
35-31 Gaines Basin Road
Albion, NY 14411

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Reeves:

I have received your letter of August 30 concerning the propriety of a partial denial of access by the Department of Correctional Services to an employee manual.

In this regard, I offer the following comments.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all record of an agency are available, except to the extent that records or portions thereof fall within one or more of the grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, three of the grounds for denial are relevant to an analysis of rights of access.

Specifically, §87(2)(g) states that an agency may withhold records that:

"are inter-agency or intra-agency materials which are not:

- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations; or
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

Mr. Steven Reeves

October 20, 1999

Page -2-

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different basis for denial is applicable. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. It would appear that the record sought would consist of instructions to staff that affect the public or an agency's policy. Therefore, I believe that it would be available, unless a different basis for denial could be asserted.

A second provision of potential significance is §87(2)(e), which permits an agency to withhold records that:

"are compiled for law enforcement purposes and which, if disclosed, would:

i. interfere with law enforcement investigations of judicial proceedings...

ii. deprive a person of a right to a fair trial or impartial adjudication;

iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or

iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

Under the circumstances, most relevant is §87(2)(e)(iv). The leading decision concerning that provision is Fink v. Lefkowitz, which involved access to a manual prepared by a special prosecutor that investigated nursing homes, in which the Court of Appeals held that:

"The purpose of this exemption is obvious. Effective law enforcement demands that violators of the law not be apprised the nonroutine procedures by which an agency obtains its information (see Frankel v. Securities & Exch. Comm., 460 F2d 813, 817, cert den 409 US 889). However beneficial its thrust, the purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution.

"To be distinguished from agency records compiled for law enforcement purposes which illustrate investigative techniques, are those which articulate the agency's understanding of the rules and regulations it is empowered to enforce. Records drafted by the body charged with enforcement of a statute which merely clarify procedural

or substantive law must be disclosed. Such information in the hands of the public does not impede effective law enforcement. On the contrary, such knowledge actually encourages voluntary compliance with the law by detailing the standards with which a person is expected to comply, thus allowing him to conform his conduct to those requirements (see Stokes v. Brennan, 476 F2d 699, 702; Hawkes v. Internal Revenue Serv., 467 F2d 787, 794-795; Davis, Administrative Law [1970 Supp], section 3A, p 114).

"Indicative, but not necessarily dispositive of whether investigative techniques are nonroutine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel (see Cox v. United States Dept. of Justice, 576 F2d 1302, 1307-1308; City of Concord v. Ambrose, 333 F Supp 958). It is no secret that numbers on a balance sheet can be made to do magical things by scrupulous nursing home operators the path that an audit is likely to take and alerting them to items to which investigators are instructed to pay particular attention, does not encourage observance of the law. Rather, release of such information actually countenances fraud by enabling miscreants to alter their books and activities to minimize the possibility of 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 than 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

Mr. Steven Reeves
October 20, 1999
Page -4-

merely a recitation of the obvious: that auditors should pay particular attention to requests by nursing homes for Medicaid reimbursement rate increases based upon projected increase in cost. As this is simply a routine technique that would be used in any audit, there is no reason why these pages should not be disclosed" (id. at 573).

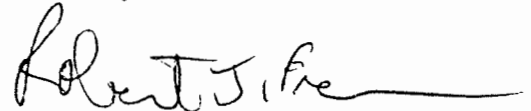
While I am unfamiliar with the record in question, it would appear that those portions which, if disclosed, would enable potential lawbreakers to evade detection could likely be withheld. It is noted that in another decision which dealt with a request for certain regulations of the State Police, the Court of Appeals found that some aspects of the regulations were non-routine, and that disclosure could "allow miscreants to tailor their activities to evade detection" [De Zimm v. Connelie, 64 NY 2d 860 (1985)]. Nevertheless, other portions of the record might be "routine" and might not if disclosed preclude employees from carrying out their duties effectively.

Lastly, the remaining ground for denial of possible relevance is §87(2)(f). That provision permits an agency to withhold records when disclosure "would endanger the life of safety of any person." To the extent that disclosure would endanger the life of safety of correction officers or others, it appears that §87(2)(f) would be applicable.

In sum, while some aspects of the record must be and apparently were disclosed, others, in my view, could justifiably have been withheld in accordance with the preceding commentary.

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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FOI L 190 - 11756

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October 21, 1999

Executive Director

Robert J. Freeman

Mr. Vincent J. Fabbo

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Fabbo:

The following pertains to your request for records of the Town of Smithtown. Although I responded to you by preparing an advisory opinion addressed to you on October 13, you indicated by phone that the opinion did not deal with all of the records that you are attempting to obtain. Based on previous conversations, I assumed that your primary interest involved knowing the identity of a person who complained that you maintained an illegal apartment in your home, and I focused only on that issue. However, you indicated that you are interested in obtaining an opinion concerning the remainder of your request, which involves "copies of any report, memoranda, determination, recommendation, all records, disposition, findings, final report...with specific regard to case #97-01769."

In this regard, as indicated in the earlier correspondence with you, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. While I am unaware of the extent to which the records in question exist or their contents, it appears that three of the grounds for denial may be pertinent to an analysis of rights of access.

First, §87(2)(b) was cited in the earlier response a basis for withholding those portions of the records which if disclosed would identify the complainant. If others were interviewed, for example, during an investigation, I believe that personally identifying details concerning those individuals could also be withheld.

Second, reports, memoranda and similar documentation prepared by Town employees 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.

Lastly, it is possible that §87(2)(e) may be pertinent. That provisions enables an agency to withhold records that:

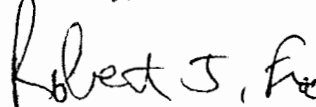
"are compiled for law enforcement purposes and which, if disclosed, would:

- i. interfere with law enforcement investigations or judicial proceedings;
- ii. deprive a person of a right to a fair trial or impartial adjudication;
- iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
- iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

The ability to assert §87(2)(e) is dependent on the nature of the records and the effects of disclosure. Only to the extent that the harmful effects of disclosure delineated in subparagraphs (i) through (iv) would that exception be applicable.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: John B. Zollo, Town Attorney



STATE OF NEW YORK
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FOI L-90-11757

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Alexander F. Treadwell

October 21, 1999

Executive Director

Robert J. Freeman

Mr. James Charleston
79-B-0179
Mid-State Correctional Facility
P.O. Box 2500
Marcy, NY 13403

Dear Mr. Charleston:

I have received your letter of October 18 in which you requested various "information/documents" 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 have possession or control of records generally. In short, I cannot provide the information that you requested because this office does not possess it.

A request for records should be made 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.

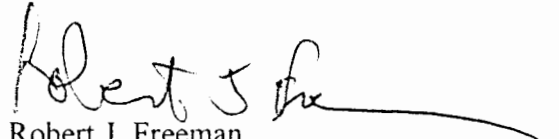
I note, too, that you sought information by asking a series of questions. Here I point out that the Freedom of Information Law deals with the obligation of government agencies to respond to requests for records; that statute does not require that agency staff provide information by answering questions. Further, 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.

Lastly, while the federal Freedom of Information Act, which applies to federal agencies, includes provisions concerning the waiver of fees, the New York equivalent includes no fee provisions. I note that it has been held that an agency may charge its established fees, if a request is made by an indigent inmate [see Whitehead v. Morgenthau, 552 NYS2d 5

Mr. James Charleston
October 21, 1999
Page -2-

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm



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COMMITTEE ON OPEN GOVERNMENT

707L 190-11758

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Alexander F. Treadwell

Executive Director

Robert J. Freeman

October 21, 1999

Mr. Eric Horton
99-A-1241
354 Hunter Street
Ossining, NY 10562-5442

Dear Mr. Horton:

I have received your letter of October 17 in which you requested from this office the Department of Correctional Services employee manual.

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee does not have possession of records generally. In short, I cannot make the manual available because this office does not possess it.

In the future, it is suggested that you seek records from the agency that would clearly maintain them. 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.

With respect to rights of access to the record in question, 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 record sought would consist of instructions to staff that affect the public or an agency's policy. Therefore, I believe that it would be available, unless a different basis for denial could be asserted.

A second provision of potential significance is §87(2)(e), which permits an agency to withhold records that:

"are compiled for law enforcement purposes and which, if disclosed, would:

- i. interfere with law enforcement investigations of judicial proceedings...
- ii. deprive a person of a right to a fair trial or impartial adjudication;
- iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
- iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

Under the circumstances, most relevant is §87(2)(e)(iv). The leading decision concerning that provision is Fink v. Lefkowitz, which involved access to a manual prepared by a special prosecutor that investigated nursing homes, in which the Court of Appeals held that:

"The purpose of this exemption is obvious. Effective law enforcement demands that violators of the law not be apprised the nonroutine procedures by which an agency obtains its information (see Frankel v. Securities & Exch. Comm., 460 F2d 813, 817, cert den 409 US 889). However beneficial its thrust, the purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution.

"To be distinguished from agency records compiled for law enforcement purposes which illustrate investigative techniques, are those which articulate the agency's understanding of the rules and regulations it is empowered to enforce. Records drafted by the body charged with enforcement of a statute which merely clarify procedural or substantive law must be disclosed. Such information in the hands of the public does not impede effective law enforcement. On the contrary, such knowledge actually encourages voluntary compliance with the law by detailing the standards with which a person is expected to comply, thus allowing him to conform his conduct to those requirements (see Stokes v. Brennan, 476 F2d 699, 702; Hawkes v. Internal Revenue Serv., 467 F2d 787, 794-795; Davis, Administrative Law [1970 Supp], section 3A, p 114).

"Indicative, but not necessarily dispositive of whether investigative techniques are nonroutine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel (see Cox v. United States Dept. of Justice, 576 F2d 1302, 1307-1308; City of Concord v. Ambrose, 333 F Supp 958). It is no secret that numbers on a balance sheet can be made to do magical things by scrupulous nursing home operators the path that an audit is likely to take and alerting them to items to which investigators are instructed to pay particular attention, does not encourage observance of the law. Rather, release of such information actually countenances fraud by enabling miscreants to alter their books and activities to minimize the possibility of 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 than exemplary.

Mr. Eric Horton
October 21, 1999
Page - 4 -

"Disclosure of the techniques enumerated in those pages would enable an operator to tailor his activities in such a way as to significantly diminish the likelihood of a successful prosecution. The information detailed on pages 481 and 482 of the manual, on the other hand, is merely a recitation of the obvious: that auditors should pay particular attention to requests by nursing homes for Medicaid reimbursement rate increases based upon projected increase in cost. As this is simply a routine technique that would be used in any audit, there is no reason why these pages should not be disclosed" (id. at 573).

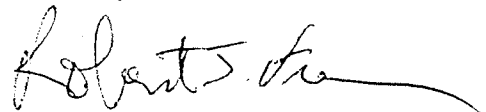
While I am unfamiliar with the record in question, it would appear that those portions which, if disclosed, would enable potential lawbreakers to evade detection could likely be withheld. It is noted that in another decision which dealt with a request for certain regulations of the State Police, the Court of Appeals found that some aspects of the regulations were non-routine, and that disclosure could "allow miscreants to tailor their activities to evade detection" [De Zimm v. Connelie, 64 NY 2d 860 (1985)]. Nevertheless, other portions of the record might be "routine" and might not if disclosed preclude employees from carrying out their duties effectively.

Lastly, the remaining ground for denial of possible relevance is §87(2)(f). That provision permits an agency to withhold records when disclosure "would endanger the life of safety of any person." To the extent that disclosure would endanger the life of safety of correction officers or others, it appears that §87(2)(f) would be applicable.

In sum, while some aspects of the record must be others, in my view, may justifiably be withheld in accordance with the preceding commentary.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt



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4076 AO-11759

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Alexander F. Treadwell

Executive Director

Robert J. Freeman

October 21, 1999

Mr. Robert S. Thompson



The staff of the Committee on Open 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 7 concerning your efforts in obtaining information from Nassau County. As I understand the matter, you want breakdowns concerning challenges to assessments, appeals, the number of reductions in assessments and similar data.

From my perspective, the issue involves whether the County has the ability to generate the data of your interest based on its existing computer programs. In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to existing records. Section 89(3) of that statute states in relevant part that an agency is not required to create a record in response to a request.

Second, §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."

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 soon after the enactment of the current version of the Freedom of Information Law that "[i]nformation

Mr. Robert S. Thompson

October 21, 1999

Page - 2 -

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)].

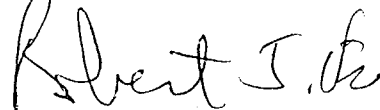
When information is maintained electronically, it has been advised that if the information sought is available under the Freedom of Information Law and may be retrieved by means of existing computer programs, an agency is required to disclose the information. In that kind of situation, the agency in 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)].

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. Assuming that the information of your interest can be generated by means of the County's existing computer programs, I believe that it would be available. In short, insofar as intra-agency materials consist of "statistical or factual tabulations or data", they must be disclosed pursuant to section 87(2)(g)(i), unless a different ground for denial applies. In my view, none of the grounds for denial would be applicable or pertinent.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Brian Meyer



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October 21, 1999

Executive Director

Robert J. Freeman

E-Mail

TO: Pamela Steigman [REDACTED]

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. Steigman:

As you are aware, I have received your letter of September 7 concerning difficulties in your attempts to obtain records from the City of Tonawanda School District. In this regard, I offer the following comments.

First, I point out that the Freedom of Information Law pertains to existing records, and that §89(3) of that statute states in part that an agency is not required to create a record in response to a request. Therefore, insofar as the records of your interest do not exist, the Freedom of Information Law would not apply.

Second, in a related vein, you referred to several specific reports and other records. It is possible that the reports were denied or that you were informed that they did not exist because the specific names that you accorded to the reports may be different from the names or titles used by the District. For instance, you requested the "Strategic Planning" report. While there may be a report dealing with the strategic planning, it may be characterized differently by the District. In the future, rather than seeking to identify a particular document of your interest, it is suggested that you provide information sufficient to "reasonably describe" the records sought as required by §89(3) of the Freedom of Information Law. Under that standard, an applicant is not required to identify a record with particularity; he or she is merely required to provide sufficient detail to enable agency staff to locate the records sought. Similarly, you requested a "budget for Central School." I would conjecture that there is not a separate budget for each school within the District. It would likely be more effective to request the District's budget.

Ms. Pamela Steigman

October 21, 1999

Page -2-

Third, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests and appeals. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

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 indicated that the District denied a request for a tape recording of a meeting because the tape is the personal property of the clerk of the Board. Assuming that the clerk used a

tape recorder in the performance of his or her duties or used the tape recording as a means of ensuring the accuracy of minutes, I believe that the tape recording would be a District record that falls within the coverage of the Freedom of Information law. 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).

Ms. Pamela Steigman

October 21, 1999

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Further, in a case involving notes taken by the Secretary to the Board of Regents that he characterized as "personal" in conjunction with a contention that he took notes in part "as a private person making personal notes of observations...in the course of" meetings. In that decision, the court cited the definition of "record" and determined that the notes did not consist of personal property but rather were records subject to rights conferred by the Freedom of Information Law [Warder v. Board of Regents, 410 NYS 2d 742, 743 (1978)].

In short, even if the clerk used a personal tape recorder or tape, based upon the preceding commentary, I believe that the tape recording is a District record that must be disclosed to the extent required by the Freedom of Information Law.

I hope that I have been of assistance.

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-DO-11761

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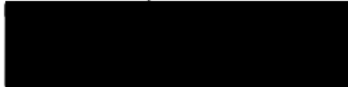
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David A. Schulz
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Alexander F. Treadwell

October 21, 1999

Executive Director

Robert J. Freeman

Mr. Harvey M. Elentuck



The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Elentuck:

I have received your letter of September 2 in which you sought my views concerning several issues relating to the implementation of the Freedom of Information Law by Community School District 25.

First, you questioned the adequacy of the acknowledgement of the receipt of a request, which did not include any date indicating when you could expect that the request would be granted or denied.

In this regard, §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].

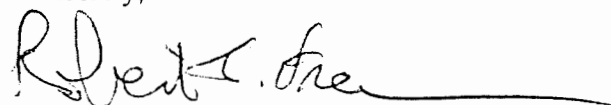
Next, you asked whether, in my view, a community school district should ensure that freedom of information requests be reviewed by an attorney. In my view, while the services of an attorney may be appropriately sought in some instances, there is not a need to seek guidance from an attorney in every instance in which a request is made under the Freedom of Information Law.

Mr. Harvey M. Elentuck
October 21, 1999
Page -2-

Lastly, you indicated that you have attempted to speak with the records access officer at Community School District 25 by phone on many occasions, but that she has always been unavailable. You have sought my views concerning her "perpetual unavailability and unresponsiveness." Not being aware of the records access officer's other duties, I cannot effectively comment. However, in some instances, individuals may be reacting to one's perpetual requests.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal line extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Anne Marie Iannizzi



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-190-
FOI-190-117602

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Executive Director

Robert J. Freeman

October 22, 1999

Mr. Scott Snyder
98-b-0265
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. Snyder:

I have received your letter of September 2 in which you sought guidance concerning access to records maintained by the courts, police departments and offices of district attorneys.

In this regard, the Freedom of Information Law pertains to agency records and §86 (30) defines the term "agency" to include:

"any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86 (1) defines the term "judiciary" to mean:

"the courts of the state, including any municipal or district court, whether or not of record."

Based on the foregoing, while a police department or the office of a district attorney is clearly an "agency" required to comply with the Freedom of Information law, the courts and court records are beyond the coverage of that law. This is not to suggest that court records may not be accessible; on the contrary, court records are generally available under other provisions of law (see e.g., Judiciary Law, §255). When seeking court records, it is recommended that a request be made to clerk of the appropriate court, citing an applicable provision of law as the basis for the request.

Mr. Scott Snyder
October 22, 1999
Page - 2 -

As the Freedom of Information Law pertains to agencies, such as the office of a district attorney, it is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)9a) through (i) of the Law.

Since you also referred to the Personal Privacy Protection Law, I point out that that statute applies only to state agencies; it does not apply to the courts, local police departments or offices of district attorneys. Moreover, although §95(1) of the Personal Privacy Protection Law generally grants rights of access to records of a state agency 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:

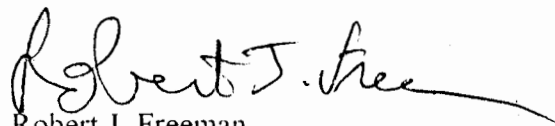
"a record of the commission of corrections, the temporary state commission of investigation, the department of correctional services, the division for youth, the division of probation or the division of state police or of any agency of component thereof whose primary function is the enforcement of civil 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 of persons in correctional facilities.

Enclosed for your review are "Your Right to Know", which deals with the Freedom of Information Law, and "You Should Know", which describes the Personal Privacy Protection Law.

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

FOI L-10-11763

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

October 22, 1999

Executive Director

Robert J. Freeman

Mr. Eddie Patterson
93-A-6264
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. Patterson:

I have received a copy of your request under the Freedom of Information Law for records maintained by a court clerk.

In this regard, for future reference, I point out that the Freedom of Information Law does not apply to the courts or court records. That statute pertains to agency records, and §86(3) defines the term "agency" to include:

"any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines the term "judiciary" to mean:

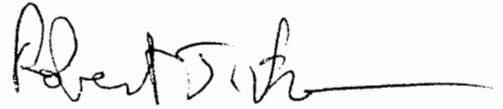
"the courts of the state, including any municipal or district court, whether or not of record."

Based on the foregoing, the courts and court records are beyond the coverage of the Freedom of Information Law. This not to suggest that court records may not be accessible; on the contrary, court records are generally available under other provisions of law (see e.g., Judiciary Law, §255). When seeking court records, it is recommended that a request be made to clerk of the appropriate court, citing an applicable provision of law as the basis for the request.

Ms. Eddie Patterson
October 22, 1999
Page -2-

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
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FOIL - AO - 11764

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October 22, 1999

Executive Director

Robert J. Freeman

Ms. Kimberly G. Shell
Harris, Beach & Wilcox
20 Corporate Woods Boulevard
Albany, NY 12211

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Shell:

As you are aware, I have received your letter of September 8, as well as the materials attached to it. Please accept my apologies for the delay in response.

You have sought an advisory opinion concerning rights of access to certain records prepared by the New York State Department of Transportation (NYSDOT). Specifically, you wrote that:

“As part of NYSDOT’s job of building and maintaining the roadways of the State of New York, NYSDOT solicits bids for state highway projects from various subcontractors, including stone and gravel (course aggregate) producers. In connection therewith, NYSDOT requires that all course aggregate be supplied from NYSDOT-approved aggregate sources. In order to be ‘approved’ by NYSDOT, each supplier must submit a course aggregate sample to NYSDOT, which in turn performs a variety of tests to determine compliance with NYSDOT specifications. NYSDOT documents such test results on data sheets, an example of which is attached hereto.

“...the data sheets list the name and address of the supplier whose materials were tested, the materials actually tested, numerical test results in various performance categories, and an identification of the mineral composition of the sample tested. The data sheets list only factual and statistical information, no NYSDOT opinions or recommendations are included on these test result data sheets. Further, the test results consist of information compiled solely by

NYSDOT. The course aggregate producers supply nothing to NYSDOT except for the material samples to be tested. The test results contain information not generated or supplied by any commercial enterprise, but rather contain data generated by NYSDOT through materials testing.”

You have asked whether the test reports are “exempt from disclosure” under §87(2)(d) of the Freedom of Information Law or accessible under that statute. From my perspective, the records must be disclosed. In this regard, I offer the following comments.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

The provision to which you referred, the so-called “trade secret” exception, enables an agency to withhold “records or portions thereof that...are trade secrets or are submitted to an agency by a commercial enterprise or derived from information submitted by a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise...”

The term “record” is defined in §86(4) of the Freedom of Information Law 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 the context of your inquiry, a commercial enterprise has not submitted “records” to an agency, but rather raw materials used in the construction of highways. I note that it has been held that items of physical evidence, such as tools and clothing, do not constitute “records”, even though perusal of those items might produce information or knowledge [see Allen v. Strojnowski, 129 AD2d 700; motion for leave to appeal denied, 70 NY2d 871 (1989)]. Similarly, the tests prepared by NYSDOT are not derived from information consisting of records obtained from a commercial enterprise. In short, I do not believe that §87(2)(d) is applicable or that it may properly be asserted as a means of denying access to the records at issue.

Also pertinent is another ground for denial. However, due to its structure, that provision would, in my opinion, require disclosure in this instance. Specifically, §87(2)(g) permits an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

- i. statistical or factual tabulations or data;

Ms. Kimberly G. Shell
October 22, 1999
Page -3-

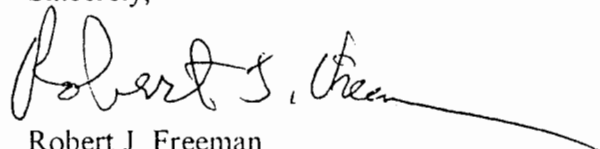
- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations; or
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those 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 sample test sheet that you provided, its contents appear to consist solely of statistical or factual information. If that is so, the records would be available in their entirety.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: John Dearstyne



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL AO - 11765

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Joseph J. Seymour
Alexander F. Treadwell

October 22, 1999

Executive Director

Robert J. Freeman

Ms. Carolyn Schurr
General Counsel
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, unless otherwise indicated.

Dear Ms. Schurr:

I have received your letter of September 3, as well as the documentation attached to it. In brief, *Newsday* reporter Joie Tyrell sought records from the Town of Babylon. Ms. Tyrell requested records pertaining to SOLAR International Trading Corp., Adam Barsky, and communications between the Town and New York City agencies, as well as the Office of the New York County District Attorney. The Town Attorney determined to disclose a number of pages, but only after redacting essentially the entirety of their contents; other than the name of a person to whom correspondence was addressed and a closing signature by the Town Attorney, or the tops of pages that identify documents as "Subpoena Duces Tecum", the contents of the records were fully deleted.

The Town Attorney wrote that the "collective basis" for the Town's denial of access involves §87(2)(e)(i) of the Freedom of Information Law, Criminal Procedure Law, §190.25(4)(a) and the Penal Law, §215.70. Section 87(2)(e) authorizes an agency to withhold records compiled for law enforcement purposes insofar as disclosure "would interfere with law enforcement investigations or judicial proceedings." The provisions of the Criminal Procedure Law and the Penal Law cited by the Town Attorney refer to disclosure of information used or presented in grand jury proceedings.

From my perspective, based upon the language of the Freedom of Information Law and its judicial interpretation, the denial of access by the Town is overbroad. While there may be some elements of the records that might justifiably be withheld, I believe 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 reiterated its general view of the intent of the Freedom of Information Law in 1996 in Gould v. NYC Police Department (89 NY2d 267), stating that:

"To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see*, Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" (*id.*, 275).

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the Department contended that DD5's could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g), an exception separate from those cited in response to your requests. The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (*id.*, 276), and stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (*id.*, 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, stating that:

"...to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents (*Matter of Fink vl. Lefkowitz, supra*, 47 N.Y.2d, at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material (*see, Matter of Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 133, 490 N.Y.S. 2d, 488, 480 N.E.2d 74; *Matter of Farbman & Sons v. New York City Health & Hosps. Corp.*, *supra*, 62 N.Y.2d, at 83, 476 N.Y.S.2d 69, 464 N.E.2d 437)" (*id.*).

In the context of Ms. Tyrell's requests, rather than citing §87(2)(g) as a basis for a blanket denial of access to the records as in Gould, the Town has engaged in a blanket denial citing 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 Town for the purpose of identifying those portions of the records that might fall within the scope of one or more of the grounds for denial of access. As the Court stated later in the decision: "Indeed, the Police Department is entitled to withhold complaint follow-up reports, *or specific portions thereof*, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" (id., 277; emphasis added).

Second, to characterize all of 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 by 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, case law 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 "pursuant to a Grand Jury subpoena." 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, some of 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.

In my view, many of the kinds of records requested, by their nature, indicate that the exception concerning records "compiled for law enforcement purposes" is inapplicable. To contend that records prepared for purposes wholly unrelated to any law enforcement investigation may now be withheld due to their use in an investigation would, in my opinion, be unreasonable and subvert the purposes of the Freedom of Information Law. In support of this view, I again point to the decision rendered by the Court of Appeals in Capital Newspapers, supra. In its discussion of the intent of the Freedom of Information Law, the court found that the statute:

"affords all citizens the means to obtain information concerning the day-to-day functioning of the state and local government thus providing the electorate with sufficient information to 'make intelligent, informed choices with respect to both the direction and scope of governmental activities' and with an effective tool for exposing waste, negligence or abuse on the part of government officers" (id. at 566).

Contracts, vouchers and other materials regarding SOLAR, its contract with the Town and the termination of that contract clearly would have been prepared not for law enforcement purposes, but in the ordinary course of business. Similarly, my understanding is that Adam Barsky is a former Town employee. While various aspects of his personnel file might justifiably be withheld, personnel records typically are prepared in the ordinary course of business and not for any law enforcement purpose.

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 most instances, two of the grounds for denial are pertinent in ascertaining rights of to personnel records.

Section 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) (reprimands); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978) (payroll information and dates of employment); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980) (disciplinary action); Geneva

Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981 (a settlement reached following the initiation of disciplinary charges); 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) (disciplinary action); Steinmetz v. Board of Education, East Moriches, *supra* (dates of employment, courses taken by teachers, etc.); Capital Newspapers v. Burns, 67 NY 2d 562 (1986) (days and dates of sick leave)]. 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 (membership in a union); Seelig v. Sieloff, 201 AD2d 298 (1994) (social security numbers)].

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, 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 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.

Communications between the Town and an office of a district attorney or other agency would constitute inter-agency materials. In addition, those kinds of records might have been compiled for law enforcement purposes. In that event, §87(2)(e) indicates that an agency may withhold those kinds of records insofar as 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."

Lastly, it appears that various Town records have been forwarded to other agencies. If the Town continues to maintain copies of those records, it would be obliged to review those records for the purpose of determining rights of access. 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.

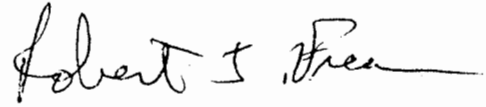
I point out that in Key v. Hynes [613 NYS 2d 926, 205 AD 2d 779 (1994)], it was found that a court could not validly accept conclusory allegations as a substitute for proof that an agency could not locate a record after having made a "diligent search". However, in another decision, such an allegation 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)].

A copy of this opinion will be forwarded to the Town Attorney.

Ms. Carolyn Schurr
October 22, 1999
Page -7-

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and is positioned above the printed name and title.

Robert J. Freeman
Executive Director

RJF:jm

cc: John J. Burke, Jr., Town Attorney



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL AO-11766

Committee Members

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Robert L. King
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Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

October 25, 1999

Ms. Estelle Levy



The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Levy:

I have received your letter of September 4, as well as the materials attached to it. You have sought clarification of the last sentence of a response to your appeal of August 18 to Thomas J. Rozinski, Counsel to the New York City Department of Parks & Recreation following a denial of a request under the Freedom of Information Law. Specifically, Mr. Rozinski wrote that "this is a final and binding agency decision."

From my perspective, that statement is intended to mean that there is no additional appeal to the Department and that the only means of reviewing or challenging the decision would involve the initiation of a judicial proceeding.

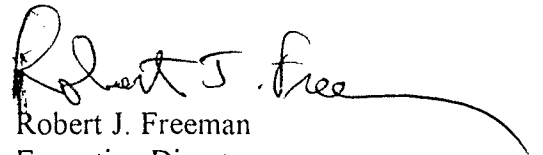
By way of additional background, when a request under the Freedom of Information Law is denied in whole or in part, the person denied access has the right to appeal to the head of the agency or a person designated by the head of the agency pursuant to §89(4)(a) of that statute. If the head of the agency or his or her designee affirms the denial of access, the person denied access would have exhausted his or her administrative remedies. At that juncture, the only remaining means of attempting to compel the agency to disclose following that "final and binding agency decision" would involve the initiation of a proceeding in Supreme Court under Article 78 of the Civil Practice Law and Rules. As stated in §89(4)(b) of the Freedom of Information Law:

"...a person denied access to a record in an appeal determination under the provisions of paragraph (a) of this subdivision may bring a proceeding for review of such denial pursuant to article seventy-eight of the civil practice law and rules..."

Ms. Estelle Levy
October 25, 1999
Page - 2 -

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: Thomas G. Rozinski



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIA No - 11767

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

October 25, 1999

E-MAIL

TO: Internet:cruise@northnet.org

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 Mrs. Counter:

As you are aware, I have received your correspondence concerning the propriety of a disclosure by a local police department of details concerning an incident involving your daughter.

In this regard, first, the Freedom of Information Law pertains to agency records. It is unclear on the basis of the materials whether the disclosure involved a record or comments given orally by the Chief of Police. If the comments were given orally, the Freedom of Information Law would not have been applicable.

When the Freedom of Information Law is applicable, 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.

Under the circumstances that you described, it appears that §87(2)(e) would have enabled the Chief to withhold the information in question. That provision authorizes an agency to withhold records that:

“are compiled for law enforcement purposes and which, if disclosed would:

- i. interfere with law enforcement investigations or judicial proceedings;
- ii. deprive a person of a right to a fair trial or impartial adjudication;

Ms. Carolee Counter
October 25, 1999
Page - 2 -

iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or

iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures;

From my perspective, it might be contended that disclosure could have "deprive[d] a person of a right to a fair trial..." If that is so, the information could have been withheld under §87(2)(e)(ii).

Notwithstanding the foregoing, the Freedom of Information Law is permissive; although it permits a government agency to withhold records in accordance with the grounds for denial, the state's highest court has held that it does not require that records be withheld when one or more of the grounds for denial applies [Capital Newspapers v. Burns, 67 NYS2d 562, 567 (1986)]. Therefore, even if the information at issue could have been withheld under the Freedom of Information Law, there would have been no legal obligation to do so.

I hope that the foregoing serves to clarify your understanding of the matter and that I have been of assistance.

RJF:tt



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL AO-11768

Committee Members

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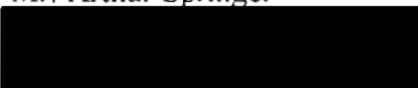
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Walter Grunfeld
Robert L. King
Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

October 25, 1999

Mr. Arthur Springer



The staff of the Committee on Open 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 September 6 in which you complained that the Department of Health failed to acknowledge the receipt of a request for records within the appropriate time.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

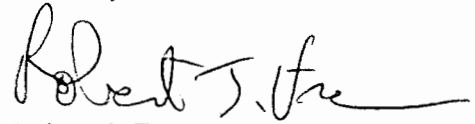
"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Mr. Arthur Springer
October 25, 1999
Page - 2 -

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:tt

cc: Oscar Carter
Gene Therriault



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI - AO - 11769

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Alexander F. Treadwell

Executive Director

Robert J. Freeman

October 25, 1999

Mr. Harold Moody
99-A-2743
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. Moody:

I have received your letter of September 7 in which you complained that your request for information had not been answered as of the date of your letter to this office.

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

Mr. Harold Moody

October 25, 1999

Page 2-

explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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.

Second, if the information of your interest, the names and titles of two individuals who "took the measurements" of the site of an incident, is maintained in a record, I believe that it 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. In my view, none of the grounds for denial would likely serve as a basis for a denial of access. If no such record exists, the Freedom of Information Law would not be applicable.

I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:tt

cc: Freedom of Information Officer, Arthur Kill Correctional Facility



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11770

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Robert L. King
Gary Lewi
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Alexander F. Treadwell

October 27, 1999

Executive Director

Robert J. Freeman

Mr. Jose Velez
82-B-1155
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. Velez:

I have received your letter of September 7 in which you sought an opinion concerning your right to obtain certain "non-medical records" from your facility, specifically, an injury report pertaining to yourself and a "health services unit written memo...concerning photogrey lenses that is posted in the eye clinic."

In this regard, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

It appears that both of the documents of your interest would fall within the scope of §87(2)(g), which, due to its structure, often requires the disclosure of substantial portions of records. 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..."


Mr. Jose Velez
October 27, 1999
Page -2-

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those 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 am unaware of the content of the injury report. If, however, it includes reference to persons other than yourself, §87(2)(b) may be pertinent. That provision permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." If, for example, the report contains medical or similar information relating to persons other than yourself, it is likely that those aspects of the record could be withheld.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman", followed by a horizontal line extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Anthony J. Annucci



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

F011-A0-11771

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Walter Grunfeld
Robert L. King
Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

October 27, 1999

Executive Director

Robert J. Freeman

Mr. Daniel Boyer
94-A-7753
Hudson Correctional Facility
P.O. Box 576
Hudson, NY 12534-0576

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Boyer:

I have received your letter of September 6 and the materials attached to it. You complained concerning delays by the Division of Parole in responding to a request under the Freedom of Information Law and contended that a "redacted" copy of a district's attorney recommendation to the Parole Board must be disclosed.

In this regard, 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.

Pertinent under the circumstances is §87(2)(g), which permits an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

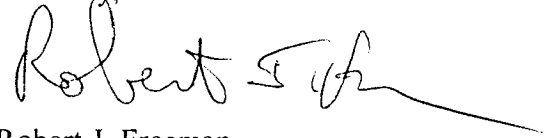
- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations; or
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. In short, insofar as the document in question consists of recommendations, advice, opinions and the like, I believe that it may be withheld.

Mr. Daniel Boyer
October 27, 1999
Page -3-

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Terrence X. Tracy
David Molik



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOJ L. 90-11772

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David A. Schulz
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Alexander F. Treadwell

October 27, 1999

Executive Director

Robert J. Freeman

Mr. Victor L. Allen
93-R-0812
P.O. Box 2000
Pine City, NY 13669

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Pagan:

I have received your letter of September 7 in which you sought assistance concerning your unsuccessful requests for records maintained by the Auburn Correctional Facility.

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."

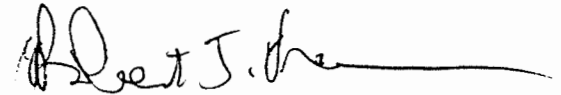
Mr. Victor L. Allen
October 27, 1999
Page -2-

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11773

Committee Members

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Website Address: <http://www.dos.state.ny.us/coog/coogwww.html>

Mary O. Donohue
Alan Jay Gerson
Walter Grunfeld
Robert L. King
Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

October 27, 1999

Executive Director

Robert J. Freeman

Mr. Thomas P. Walsh
96-A-5765
Marcy Correctional Facility
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. Walsh:

I have received your letter of September 8 in which you sought assistance concerning your unsuccessful requests for records maintained by the Marcy Correctional Facility.

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

Mr. Thomas P. Walsh
October 27, 1999
Page -2-

explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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 point out that the Freedom of Information Law pertains to existing records and that §89(3) of that statute indicates that an agency is not required to create a record in response to a request. If there is no record indicating the number of inmates who participated in the Temporary Release Program or had been approved to participate in that program, the Department would not be obliged to prepare a record containing that information on your behalf.

If records have been prepared containing the information sought, I believe that they would be accessible under §87(2)(g)(i) of the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: James Recore



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11774

Committee Members

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October 27, 1999

Executive Director

Robert J. Freeman

Mr. Bryant Pagan
98-R-6614
P.O. Box 247
Ogdensburg, NY 13669

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Pagan:

I have received your undated letter in which you sought assistance concerning delays in response to your requests for records of the Bronx County District Attorney.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests 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:

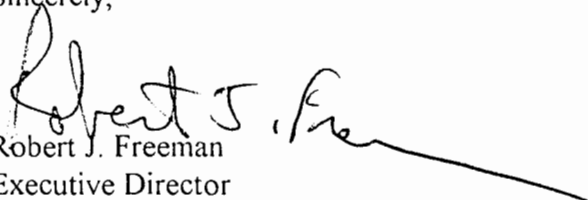
"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Mr. Bryant Pagan
October 27, 1999
Page -2-

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-00-11775

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Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

October 27, 1999

Mr. Anthony M. Mosca

Dear Mr. Mosca:

I have received your note of September 9 in which you asked when this office is "going to do something about this intolerable situation." You attached a letter to the editor of the *Journal News* relating to the apparent failure of the Mount Vernon School District to comply with the Freedom of Information Law. That letter referred to an advisory opinion prepared on May 12 at the request of Mr. Ignazio Vito Cavalluzzi, and you indicated that the opinion and other documentation concerning compliance with the Freedom of Information Law have been "ignored" by the Superintendent.

In this regard, the Committee on Open Government has the authority 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. While the opinions rendered by the Committee are not binding, it is my hope that they are educational and persuasive and that they serve to encourage compliance with law.

In those instances in which an agency fails or refuses to comply, as suggested in the opinion sent to Mr. Cavalluzzi, a person denied access to records has the right to appeal the denial in accordance with §89(4)(a) of the Freedom of Information Law. To reiterate, that provision states in relevant part that:

"...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."

It is also noted that a court may, in its discretion, award attorney's fees to a person who prevails in a judicial proceeding challenging a denial of access if certain conditions are met. Specifically, §89(4)(c) states that:

Mr. Anthony M. Mosca

October 27, 1999

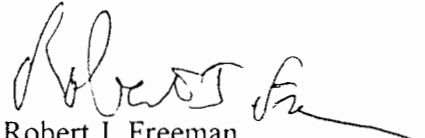
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“The court in such a proceeding may assess, against such agency involved, reasonable attorney’s fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed, provided, that such attorney’s fees and litigation costs may be recovered only where the court finds that:

- i. the record involved was, in fact, of clearly significant interest to the general public; and
- ii. the agency lacked a reasonable basis in law for withholding the record.”

I regret that I cannot be of greater assistance.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman".

Robert J. Freeman
Executive Director

RJF:tt



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

O.M.L. - AO - 3075
FOIL - AO - 11776

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October 28, 1999

Executive Director

Robert J. Freeman

Ms. Ralene Adler



The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Adler:

I have received your letter of September 9 in which you raised a series of questions concerning access to meetings and records of the Great Neck Library and its Board of Trustees. You indicated that the Library is a "free association library" and that, pursuant to its by-laws, the Library has determined to comply with the Freedom of Information Law.

In this regard, I offer the following comments in response to your questions.

First, having written to you on March 2, 1998, you are aware the board of trustees of a free association library is subject to the Open Meetings Law, even though it may be a not-for-profit corporation rather than a governmental entity. To reiterate, the Open Meetings Law, which is codified as Article 7 of the Public Officers Law, is applicable to boards of trustees of public and association 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 association libraries, must be conducted in accordance with that statute in the same manner as public bodies subject to that statute.

Second, §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". It is emphasized that the definition has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

I point out that the decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that so-called "work sessions" and similar gatherings held for the purpose of discussion, but without an intent to take action, fell outside the scope of the Open Meetings Law. In discussing the issue, the Appellate Division, whose determination was unanimously affirmed by the Court of Appeals, stated that:

"We believe that the Legislature intended to include more than the mere formal act of voting or the formal execution of an official document. Every step of the decision-making process, including the decision itself, is a necessary preliminary to formal action. Formal acts have always been matters of public record and the public has always been made aware of how its officials have voted on an issue. There would be no need for this law if this was all the Legislature intended. Obviously, every thought, as well as every affirmative act of a public official as it relates to and is within the scope of one's official duties is a matter of public concern. It is the entire decision-making process that the Legislature intended to affect by the enactment of this statute" (60 AD 2d 409, 415).

In short, based upon the direction given by the courts, if a majority of the public body, or a library board of trustees, gathers to conduct the business of the body, in their capacities as board members, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law. As you described them, the gatherings held by the trustees with the consultant would constitute "meetings" that fall within the coverage of the Open Meetings Law.

Third, meetings held in accordance with the Open Meetings Law are presumed to be open to the public. Only to the extent that an executive session may properly be held can the public be excluded from a meeting. I note that §102(3) of the Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded, and that paragraphs (a) through (h) of §105(1) specify and limit the subjects that may appropriately be considered during an executive session. As such, a public body cannot conduct an executive session to discuss the subject of its choice.

With respect to notice, as indicated above, §260-a of the Education Law states in part that notice of the time and place of a meeting scheduled at least two weeks in advance must be given to the public and the news media at least one week before the meeting. With regard to meetings scheduled less than two weeks in advance, I believe that the Open Meetings Law would apply. Section 104 of that statute, which had been §99, 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."

Based on the foregoing, if a meeting is scheduled at least a week in advance but not more than two weeks in advance, notice of the time and place must be given to the news media and to the public by means of posting in one or more designated public locations, not less than seventy-two hours prior to the meeting. If a meeting is scheduled less than a week an advance, again, notice of the time and place must be given to the news media and posted in the same manner as described above, "to the extent practicable", at a reasonable time prior to the meeting. Therefore, if, for example, there is a need to convene quickly, the notice requirements can generally be met by telephoning the local news media and by posting notice in one or more designated locations.

Lastly, assuming that the Library acts as if it is an agency required to comply with the Freedom of Information Law, the materials to which you referred would be subject to rights of access. That statute pertains to agency records, and §86(4) defines the term "record" to include:

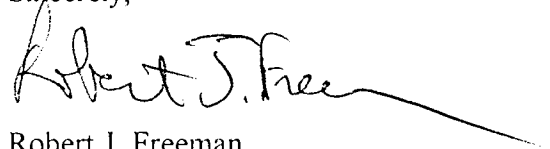
"any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, information in any physical form kept or produced by or for the Library would constitute a record subject to rights of access. This is not to suggest that all such records 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.

Ms. Ralene Adler
October 28, 1999
Page -4-

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink that reads "Robert J. Freeman". The signature is written in a cursive style with a long, sweeping underline that extends to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees, Great Neck Library



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11777

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Alexander F. Treadwell

October 28, 1999

Executive Director

Robert J. Freeman

Mr. Rashaad Marria
95-A-4315
Shawangunk Correctional Facility
Box 700
Wallkill, NY 12589-0700

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Marria:

I have received your letter of August 23. Please note that the Committee on Open Government has no regional office. The address appearing above is the only office of the Committee.

You have asked that this office "intervene" and "investigate" with respect to records pertaining to your case that you requested from the New York City Police Department and the Office of the Kings County District Attorney. In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law; the Committee is not empowered to "intervene" in the legal sense, nor does it have the ability or resources to "investigate." Nevertheless, having reviewed your request, I offer the following comments.

First, since you referred to a fee waiver under the "amended F.O.I.A.", I note that that provision pertains to records maintained by federal agencies and is not applicable in the context of your request. Further, the provision that is applicable, the New York Freedom of Information Law, makes no reference to fee waivers, 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, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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

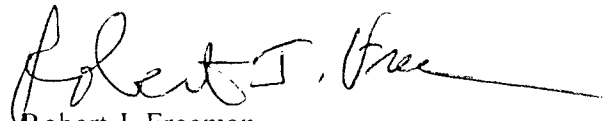
Mr. Rashaad Marria
October 28, 1999
Page -6-

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: Sgt. Richard Evangelista
Records Access Officer, Office of the Kings County District Attorney



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AJ-11778

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Alexander F. Treadwell

October 28, 1999

Executive Director

Robert J. Freeman

Ms. Rose Ann King

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. King:

I have received your letter of September 13. You have sought an opinion concerning a request for records pertaining to the arrest of a named individual in Queens in 1973.

Having reviewed your request, the outcome of the arrest is not indicated, nor is your relationship to the matter or the person arrested. Nevertheless, in an effort to provide assistance, I offer the following comments.

First, the Freedom of Information Law pertains to existing records. Since the event occurred in 1973, it is possible that many of the records relating to it no longer exist. To the extent that records have been destroyed or discarded, the Freedom of Information Law would not apply.

Second, to the extent that the records of your interest continue to exist, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Since I am unaware of the contents of all of the records or the effects of their disclosure, I cannot offer specific guidance. Nevertheless, the following paragraphs will review the provisions that may be significant in determining rights of access to the records in question.

The first ground for denial, §87(2)(a), would be relevant if the charges against the person arrested were dismissed. That provision pertains to records that "are specifically exempted from disclosure by state or federal statute." If the charges were dismissed in favor of the accused, the records would be sealed pursuant to §160.50 of the Criminal Procedure Law and, therefore, exempt from disclosure under the Freedom of Information Law.

If there was a conviction, insofar as the records continue to exist, of possible significance 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 importance is §87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". That provision might be applicable relative to the deletion of identifying details in a variety of situations, i.e., where a record identifies a confidential source or a witness, for example, or if the records include personal or intimate details pertaining to the person arrested.

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,

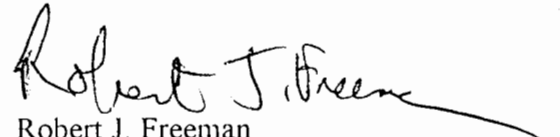
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151 AD 2d 677, 679 (1989)]. Based upon that decision, it appears that records introduced into evidence or disclosed during a public judicial proceeding should be available.

In a related vein, again, if there was a conviction, a source of records pertaining to the matter would be the court in which the proceeding was conducted. While the courts are not subject to the Freedom of Information Law, court records are generally available (unless sealed) under other provisions of law (see e.g., Judiciary Law, §255).

I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:jm



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October 28, 1999

Executive Director

Robert J. Freeman

Mr. Jerry Brixner

The staff of the Committee on Open 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 September 11 and the correspondence attached to it. In short, you have questioned the propriety of a denial of access by the Town of Chili to cellular phone bills involving the Town Supervisor. While the Town Clerk informed you that the amounts of the bills would be disclosed, she wrote that "actual copies with the phone calls made and numbers made during a specified month constitute an invasion of privacy."

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, and the introductory language of §87(2) refers to the capacity to withhold "records or portions thereof" that fall within the scope of the grounds for denial that follow. In my opinion, the phrase quoted in the preceding sentence indicates that a single record may be both accessible or deniable in whole or in part. I believe that the quoted phrase also imposes an obligation on agency officials to review records sought, in their entirety, to determine which portions, if any, may justifiably be withheld.

In my view, two of the grounds for denial may be relevant to an analysis of rights of access to phone bills.

Section 87(2)(g) states that an agency may withhold records that:

"are inter-agency or intra-agency materials which are not:

- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;

- iii. final agency policy or determinations; or
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

If the bills are generated by the Town, I believe that they could be characterized as intra-agency materials. Nevertheless, in view of their content, they would apparently consist solely of statistical or factual information accessible under §87(2)(g)(i) unless another basis for denial applies. As such, §87(2)(g) would not, in my opinion, serve as a basis for denial. If the bills were generated by a telephone company, an entity outside of government that is not an agency, §87(2)(g) would not apply.

The other ground for denial of relevance is §87(2)(b), which permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy."

Although the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public employees. It is clear that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. With regard to records pertaining to public employees, the courts have found that, as a general rule, records that are relevant to the performance of a public employee's official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

When a public officer or employee uses a telephone in the course of his or her official duties, bills involving the use of the telephone would, in my opinion, be relevant to the performance of that person's official duties. On that basis, I do not believe that disclosure would result in an unwarranted invasion of personal privacy with respect to an officer or employee serving as a government official.

Since phone bills often list the numbers called, the time and length of calls and the charges, it has been contended by some that disclosure of numbers called might result in an unwarranted invasion of personal privacy, not with respect to a public employee who initiated the call, but rather with respect to the recipient of the call.

There is but one reported decision of which I am aware that deals with the issue. In Wilson v. Town of Islip, one of the categories of the records sought involved bills involving the use of cellular telephones. In that decision, it was found that:

"The petitioner requested that the respondents provide copies of the Town of Islip's cellular telephone bills for 1987, 1988 and 1989. The court correctly determined that the respondents complied with this request by producing the summary pages of the bills showing costs incurred on each of the cellular phones for the subject period. The petitioner never specifically requested any further or more detailed information with respect to the telephone bills. In view of the information disclosed in the summary pages, which indicated that the amounts were not excessive, it was fair and reasonable for the respondents to conclude that they were fully complying with the petitioner's request" [578 NYS 2d 642, 643, 179 AD 2d 763 (1992)].

The foregoing represents the entirety of the Court's decision regarding the matter; there is no additional analysis of the issue. I believe, however, that a more detailed analysis is required to deal adequately with the matter.

When phone numbers appear on a bill, those numbers do not necessarily indicate who in fact was called or who picked up the receiver in response to a call. In many instances, an indication of the phone number would disclose nothing regarding the nature of a conversation. Further, even though the numbers may be disclosed, nothing in the Freedom of Information Law would require an individual to indicate the nature of a conversation. In short, I believe that the holding in Wilson is conclusory in nature and lacks a substantial analysis of the issue.

This is not to suggest, however, that the numbers appearing on every phone bill must be disclosed in every instance. Exceptions to the general rule of disclosure might arise if, for example, a telephone is used to contact recipients of public assistance or persons seeking certain health services. It has been advised in the past that if a government employee contacts those classes of persons as part of the employee's primary ongoing and routine duties, there may be grounds for withholding phone numbers listed on a bill. For instance, disclosure of numbers called by a caseworker who phones applicants for or recipients of public assistance might identify those who were contacted. In my view, the numbers could likely be deleted in that circumstance to protect against an unwarranted invasion of personal privacy due to the status of those contacted. Similarly, if a law enforcement official phones informants, disclosure of the numbers might endanger an individual's life or safety, and the numbers might justifiably be deleted pursuant to §87(2)(f) of the Freedom of Information Law.

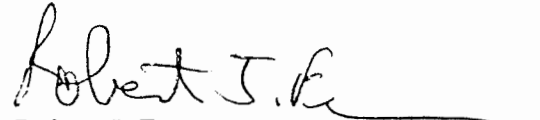
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In the case of calls made by myself, a town supervisor or others in similar positions, phone calls are likely made to great variety of persons in a broad variety of contexts. Unlike the caseworker who routinely phones a class of persons having a particular status (i.e., recipients of public assistance), the calls made by the Supervisor may involve an assortment of issues and persons who do not fall within any special identifiable class or status. If that is so, disclosure of a phone number would not alone signify a personal detail involving the recipient of a call. Further, as suggested previously, disclosure of the number would not necessarily indicate who received the call, nor would it disclose anything about the nature of the call of a conversation.

In sum, subject to the unusual kinds of exceptions discussed earlier, it appears that phone bills should be disclosed under the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and extends to the right with a long horizontal flourish.

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Carol O'Connor



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FOIL-AU-11780

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Robert J. Freeman

October 28, 1999

Mr. Richard J. Guertin
Corporation Counsel
City of Middletown
16 James 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. Guertin:

I have received your letter of September 14 and the materials attached to it. According to your letter, the City of Middletown "has signed an Agreement with a wholly owned subsidiary of BankAtlantic in Florida for the purchase in bulk of the City's delinquent tax liens and other liens." You indicated that the purchaser has asked that the Agreement "be considered exempt from disclosure under FOIL, because it would affect the Company's competitive position in the tax lien purchase market." In addition, paragraph 17 of the contract states that:

"Both parties to the Agreement shall keep confidential and not divulge to any third party, without the other party's prior written consent, the price paid by the purchaser for the Liens, or any other provisions of this Agreement, except when necessary in working with legal counsel, investors, auditor, taxing authorities or other governmental agencies, and as required by the New York Freedom of Information Law."

It is your view that §87(2)(d) of the Freedom of Information Law "would exempt the contract from disclosure." You have asked whether I concur with your position.

In this regard, I am unfamiliar with the area of commerce in which the signatory to the agreement is involved, the extent to which there is competition, or the effects of disclosure. Consequently, I cannot offer an opinion that deals specifically with the ability to withhold the contract in question. However, in an effort to offer guidance, I offer following comments.

First, as you are aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. 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.

Second, it has been held that an agreement, a promise or 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 a promise or agreement of confidentiality would serve to remove from public rights of access records that would otherwise be available.

Third, I concur with your contention that the only exception that would be pertinent is §87(2)(d). However, in my view, the extent to which it would serve as a valid basis for denial is questionable. That provision permits an agency to withhold records or portions thereof that:

"are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise..."

In my opinion, the question under §87(2)(d) involves the extent, if any, to which disclosure would "cause substantial injury to the competitive position" of a commercial 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 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).

Lastly, the Court of Appeals most recently expressed 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 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;

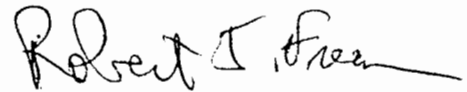
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*Matter of Farbman & Sons v. New York City Health & Hosps. Corp.,
supra, 62 N.Y.2d, at 83, 476 N.Y.S.2d 69, 464 N.E.2d 437)" (id.).*

Again, I am unaware of which portions of the documentation at issue would, if disclosed, cause substantial injury to the competitive position of the entity with which the City has contracted. However, it is clear in my opinion that some elements of the contract (i.e., paragraph 17 quoted earlier) would not fall within the coverage of §87(2)(d). It is suggested that you review the contract, perhaps with a representative of the entity, for the purpose of identifying those aspects of the documentation that you believe you could successfully withhold in view of the judicial decisions cited above and the burden of proof that must be met in the event of judicial review of a denial of access.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink that reads "Robert J. Freeman". The signature is written in a cursive style with a long horizontal line extending to the right.

Robert J. Freeman
Executive Director

RJF:jm



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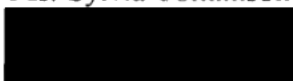
Mary O. Donohue
Alan Jay Gerson
Walter Grunfeld
Robert L. King
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Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

October 28, 1999

Executive Director

Robert J. Freeman

Ms. Sylvia Tomlinson



Dear Ms. Tomlinson:

I have received a copy of your appeal under the Freedom of Information Law addressed to Dr. Rachel Bryant, who is associated with a professional corporation.

In an effort to enhance your understanding of the matter, I point out that the Freedom of Information Law would not be applicable in the circumstance described in your correspondence. That statute pertains to agency records, and §86(3) defines the term "agency" to mean:

"any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, the Freedom of Information Law is applicable to entities of state and local government; it does not apply to records of private entities, such as professional corporations, or to private practitioners.

Notwithstanding the foregoing, you may have a right to obtain the records of your interest under §33.16 of the Mental Hygiene Law, and it is suggested that you review that provision.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Dr. Rachel Bryant



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AD. 11782

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October 28, 1999

Executive Director

Robert J. Freeman

Mr. H. Thompson
96-B-0910
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. Thompson:

I have received your letter of September 13 in which you sought my opinion concerning your right to obtain certain records from the Department of Correctional Services relating to an incident in which you were accused of assaulting correction officers. The records in question involve an "unusual incident report" and copies of harassment grievances concerning seven correction officers.

In this regard, by way of background, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

The first ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §50-a of the Civil Rights Law. In brief, that statute provides that personnel records of police and correction officers that are used to evaluate performance toward continued employment or promotion are confidential. The Court of Appeals, the State's highest court, in reviewing the legislative history leading to its enactment, has held that 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 NY2d 562, 568 (1986)]. In another decision which dealt with unsubstantiated complaints against correction officers, the Court of Appeals held that the purpose of §50-a "was to prevent the release of sensitive personnel records that could be used in litigation for purposes of harassing or embarrassing correction officers" [Prisoners' Legal Services v. NYS Department of Correctional Services, 73 NY 2d 26, 538 NYS 2d 190, 191 (1988)].

The Court in an opinion rendered earlier this year reiterated its view of §50-a, citing that decision and stating that:

“...we recognized that the decisive factor in determining whether an officer’s personnel record was exempted from FOIL disclosure under Civil Rights Law § 50-a was the potential use of the information contained therein, not the specific purpose of the particular individual requesting access, nor whether the request was actually made in contemplation of litigation.

‘Documents pertaining to misconduct or rules violations by corrections officers – which could well be used in various ways against the officers – are the very sort of record which *** was intended to be kept confidential. *** The legislative purpose underlying section 50-a *** was *** to protect the officers from the use of records *** as a means for harassment and reprisals and for the purpose of cross-examination’ (73 NY2d, at 31 [emphasis supplied])” (Daily Gazette v. City of Schenectady, 93 NY2d 145, 156- 157 (1999)).

Based on the foregoing, the grievances appear to be exempt from disclosure under the Freedom of Information Law and properly withheld by the Department.

With respect to the unusual incident report, several grounds for denial may be relevant. That report would fall within the scope of §87(2)(g), which permits an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations; or
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

Also of potential significance is §87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". That provision might be applicable relative to the deletion of identifying details in a variety of situations, i.e., where a record identifies a confidential source, a witness, or 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:

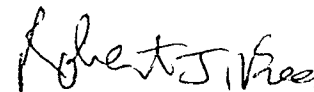
- i. interfere with law enforcement investigations or judicial proceedings;
- ii. deprive a person of a right to a fair trial or impartial adjudication;
- iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
- iv. reveal criminal investigative 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 matter and that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Anthony J. Annucci



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11783

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Alexander F. Treadwell

Executive Director

Robert J. Freeman

October 29, 1999

Mr. Paul Bunker
97-A-1151
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. Bunker:

I have received your letter of September 12 in which you complained that requests for records of the Office of the Westchester County District Attorney 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 acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully

Mr. Paul Bunker
October 29, 1999
Page - 2 -

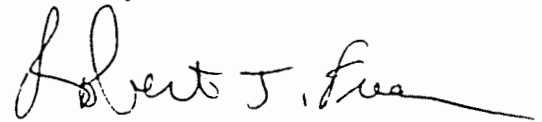
explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Lastly, I note that you referred to requests for a variety of records, including DD5's. A "DD5" is a form used only by the New York City Police Department. As such, it is suggested that unless it is certain that an agency uses a particular form, you avoid using form names or titles and that, instead, you "reasonably describe" the records sought as required by §89(3) of the Freedom of Information Law.

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

FOJL-AO-11784

Committee Members

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

October 28, 1999

Executive Director

Robert J. Freeman

Mr. Thomas P. Walsh
96-A-5765
Marcy Correctional Facility
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. Walsh:

I have received your letter of September 13. You have sought assistance concerning an unanswered request for information from a police department relating to your case.

First, having reviewed your request, it is addressed to an unnamed police department in Yaphank. It is suggested that a request specify the agency to receive it. On the basis of your letter, it is unclear whether you intended to contact the Suffolk County Police Department or a town or village police department.

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 for information. The same provision requires that an applicant "reasonably describe" the records sought in order that agency staff can locate and identify the records. Two aspects of your request involve the "Chain of custody of the Tapes" and "Sealing performed prior to inventory of the tapes." There is no indication of the nature of the tapes, and it is questionable whether the request "reasonably describes" the records. Further, I am unaware of whether law enforcement agencies prepare records that, in a particular form, specify the chain of custody or sealing of records. If no such records exist, the Freedom of Information Law would not apply.

Third, when a proper request is made, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record

Mr. Thomas P. Walsh

October 28, 1999

Page -2-

reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

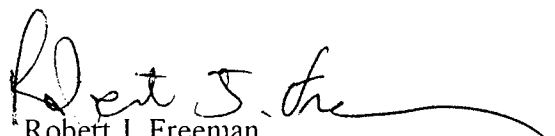
If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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



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7011 AO - 11785

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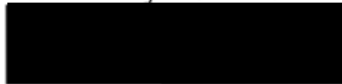
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Joseph J. Seymour
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October 28, 1999

Executive Director

Robert J. Freeman

Mr. Harvey M. Elentuck



The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Elentuck:

I have received your letter of September 12. You have questioned whether the time to be taken by Community School District 25 to respond to a request for records is appropriate.

In this regard, as you are aware, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

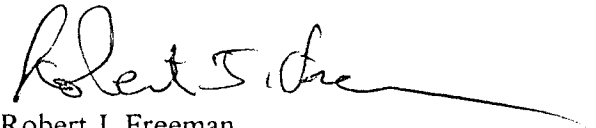
"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

While an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days, when such acknowledgement is given, there is no precise time period within which an agency must grant or deny access to records. The time needed to do so may be dependent upon the volume of a request, the possibility that other requests have been made, the necessity to conduct legal research, the search and retrieval techniques used to locate the records and the like. In short, when an agency acknowledges the receipt of a request because more than five business days may be needed to grant or deny a request, so long as it provides an approximate date indicating when the request will be granted or denied, and that date is reasonable in view of the attendant circumstances, I believe that the agency would be acting in compliance with law.

Mr. Harvey M. Elentuck
October 28, 1999
Page -2-

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Marie Iannizzi



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-DO-11786

Committee Members

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October 29, 1999

Executive Director

Robert J. Freeman

Mr. Darrell R. Green
96-A-6435
Eastern New York 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. Green:

I have received your letter of September 12 in which you sought advice concerning a request made under the Freedom of Information Law to the New York City Police Department.

As I understand the matter, at the beginning of your first request, you made reference to an indictment number. In response, you were informed that the Department does not maintain its records in a manner that permits their retrieval through the use of an indictment number as an identifier. In the same response, it was suggested that you "provide additional information such as the date, time, precinct or arrest, number, and crime charged..." Nevertheless, at the end of that same request, you included your date of birth, social security number, the precinct in which the arrest was made, the street of the arrest, the charges and the date of the arrest.

In my view, it is unclear whether the recipient of the request read the entirety of that document, for with the information provided in addition to your name and indictment number, it appears that the request would have "reasonably described" the records as required by §89(3) of the Freedom of Information Law. To meet that standard, an applicant must include sufficient detail to enable agency staff to locate and identify the records. In short, it appears that the response to your request may have been the result of an oversight. It is suggested that you might contact the records access officer and highlight the portions of the request that may be used to enable the Department to locate the records of your interest.

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:

Mr. Darrell R. Green

October 29, 1999

Page -2-

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

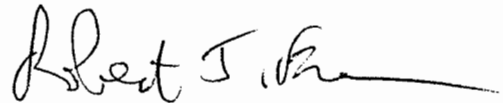
"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

For your information, the person designated by the Department to determine appeals is Susan Petito, Special Counsel.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Sgt. Richard Evangelista



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI-AO-11787

Committee Members

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Warren Mitofsky
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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

October 29, 1999

Executive Director

Robert J. Freeman

Mr. Calvin L. Butler
98-B-2303
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. Butler:

I have received your letter of September 13 in which you raised questions concerning the ability to obtain records relating to grand jury and trial proceedings under the Freedom of Information Law.

In this regard, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

As your inquiry concerns records relating to a grand jury, 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."

Mr. Calvin L. Butler
October 29, 1999
Page -2-

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.

With respect to records used at a trial, 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.

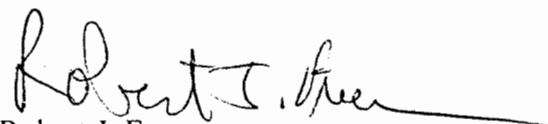
However, I point out that in the same decision, it was also found that:

"...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

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. R. Michael Tantillo



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-40-11788

Committee Members

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Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

October 29, 1999

Mr. David J. Todeschini
98-A-4798
Groveland Correctional Facility
Box 49
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. Todeschini:

I have received your letter of September 15 concerning a denial of access to records by the Division of State Police and your unsuccessful efforts in gaining access to court records under the Freedom of Information Law.

With respect to the former, based on a response by Lt. Col. Dutcher, your request had been answered previously, and he wrote that it would not be reconsidered. If I understand the matter accurately, your initial request was denied. If that was so, you would have had thirty days to appeal the denial pursuant to §89(4)(a) of the Freedom of Information Law, and if the appeal was denied, four months from that determination to seek judicial review of the denial.

I note, too, that you referred to decisions from other jurisdictions which likely have no relevance to determining rights of access under the New York Freedom of Information Law. Similarly, you made reference to "dd5's". I believe that the dd5 is a form used solely by the New York City Police Department.

With regard to your request for court records, 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."

Mr. David J. Todeschini
October 29, 1999
Page - 2 -

In turn, §86(1) defines the term "judiciary" to mean:

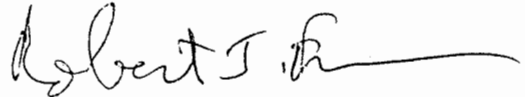
"the courts of the state, including any municipal or district court,
whether or not of record."

Based on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law (see e.g., Judiciary Law, 255) may grant broad public access to those records. Even though other statutes may deal with access to court records, the procedural provisions associated with the Freedom of Information Law (i.e., those involving the designation of a records access officer or the right to appeal a denial) would not ordinarily be applicable.

It is suggested that you resubmit your request to the clerk of the court, citing an applicable provision of law as the basis for your request.

I hope that 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: Lt. Col. Raymond G. Dutcher
Catherine Linton, Chief Clerk



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11789

Committee Members

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Walter Grunfeld
Robert L. King
Gary Lewi
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Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

October 29, 1999

Executive Director

Robert J. Freeman

Mr. Rafael Robles
88-A-8275
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. Robles:

I have received your letter of September 14 in which you sought my views concerning several requests made under the Freedom of Information Law.

In this regard, I offer the following comments.

First, since many of the records that you requested were likely prepared in 1987, the extent to which they continue to exist is questionable. Insofar as the records of your interest no longer exist, the Freedom of Information Law would not apply.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

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.

I point out 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.

Other requests involved records relating to "emergency activity", the investigation of a fire, photographs of the scene, and similar records. I note that I am unfamiliar with any previous requests or which records might have been disclosed or withheld. Of potential relevance to the matter is the decision rendered in Moore v. Santucci [151 AD 2d 677 (1989)], in which it was held that if records have been disclosed during a public proceeding, they are generally available under the Freedom of Information Law. In that decision, it was also found, however, that an agency need not make available records that had been previously disclosed to the applicant or that person's attorney, unless there is an allegation "in evidentiary form, that the copy was no longer in existence." In my view, if you can "in evidentiary form" demonstrate that neither you nor your attorney maintain records that had previously been disclosed, the agency would be required to respond to a request for the same records. I also point out, however, that the decision in Moore specified that the respondent office of a district attorney was "not required to make available for inspection or copying any suppression hearing or trial transcripts of a witness' testimony in its possession, because the transcripts are court records, not agency records" (id. at 680).

Assuming that the records sought have not been previously disclosed, I believe several of the grounds for denial could be pertinent.

Section 87(2)(b) permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". From my perspective, the propriety of a denial of access would, under the circumstances, be dependent upon the nature of statements by witnesses or the contents of other records have already been disclosed. If disclosure of the records in question would not serve to infringe upon witnesses' privacy in view of prior disclosures, §87(2)(b) might not justifiably serve as a basis for denial. However, if the statements in question include substantially different information, that provision may be applicable.

Also potentially relevant is §87(2)(e), which permits an agency to withhold records that:

"are compiled for law enforcement purposes and which, if disclosed, would:

- i. interfere with law enforcement investigations or judicial proceedings;
- ii. deprive a person of a right to a fair trial or impartial adjudication;
- iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
- iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my view, the foregoing indicates that records compiled for law enforcement purposes can be withheld to the extent that disclosure would result in the harmful effects described in subparagraphs (i) through (iv) of §87(2)(e).

Section 87(2)(f) permits an agency to withhold records to the extent that disclosure would "endanger the life or safety of any person." Without knowledge of the facts and circumstances of your case, I could not conjecture as to the relevance of that provision.

Lastly, §87(2)(g) authorizes an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

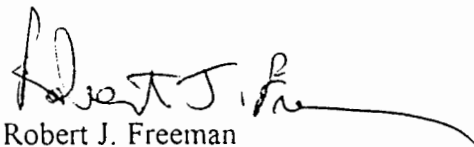
- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations; or
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

Mr. Rafael Robles
October 29, 1999
Page -4-

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer, Office of the Kings County District Attorney
Records Access Officer, New York City Fire Department
Records Access Officer, Emergency Medical Services



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-90-11790

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Executive Director

Robert J. Freeman

November 1, 1999

Mr. William Sepe



The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Sepe:

I have received your letter of September and the materials relating to it. You have made two requests to the City of Poughkeepsie under the Freedom of Information Law, neither of which was answered. Consequently, you asked whether you are "using" that statute "correctly."

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, such as a city, is required to designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests for records, and requests should ordinarily be made to that person. In my view, the officials in receipt of your requests should have responded in a manner consistent with law or forwarded the requests 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..."

Mr. William Sepe
November 1, 1999
Page - 2 -

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

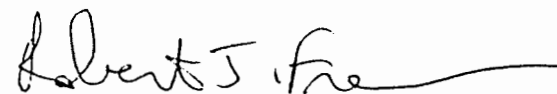
"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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, having reviewed your request to the City's Sanitation Supervisor, I believe that there are elements of the request that do not clearly involve records, but rather the making of judgments or interpretations of law that involve legal research. An agency subject to the Freedom of Information Law is required to disclose existing records that have been "reasonably described." The first aspect of your request involves "A copy of all City of Poughkeepsie Sanitation Department rules, regulations, ordinances, and laws concerning bushes, trees, grass, and other vegetation"; another involves provisions that "give the Sanitation Department the authority to enter private property against the owner's wishes to trim bushes." In both instances, judgments must be made as to which provisions of law might apply. Applicable laws might involve such areas as sanitation, health, environment, traffic, public safety, and perhaps other subjects. Further, reasonable people, as well as attorneys, often differ as to the meaning or applicability of laws and rules. In short, those kinds of requests are not, in my view, valid for the purposes of the Freedom of Information Law. Conversely, your request for a copy of "Section 9-10 of the Code of Ordinances of the City of Poughkeepsie" involves a particular record that is clearly described and would, in my opinion, be fully consistent with the Freedom of Information Law.

I hope that the foregoing serves to clarify your understanding of the Freedom of Information Law and that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt
cc: Hon. Colette Lafuenta, Mayor
Mel Knapp



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-DO-11791

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Executive Director

Robert J. Freeman

November 1, 1999

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 September 16 and the materials attached to it. You have sought an opinion concerning "the availability of billing and payments of special district attorneys/attorneys appointed to individual matters." Although vouchers were disclosed, in many, the "case name (defendant), assignment date was blacked out showing only the amount charged but no indication what the amount was for." Similarly, you wrote that on the voucher you enclosed, "blacked out [are] all identifying factors and explanation of services rendered so there is no indication of what the services rendered are for the services charged."

Except as otherwise indicated, it appears that the portions "blacked out" should have been disclosed. In this regard, I offer the following comments.

First, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records 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.

Pertinent with respect to the records that you requested is a decision that involved a request for the amount of money paid in 1994 to a particular law firm for legal services rendered in representing a 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" (Orange

County Publications v. County of Orange, 637 NYS 2d 596, 599 (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'" (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.

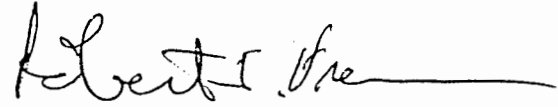
In the context of your request, I am unaware of the nature of the clients represented. However, because judicial proceedings are public, the identities of defendants and the nature of the proceedings may be known. The exception that may be applicable here involves the situation in which charges are dismissed in favor of an accused in which records pertaining the incident are generally sealed pursuant to §160.50 of the Criminal Procedure Law. In that event, I believe that a defendant's name could be deleted. However, in that and other circumstances, I believe that the remainder of the record, i.e., portions indicating the date, the nature of services rendered and the like, must, in accordance with the decisions cited earlier, be disclosed.

Lastly, it appears that the attorney's tax exempt number was deleted. In my view, that item could properly have been 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.

Ms. June Maxam
November 1, 1999
Page - 5 -

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:tt

cc: Mariagnes DeMeo



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIA AD-11792

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November 1, 1999

Executive Director

Robert J. Freeman

Mr. Christopher K. Philippo

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Philippo:

I have received your letter of September 19 in which you referred to a refusal by the Rensselaer County Department of Social Services to disclose your medical history to you pursuant to §373-a of the Social Services Law "on the basis that [you] had already received [your] medical history as part of the Non-Identifying Information Report [you] received from the New York State Adoption Information Registry." You have asked whether if you have requested a record once, you are not entitled to request it a second time.

From my perspective, if the County maintains the same record as that maintained in the Adoption Registry, you may not be entitled to seek it a second time. In Moore v. Santucci [151 AD 2d 677 (1989)] it was found that an agency need not make available records that had been previously disclosed to the applicant or that person's representative, 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 representative maintains records that had previously been disclosed, the agency would be required to respond to a request for the same records.

On the other hand, if the records maintained by the two entities are different, I believe that the County would be obliged to its records to the extent required by §373-a and the Freedom of Information Law [see Malowski v. D'Elia, 160 AD2d 798 (1990)]. In that event, a request should be made to the County's "records access officer." 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, and he or she is required to coordinate an agency's response to requests. It is suggested that you contact the office of the County Executive to ascertain the identity of the records access officer.

Mr. Christopher K. Philippo

November 1, 1999

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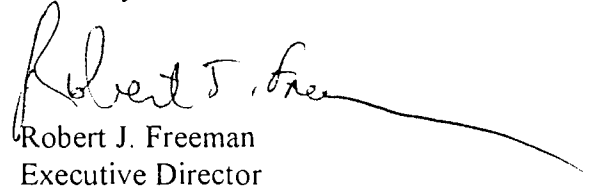
Lastly, as I understand the applicable statute, adoption records can be disclosed only pursuant to a court order. I point out that the first ground for denial of access to records in the Freedom of Information Law, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §114 of the Domestic Relations Law, which generally requires that adoption records be sealed and confidential. As such, the Freedom of Information Law would not be applicable to those records. Section 114 states in part that:

"No person, including the attorney for the adoptive parents shall disclose the surname of the child directly or indirectly to the adoptive parents except upon order of the court. No person shall be allowed access to such sealed records and order and any index thereof except upon an order of a judge or surrogate of the court in which the order was made or of a justice of the supreme court. No order for disclosure or access and inspection shall be granted except on good cause shown and on due notice to the adoptive parents and to such additional persons as the court may direct."

Based on the foregoing, only a court by means of an order could unseal records relating to an adoption.

I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:jm

cc: Cathy McCarthy, Rensselaer County Dept. of Social Services



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11793

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November 1, 1999

Executive Director

Robert J. Freeman

Mr. Frederick H. Ahrens, Jr.
Steuben County Attorney
3 East Pulteney Square
Bath, NY 14810

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Ahrens:

I have received your letter of September 17. In short, you have asked whether you must disclose the home addresses of the County's employees to a public employee union.

From my perspective, the County has the ability to withhold the addresses. 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 advised that the disclosure of home addresses would constitute "an unwarranted invasion of personal privacy" [see §87(2)(b)]. 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

Mr. Frederick H. Ahrens, Jr.

November 1, 1999

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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]. In my view, a public employee's home address is largely irrelevant to the performance of his or her duties.

Although tangential to the matter, I point out that one of the few instances in which the Freedom of Information Law requires that an agency prepare a record involves payroll information. Specifically, §87 (3) (b) of the law states that each agency shall maintain:

“a record setting forth the name, public office address, title and salary of every officer or employee of the agency.”

It is noted that the analogous provision in the Freedom of Information Law as originally enacted [formerly Public Officers Law, §88 (1)(g) referred to a payroll record identifying employees by name and address. That provision did not indicate which address, home or public office address, should be disclosed. Having received questions and complaints regarding the disclosure of home addresses of public employees, the “payroll provision” was clarified by the Legislature in its repeal of the original statute and the enactment of the current Freedom of Information Law in 1977, which became effective on January 1, 1978. Again, the extant provision refers specifically to the “public office address”, rather than the “address”, as in the original statute.

Third, as you indicated, §89 (7) states that:

“Nothing in this article shall require the disclosure of the home address of an officer or employee, former officer or employee, or of a retiree of a public employees' retirement system; nor shall anything in this article require the disclosure of the name or home address of a beneficiary of a public employees' retirement system or of an applicant for appointment to public employment; provided however, that nothing in this subdivision shall limit or abridge the right of an employee organization, certified or recognized for any collective negotiating unit or an employer pursuant to article fourteen of the civil service law, to obtain the name or home address of an officer, employee or retiree of such employer, if such name or home address is otherwise available under this article.”

The language quoted above indicates in its initial clauses that the home addresses of present and former public employees need not be disclosed under the Freedom of Information Law. Further, although the last clause of the provision refers to rights of access to home addresses by an employee organization, the cited provision grants such rights “if such name or home address is *otherwise available under this article*.” Since I do not believe that there is a right to home addresses granted

Mr. Frederick H. Ahrens, Jr.

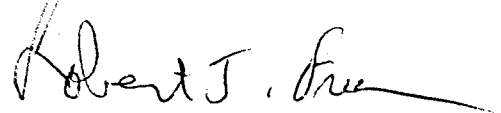
November 1, 1999

Page - 3 -

by "this article", it does not appear that a public employee union has the right to obtain home addresses of employees under the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in dark ink and has a long, sweeping horizontal line extending to the right.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11794

Committee Members

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Walter Grunfeld
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Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

November 2, 1999

Executive Director

Robert J. Freeman

David M. Brockway, Esq.
Attorney for the Town of Baldwin
312 Lake Street
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. Brockway:

I have received your letter of September 24 in which you raised two issues concerning the obligation of the Baldwin Volunteer Fire Department to disclose certain records.

You asked whether the Baldwin Town Board may under the Freedom of Information Law obtain copies of "all receipts and expenditures of the Fire Dept. from a prior year..." From my perspective, the Town, or any person, would have the right to obtain those documents.

As you may be aware, 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:

David M. Brockway, Esq.

November 2, 1999

Page -3-

"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.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. From my perspective, the kinds of records to which you referred would be public, for none of the grounds for denial would apply.

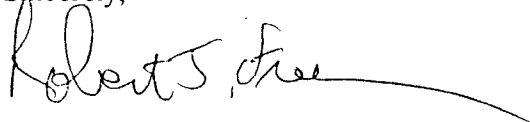
Next, you asked whether home addresses of the Department's volunteers and officers must be disclosed. While those persons are not public officers or employees, I note that §89(7) of the Freedom of Information Law specifies that the home addresses of present or former public officers or employees need not be disclosed. Since public employees have less privacy than others due to requirements that they be more accountable than others, I believe that home addresses of the

David M. Brockway, Esq.
November 2, 1999
Page -4-

Department's volunteers clearly may be withheld pursuant to §87(2)(b) on the ground that disclosure would constitute "an unwarranted invasion of personal privacy."

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and extends across the right side of the page.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-90-11795

Committee Members

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Joseph J. Seymour
Alexander F. Treadwell

November 2, 1999

Executive Director

Robert J. Freeman

Mr. James R. Neddo
97-B-0597
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. Neddo:

I have received your letter of September 19 in which you sought an advisory opinion. You wrote that your son attends the Head Start Program in Washington County and that you have attempted without success to obtain report cards, progress reports and similar records pertaining to your son. You have asked whether seeking the records under the Freedom of Information Law is appropriate.

In this regard, the Head Start Program is based upon federal legislation and is implemented locally. The entities that may implement the program can be diverse and may be local governments, churches, not-for-profit or other similar organizations. In the case of the Head Start Program in Washington County, I have been informed that it is implemented by the Washington County Community Action Agency.

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."

Mr. James R. Neddo

November 2, 1999

Page -2-

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."

Mr. James R. Neddo

November 2, 1999

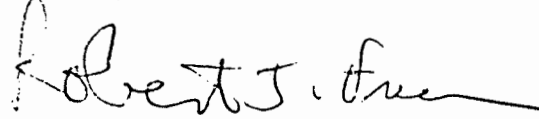
Page -3-

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.

In my view, as the parent of a minor child, it would appear that you should enjoy rights of access to the records pertaining to your child.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and is positioned above the printed name and title.

Robert J. Freeman
Executive Director

RJF:jm

cc: Washington County Community Action Agency



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI-10-11796

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Alexander F. Treadwell

Executive Director

Robert J. Freeman

November 3, 1999

Mr. Marvin Datz

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Datz:

I have received your letter of September 20 in which you raised questions concerning an "appeal form" sent to you by George Christian, Appeals Officer for the Department of Motor Vehicles, "as a guide." You also asked that I inform you of the views of Lieutenant Governor Donohue and Secretary of State Treadwell.

In this regard, first, the Lieutenant Governor is not the chair of the Committee on Open Government; the Committee currently has no chair. Further, as indicated above, the staff of the Committee is authorized to offer opinions and advice on behalf of its members.

Second, based on your comments, it appears that you misunderstand the process or have misinterpreted the matter. In general, the initial step in seeking records under the Freedom of Information Law involves directing a request to the agency's records access officer. That person has the duty of coordinating an agency's response to requests (see 21 NYCRR Part 1401). Once in receipt of the request, the agency has five business days to respond in a manner consistent with §89(3). If the request is denied in whole or in part, the person denied access has the right to appeal within thirty days of the denial 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 reasons for further denial, or provide access to the record sought."

Mr. Marvin Datz
November 8, 1999
Page - 2 -

Third, the form that you enclosed is not, in my view, objectionable, and as Mr. Christian indicated, is merely a guide. In terms of the minimum requirements for appealing a denial of access, §1401. 7(e) of the regulations promulgated by the Committee on Open Government states that:

“The time for deciding an appeal by the individual or body designated to hear appeals shall commence upon receipt of written appeal identifying:

- (1) the date and location of requests for records;
- (2) the records that were denied; and
- (3) the name and return address of the appellant.”

Lastly, I note that the form includes space for indicating the reason for appealing. In my opinion, to appeal, an applicant for records must merely have been denied access to the records sought or portions thereof. That person may but is not required to state the reasons for an appeal.

I hope that the foregoing serves to clarify your understanding of the matter.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: George Christian
Alexandra Sussman



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

F02L-A0-11797

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Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

November 5, 1999

Executive Director

Robert J. Freeman

Mr. Darryl Dickens
97-A-0167
Coxsackie Correctional Facility
P.O. Box 999
Coxsackie, NY 12051-0999

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Dickens:

I have received your letter of September 20. You have sought an advisory opinion concerning a request for records relating to grand jury proceedings from the Office of the New York County District Attorney.

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 are 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.

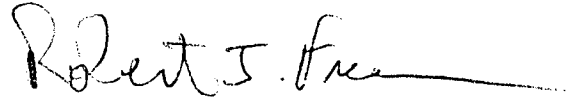
Mr. Darryl Dickens

November 5, 1999

Page -2-

I hope that the foregoing serves to enhance your understanding of the matter and that I have been of assistance.

Sincerely,

A handwritten signature in black ink that reads "Robert J. Freeman". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Gary J. Galperin
Carmen A. Morales



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11798

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

November 5, 1999

Executive Director

Robert J. Freeman

Ms. Concetta M. Boschwitz



The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Boschwitz:

I have received your letters of September 23 and October 21. In short, in response to a request to the Shenendehowa Central School District for "information pertaining to comments by teachers regarding [your] performance evaluation", you were informed that the comments were destroyed, and that if they existed, you would not be able to see them. You have asked whether, in my view, the response is "correct."

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to existing records. Consequently, if the records of your interest were destroyed, that statute would not be applicable.

Second, the Freedom of Information Law does not deal with the destruction of records. 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 suggested that you might contact that agency in an effort to ascertain whether the records in question were properly destroyed.

Lastly, when an agency maintains 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.

Pertinent in the circumstances that you described would be §87(2)(g), which states that an agency may withhold records that:

"are inter-agency or intra-agency materials which are not:

- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;

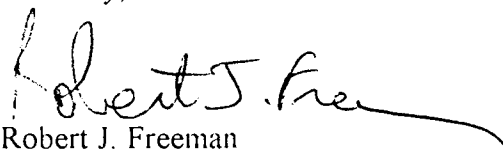
Ms. Concetta M. Boschwitz
November 5, 1999
Page -3-

- iii. final agency policy or determinations; or
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. Therefore, insofar as the comments consisted of opinions of staff, for instance, a request for existing records in the nature of those of your interest could, in my view, be withheld.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Lorraine Longhurst, Records Access Officer



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11799

Committee Members

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

November 5, 1999

Executive Director

Robert J. Freeman

Mr. William Quinones
98-R-5530
Riverview Correctional Facility
P.O. Box 247
Ogdensburg, NY 13669

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Quinones:

I have received your letter of September 16 and the materials attached to it. Once again, you have sought assistance in obtaining records from your attorney under the Freedom of Information Law. You indicated that the attorney is employed by the Legal Aid Society in the Bronx.

In this regard, as indicated in previous correspondence, 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 that there are a variety of entities within New York that use the name "Legal Aid Society". Some are a part of the federal Legal Services Corporation, some may be private not-for profit corporations, and some may be parts of units of local government. While legal aid societies which are agencies of local government may be subject to the Freedom of Information Law, most are not "agencies" as that term is defined in the Freedom of Information Law and, as such, are not subject to that statute.

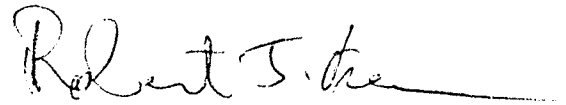
Mr. William Quinones
November 5, 1999
Page -2-

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 the Freedom of Information Law.

As you requested, the materials attached to your letter are being returned to you.

I regret that I cannot be of greater assistance.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11800

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Warren Mitofsky
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Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

November 8, 1999

Mr. James E. Brooks
92-B-2908
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. Brooks:

I have received your letter of September 21 in which you questioned the fee of fifteen dollars imposed by the Division of State Police for a copy of an investigative report.

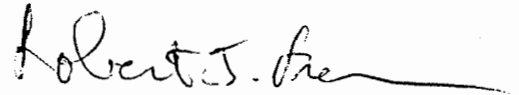
In this regard, in brief, §87(1)(b)(iii) of the Freedom of Information Law authorizes agencies to charge up to twenty-five cents per photocopy up to nine by fourteen inches, or the actual cost of reproducing other records (i.e., computer tapes and disks, etc.), *"except when a different fee is otherwise prescribed by statute."* The fee charged by the Division is based on a statute, §66-a(2) of the Public Officers Law, which provides 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."

Mr. James E. Brooks
November 8, 1999
Page - 2 -

I hope that the foregoing serves to clarify your understanding of the matter and that I have been of assistance.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:tt

cc: Lt. Laurie M. Wagner



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL AO - 11801

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Joseph J. Seymour
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Executive Director

Robert J. Freeman

November 8, 1999

Mr. Timothy C. Webster
Tioga County Jail
103 Corporate Drive
Owego, NY 13827

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Webster:

I have received your letter of September 26 in which you assistance concerning unanswered requests for records.

In this regard, first, pursuant to regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), each agency is required to designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests, and requests should ordinarily be sent to that person. While I believe that the persons in receipt of your requests should have responded to you in a manner consistent with the Freedom of Information Law or forwarded your requests to the appropriate persons, it is suggested that you might want to resubmit your requests to the records access officers of the agencies that failed to respond.

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

Mr. Timothy C. Webster

November 8, 1999

Page- 2 -

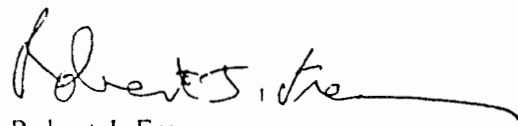
that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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

7076-AO-11802

Committee Members

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Executive Director

Robert J. Freeman

November 8, 1999

Mr. Earl Philip King
91-A-5926
Woodbourne Prison
Pouch No. 1
Woodbourne, NY 12788

Dear Mr. King:

I have received your undated letter in which you sought my opinion concerning a request made to 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 that there are a variety of entities within New York that use the name "Legal Aid Society". Some are a part of the federal Legal Services Corporation, some may be private not-for profit corporations, and some may be parts of units of local government. While legal aid societies which are agencies of local government may be subject to the Freedom of Information Law, 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 the Freedom of Information Law.

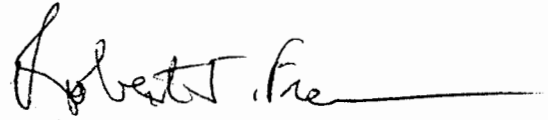
Mr. Earl Philip King

November 8, 1999

Page - 2 -

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,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", followed by a long horizontal line extending to the right.

Robert J. Freeman
Executive Director

RJF:tt



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

707L-AO - 11803

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Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

November 8, 1999

Mr. Kevin Nimmons
99-R-3927 B2-9T
Riverview Correctional Facility
P.O. Box 247
Ogdensburg, NY 13669

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Nimmons:

I have received your letter of September 26 in which you asked for a copy of the employee manual used by the Department of Correctional Services or that I explain why portions of the manual are being withheld.

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, such as the manual in which you are interested.

With respect to rights of access to the manual, 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..."

Mr. Kevin Nimmons

November 8, 1999

Page - 2 -

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different basis for denial is applicable. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. It would appear that the record sought would consist of instructions to staff that affect the public or an agency's policy. Therefore, I believe that it would be available, unless a different basis for denial could be asserted.

A second provision of potential significance is §87(2)(e), which permits an agency to withhold records that:

"are compiled for law enforcement purposes and which, if disclosed, would:

- i. interfere with law enforcement investigations of judicial proceedings...
- ii. deprive a person of a right to a fair trial or impartial adjudication;
- iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
- iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

Under the circumstances, most relevant is §87(2)(e)(iv). The leading decision concerning that provision is Fink v. Lefkowitz, which involved access to a manual prepared by a special prosecutor that investigated nursing homes, in which the Court of Appeals held that:

"The purpose of this exemption is obvious. Effective law enforcement demands that violators of the law not be apprised the nonroutine procedures by which an agency obtains its information (see Frankel v. Securities & Exch. Comm., 460 F2d 813, 817, cert den 409 US 889). However beneficial its thrust, the purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution.

"To be distinguished from agency records compiled for law enforcement purposes which illustrate investigative techniques, are those which articulate the agency's understanding of the rules and regulations it is empowered to enforce. Records drafted by the body

charged with enforcement of a statute which merely clarify procedural or substantive law must be disclosed. Such information in the hands of the public does not impede effective law enforcement. On the contrary, such knowledge actually encourages voluntary compliance with the law by detailing the standards with which a person is expected to comply, thus allowing him to conform his conduct to those requirements (see Stokes v. Brennan, 476 F2d 699, 702; Hawkes v. Internal Revenue Serv., 467 F2d 787, 794-795; Davis, Administrative Law [1970 Supp], section 3A, p 114).

"Indicative, but not necessarily dispositive of whether investigative techniques are nonroutine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel (see Cox v. United States Dept. of Justice, 576 F2d 1302, 1307-1308; City of Concord v. Ambrose, 333 F Supp 958). It is no secret that numbers on a balance sheet can be made to do magical things by scrupulous nursing home operators the path that an audit is likely to take and alerting them to items to which investigators are instructed to pay particular attention, does not encourage observance of the law. Rather, release of such information actually countenances fraud by enabling miscreants to alter their books and activities to minimize the possibility of 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 than 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

Mr. Kevin Nimmons

November 8, 1999

Page - 4 -

detailed on pages 481 and 482 of the manual, on the other hand, is merely a recitation of the obvious: that auditors should pay particular attention to requests by nursing homes for Medicaid reimbursement rate increases based upon projected increase in cost. As this is simply a routine technique that would be used in any audit, there is no reason why these pages should not be disclosed" (id. at 573).

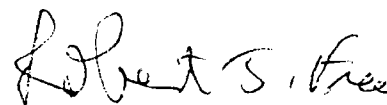
While I am unfamiliar with the record in question, it would appear that those portions which, if disclosed, would enable potential lawbreakers to evade detection could likely be withheld. It is noted that in another decision which dealt with a request for certain regulations of the State Police, the Court of Appeals found that some aspects of the regulations were non-routine, and that disclosure could "allow miscreants to tailor their activities to evade detection" [De Zimm v. Connelie, 64 NY 2d 860 (1985)]. Nevertheless, other portions of the records might be "routine" and might not if disclosed preclude employees from carrying out their duties effectively.

Lastly, the remaining ground for denial of possible relevance is §87(2)(f). That provision permits an agency to withhold records when disclosure "would endanger the life of safety of any person." To the extent that disclosure would endanger the life of safety of officers or others, it appears that §87(2)(f) would be applicable.

In sum, while some aspects of the manual might be deniable, others must in my opinion be disclosed in conjunction with the preceding commentary.

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

707C-100-11804

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Robert L. King
Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

November 8, 1999

Executive Director

Robert J. Freeman

Mr. Doug Williamson
96-B-1249
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. Williamson:

I have received your letter of September 27 in which you sought guidance in attempting to obtain a copy of a "Dr's script."

In this regard, it is unclear on the basis of your letter whether the prescription was filled at your facility or elsewhere, or whether the physician is associated with the facility.

In this regard, if the entity that maintains the prescription is a governmental entity, the Freedom of Information Law would be applicable. In terms of rights granted by that statute, it is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

With regard to medical records, the Freedom of Information Law, in my view, likely permits that some of those records may be withheld in whole or in part, depending upon their contents. For instance, medical records prepared by hospital personnel could be characterized as "intra-agency materials" that fall within the scope of §87(2)(g) of the Freedom of Information Law. To the extent that such materials consist of advice, opinion, recommendation and the like, I believe that the Freedom of Information Law would permit a denial.

Nevertheless, a different statute, §18 of the Public Health Law, generally grants rights of access to medical records to the subjects of the records. As such, that statute may provide greater access to medical records than the Freedom of Information Law. It is suggested that you send your request to the hospital and make specific reference to §18 of the Public Health Law when seeking medical records.

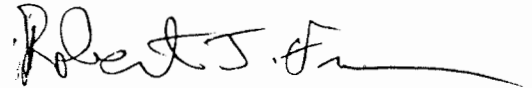
Mr. Douglas Williamson
November 8, 1999
Page -2-

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,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

7076-190-11805

Committee Members

Mary O. Donohue
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November 9, 1999

Mr. William J. Stoecker



Dear Mr. Stoecker:

I have received your letter of November 3 in which you sought "all relevant documents" concerning yourself or the Grabill Corporation covering the period of 1982 to the present.

In this regard, the Committee on Open Government is authorized to provide advice and opinions relating to public access to government records in New York, primarily under the state's Freedom of Information Law. The Committee does not have possession or control of records generally, and it is not empowered to acquire records on behalf of individuals. However, in an effort to assist you, I offer the following comments.

First, the statute upon which you based your request, 5 USC §552, is the federal Freedom of Information Act, which applies only to records maintained by federal agencies. Again, the applicable statute in this instance is the New York Freedom of Information Law.

Second, requests for records should be directed to the "records access officer" at the agency or agencies that you believe would possess the records of your interest. The records access officer has the duty of coordinating an agency's response to requests.

Third and perhaps most important, §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Consequently, a request should include sufficient detail to enable agency staff to locate and identify the records.

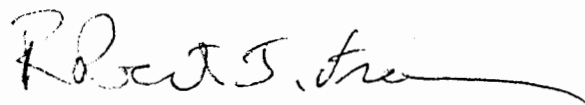
Lastly, although the federal Act contains provisions concerning the waiver of fees, its New York equivalent includes no such provisions. However, as a general matter, agencies subject to the New York Freedom of Information Law may charge a maximum of twenty-five cents per photocopy and may not charge for search, personnel time or other administrative costs.

Enclosed for your review is "Your Right to Know", which describes open government laws in New York

Mr. William J. Stoecker
November 9, 1999
Page - 2 -

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:tt
Enc.



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11806

Committee Members

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Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

November 9, 1999

Mr. Norman Roth
President
University Hill Realty Ltd.
500 Westcott Street
Syracuse, NY 13210

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Roth:

I have received your letter of October 4, as well as the materials relating to it.

By way of background, in November of 1997, Ms. Kathryn L. Hudson sought records that were communicated between you and the Syracuse Housing Authority from the Authority "pertaining to Section 8 subsidy agreements" as they related to certain properties. In response to the request, the Authority "released a file of approximately one hundred twenty (120) pages" that included a "lawyer-client" confidential letter that was "privileged". You wrote further that Ms. Hudson "gave, loaned, or shared" the file with a third party who in turn "shared this package" with you and the Syracuse Newspapers. The Authority's attorney asked the third party to return the confidential letter and all copies of that document, and you have questioned the "legal status of this letter" and whether you can use it in a court of law as evidence.

From my perspective, first, once copies of records are disclosed in response to a request made under the Freedom of Information Law, the recipient essentially owns the copies and may do with them as he or she sees fit. The intended use of records is irrelevant, and 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 a somewhat related vein, it has been held that tape recordings of open meetings held by public bodies are accessible under the Freedom of Information Law (see Zaleski v. Hicksville Union Free School District, Supreme Court, Nassau County, NYLJ, December 27, 1978) and that any person may tape record those meetings in a manner that is not disruptive, even though “recordings can be edited, altered, or used out of context” [see Mitchell v. Garden City Union Free School District, 113 AD2d 924, 925 (1985)]. In Mitchell, the Court also stated that “[o]nce the information and comments are conveyed to the public, it should be of no consequence that they may subsequently be repeated, by means of replay, to those who were unable to attend” (*id.*). Based on the foregoing, once a person has received a record from an agency, he or she may display or reproduce it in a manner that is beyond the control of the agency.

Second, one of the grounds for withholding records under the Freedom of Information Law, §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)].

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, ‘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)].”

Mr. William Roth
November 9, 1999
Page - 3 -

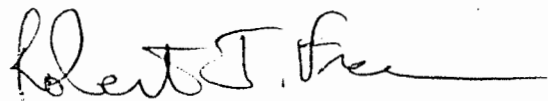
In my view, by disclosing the record in response to a request made under the Freedom of Information Law, the Authority, the client, waived the privilege.

In short, under the circumstances that you described, any copies of the letter in possession of members of the public are, in my opinion, their property, and I do not believe that they would be obliged to return them.

I cannot answer as to whether the document may be used as evidence, for that issue is unrelated to the Freedom of Information Law and, therefore, is beyond the jurisdiction of this office.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:tt

cc: Frederick Murphy



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AD-11807

Committee Members

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Joseph J. Seymour
Alexander F. Treadwell

November 10, 1999

Executive Director

Robert J. Freeman

Mr. Garland Osiris



The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Osiris:

As you are aware, your letter of September 29 addressed to Attorney General Spitzer 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 indicated that you made a request under that statute on August 17 to the New York City Department of Citywide Administrative Services. Although you made reference to the request being attached to your letter, no such document was included among the materials sent to this office. Nevertheless, in an effort to assist you, 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 made to that person. If you did not send your request to the records access officer, the person in receipt of the request, in my view, should have responded in a manner consistent with the Freedom of Information Law or forwarded the request to the appropriate person. It is suggested, however, that you attempt to contact the records access officer to ascertain the status of your request.

Second, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person

requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Third, while I am unfamiliar with 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.

I would conjecture that two of the grounds for denial would be pertinent to your request. One of them, however, often 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 noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations

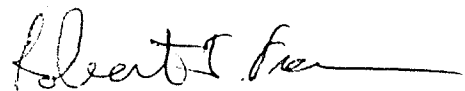
Mr. Garland Osiris
November 10, 1999
Page -3-

or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those 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 other provision of possible significance, §87(2)(h), authorizes an agency to withhold examination questions and answers to the extent that the questions will be given in the future.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman", followed by a horizontal line extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI LAO - 11808

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

November 10, 1999

Executive Director

Robert J. Freeman

Ms. Heather Struck

The staff of the Committee 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. Struck:

I have received your letter of September 30, as well as the materials attached to it. You have sought an opinion concerning rights of access under the Freedom of Information Law or the Family Educational Rights and Privacy Act ("FERPA") to "the records of the New York State School Music Association ("NYSSMA") containing All-State Evaluations and Proficiency List rankings..." You wrote that neither the "All-State Recommendations" nor the "proficiency lists" are made available to parents or students.

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 includes entities of state and local government within its coverage. NYSSMA, according to the materials that you forwarded, as well as telephone conversations with John Krestic, its 2nd Vice President, and Jerome Ehrlich, its counsel, is a private, not-for-profit corporation. It does not serve public schools exclusively, for its members include both public and private schools. In short, I do not believe that it is an "agency" that falls within the framework of the Freedom of Information Law.

Ms. Heather Struck
November 10, 1999
Page -2-

Second, a school district, a governmental entity, is clearly an "agency" subject to the requirements of that statute. Again, that law pertains to agency records, and §86(4) defines the term "record" expansively to include:

"any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

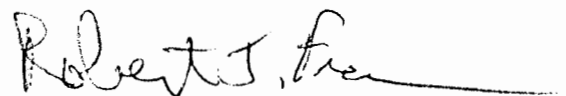
In view of the definition, an agency record includes not only materials kept by a school district, for example, but also materials kept *for* a school district. The question, therefore, is whether the materials in which you are interested are kept by NYSSMA for a school district. If they are, I believe that they would constitute "agency records" for purposes of the Freedom of Information Law and "education records" accessible to parents of students pursuant to FERPA and the regulations promulgated thereunder by the U.S. Department of Education (34 CFR §99.3).

Having discussed the matter at some length with Mr. Krestic, he indicated that the records NYSSMA prepares are prepared for its own purposes and that they are never agency records, even though some records or portions of records are transmitted to students and teachers. With respect to the form in which you are interested, he indicated that the top portion consisting of an adjudicator's comments and evaluation of a student's performance is given to the student and his or her teacher. Mr. Krestic specified, however, that the bottom portion of the form ("All-State Recommendation") represents an additional step in considering a student and is used internally by NYSSMA in combination with a "proficiency list", the latter of which was characterized as confidential and is not disclosed to either a student or any school official or teacher. If that is so, the records at issue would not be kept or held for an agency; rather, as I understand the matter, they are used internally by and for NYSSMA alone.

If my interpretation of the matter is accurate, the records of your interest would not be agency records or education records and would fall beyond the scope of both the Freedom of Information Law and FERPA.

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 Krestic
Jerome Ehrlich



STATE OF NEW YORK
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7076-20-11809

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November 10, 1999

Executive Director

Robert J. Freeman

Mr. John Fitzgerald

The staff of the Committee on Open 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 October 5 in which you raised questions concerning a denial of access to certain records by the Valhalla Union Free School District. In short, you requested and received copies of invoices for legal services paid by the District, but the "bills came with every detail line blacked out." You wrote that "[o]nly the legal letterhead and the amounts are shown." The remainder of the content of the records was withheld based on the attorney-client privilege.

From my perspective, based on the judicial interpretation of the Freedom of Information Law, it is likely that substantial portions of the records that were withheld should have been disclosed. 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 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 most recently in 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 "DDS'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.*).

Pertinent with respect to the records that you requested is a decision, Orange County Publications v. County of Orange [637 NYS2d 596 (1995)], that 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.

In the context of a school district's duties, insofar as the records identify or could identify particular students, I believe that they must be withheld. Another statute that exempts records from disclosure is the Family Education Rights and Privacy Act ("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 or other aspects of records that would make a student's identity easily traceable must in my view be withheld in order to comply with federal law. Similarly, references to employees involved in disciplinary proceedings when such proceedings have not resulted in any final determination reflective of misconduct could be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see Herald Company v. School District of the City of Syracuse, 430 NY 2d 460 (1980)].

In a decision dealing specifically with bills involving services rendered by attorneys for a school district, that matter involved an applicant ("petitioner") who sought billing statements for legal services provided to the Board ("respondents") by a law firm. Since the statements made available included "only the time period covered and the total amount owed for services and disbursements", petitioner contended that "she is entitled to that billing information which would detail the fee, the type of matter for which the legal services were rendered and the names of the parties to any current litigation". In its discussion of the issue, the court found that:

"The difficulty of defining the limits of the attorney client privilege has been recognized by the New York State Court of Appeals. (Matter of Priest v. Hennessy, 51 NY2d 62, 68.) Nevertheless, the Court has ruled that this privilege is not limitless and generally does not extend to the fee arrangements between an attorney and client. (Matter of Priest v. Hennessy, supra.) As a communication regarding a fee has no direct relevance to the legal advice actually given, the fee arrangement is not privileged. (Matter of Priest v. Hennessy, supra, at 69.)

"There appear to be no New York cases which specifically address how much of a fee arrangement must be revealed beyond the name of the client, the amount billed and the terms of the agreement. However, the United States Court of Appeals, in interpreting federal law, has found that questions pertaining to the date and general nature of legal services performed were not violative of client confidentiality. (Cotton v. United States, 306 F.2d 633.) In that Court's analysis such information did not involve the substance of the matters was not privileged...

"...Respondents have not justified their refusal to obliterate any and all information which would reveal the date, general nature of service rendered and time spent. While the Court can understand that in a few limited instances the substance of a legal communication might be revealed in a billing statement, Respondents have failed to come forward with proof that such information is contained in each and every document so as to justify a blanket denial of disclosure. Conclusory characterizations are insufficient to support a claim of privilege. (Church of Scientology v. State of New York, 46 NY 2d 906, 908.)...Therefore, Petitioner's request for disclosure of the fee,

Mr. John Fitzgerald
November 10, 1999
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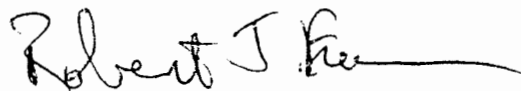
type of matter and names of parties to pending litigation on each billing statement must be granted."

In sum, the blanket denial of access by the District was in my view inconsistent with the language of the Freedom of Information Law and judicial interpretations of that statute.

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,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and has a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Superintendent



STATE OF NEW YORK
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FOI-90-11810

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Alexander F. Treadwell

Executive Director

Robert J. Freeman

November 10, 1999

Mr. Joseph Micklas



The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Micklas:

I have received your letter of September 30 in which you sought an opinion concerning the Freedom of Information Law.

According to your letter, a member of the Mechanicville School District Board of Education "read a letter, in public session, about a particular subject that had his strong support", and his intent "was to convince other fellow board members to join his opinion." You have asked whether that letter is subject to the Freedom of Information Law.

From my perspective, a letter prepared or acquired by a member of a board of education and read aloud at an open meeting of the board falls within the coverage of the Freedom of Information Law and must be disclosed on request. In this regard, I offer the following comments.

First and most importantly, 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).

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).

Most recently, the Court of Appeals found that materials received by a corporation providing services for a branch of the State University that were kept on behalf of the University constituted "records" falling within 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,

Mr. Joseph Micklas
November 10, 1999
Page 3-

Inc. v. Auxiliary Services Corporation of the State University of New York at Farmingdale, 87 NY 2d 410, 417 (1995)].

In a different but related vein, in a decision involving notes taken by the Secretary to the Board of Regents that he characterized as "personal" in conjunction with a contention that he took notes in part "as a private person making personal notes of observations...in the course of" meetings, the court cited the definition of "record" and determined that the notes did not consist of personal property but rather were records subject to rights conferred by the Freedom of Information Law [Warder v. Board of Regents, 410 NYS 2d 742, 743 (1978)].

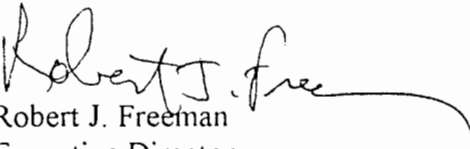
In short, based on the language of the Freedom of Information Law and its judicial interpretation, it is clear in my view that the letter in question is an "agency record", irrespective of whether it is kept in District offices.

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 the letter was read aloud at an open meeting, there would be no basis for denying access to that document.

As you requested, copies of this opinion will be forwarded to the persons identified in your letter.

I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education
Robert Kennedy
Kathy Wolverton



STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11811

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Alexander F. Treadwell

Executive Director

Robert J. Freeman

November 10, 1999

Mr. Pedro Laureano
85-A-6071
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. Laureano:

I have received your letter of October 4, as well as the correspondence attached to it. You have sought assistance in relation to an appeal sent to the Department of Correctional Services on September 1 that had not been answered and concerning rights of access to "quarterly evaluations" pertaining to you.

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."

I point out that it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

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

Mr. Pedro Laureano
November 10, 1999
Page - 2 -

extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Of apparent relevance to the records in question is §87(2)(g), which permits an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

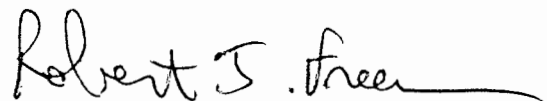
- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations; or
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

Enclosed as requested is a copy of the latest supplement to the Committee's annual report.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt
cc: Anthony J. Annucci
Enc.



STATE OF NEW YORK
DEPARTMENT OF STATE
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FOIL-RO-11812

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Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

November 12, 1999

Executive Director

Robert J. Freeman

Mr. Charles Hili
89-A-7044
P.O. Box 700
Wallkill, NY 12589

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Hili:

I have received your letter of September 30 in which you questioned the propriety of a denial of a request for records by the parole officer at your facility. He wrote that:

“The New York State Division of Parole Policy is to honor ‘F.O.I.L. Requests’ when someone meets the following criteria:

- 1) Within (2) two months of a scheduled Parole Board Appearance;
- 2) Having appeared before the Parole Board within the last (2) two months.
- 3) Have a pending appeal with the N.Y.S. Division of Parole.

“As you do not meet the above criteria, your F.O.I.L. request is denied.”

In my view, the response is inconsistent with law. 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)].

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 is in my opinion irrelevant.

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.

The first ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." From my perspective, there is no statute that would exempt the records in question from disclosure. 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, unless the records in question can be characterized as being exempted from disclosure by statute, neither a policy nor regulations would serve to enable the Department to withhold records that would otherwise be available under the Freedom of Information Law.

Lastly, when an agency denies access to records, the applicant has the right to appeal pursuant to §89(4)(a) of the Freedom of Information Law, which states in relevant part that:



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL NO- 11813

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Executive Director

Robert J. Freeman

November 15, 1999

Chief Doyle L. Marquart
Chief of Police
Waterloo Police Department
41 West Main Street
Waterloo, NY 13165

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Chief Marquart:

I have received your letter of October 5 in which you described your Department's practices concerning the disclosure of records pertaining to apparently eligible youthful offenders. You referred specifically to a directive given by the Village Justice that the name of a 16, 17 or 18 year old who has been arrested for a felony cannot be disclosed due to youthful offender status and questioned the propriety of his position.

From my perspective, the policies of the Department as you described them are 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 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 §720.15 of the Criminal Procedure Law, which provides that:

Chief Doyle L. Marquart

November 15, 1999

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- "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.

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



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI-AO-11814

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Alexander F. Treadwell

Executive Director

Robert J. Freeman

November 17, 1999

Mr. Francis T. Murray
County Attorney
County of Ulster
P.O. Box 1800
240 Fair Street
Kingston, NY 12402-1800

The staff of the Committee on Open 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 October 14, as well as the memorandum attached to it. The issue involve the extent to which the County is required to generate information stored electronically under the Freedom of Information Law. You wrote that the memorandum "points out that where a program doesn't exist to run against existing raw data, a program must be produced by an operator and loaded to access the data in the requested form." It is your view that those steps may represent the "creation of a new document..."

In this regard, as you are aware, the Freedom of Information Law pertains to existing records. Section 89(3) of that statute provides in part that an agency is not required to create a record in response to a request. I point out, however, that §86(4) of the Freedom of Information Law defines the term "record" expansively to include:

"any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based upon the language quoted above, if information is maintained in some physical form, it would in my opinion constitute a "record" subject to rights of access conferred by the Law. Further, the definition of "record" includes specific reference to computer tapes and discs, and it was held some fifteen years ago that "[i]nformation is increasingly being stored in computers and access to such data

Mr. Francis T. Murray
November 17, 1999
Page - 2 -

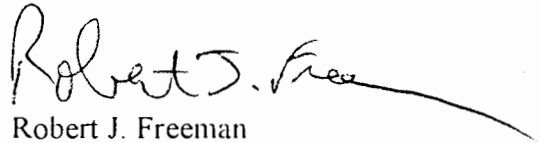
should not be restricted merely because it is not in printed form" [Babigian v. Evans, 427 NYS 2d 688, 691 (1980); aff'd 97 AD 2d 992 (1983); see also, Szikszy v. Buelow, 436 NYS 2d 558 (1981)].

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 does not now exist or cannot be retrieved or extracted without new programming or 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 an applicant's interest. Those steps, in my view, would exceed an agency's responsibilities under the Freedom of Information Law, and in those instances, if an agency wants to accommodate an applicant, it has been advised that an agency is not limited to the fees that would ordinarily be applicable under that statute. Stated differently, if the County chooses to develop new programs in a manner that exceeds its duties imposed by the Freedom of Information Law, I believe that it may contract with the applicant and determine a mutually agreeable fee for services.

I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:tt

FOIL-A0-11815

From: Robert Freeman
To: [REDACTED]
Date: Thu, Nov 18, 1999 9:00 AM
Subject: Dear Ms. Breslin:

Dear Ms. Breslin:

I regret that I cannot email copies of the opinions to which you referred because they were prepared years ago, before they could be electronically stored or transmitted. If you provide an address or a fax number, they can be mailed or faxed to you.

With respect to the issue, all agency records fall within the coverage of the Freedom of Information Law, and under §89(3) of that statute, an agency may require that a request be made in writing. As a general matter, the Freedom of Information Law is based on a presumption of access. Stated differently, all agency records are available, except to the extent that one or more grounds for denial listed in §87(2) may be asserted. Findings of code violations would clearly be accessible, and factual portions of any reports would also be available.

If you need additional information, please feel free to contact me.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518 - Phone
(518) 474-1927 - Fax
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STATE OF NEW YORK
DEPARTMENT OF STATE
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FOIL AO - 11816

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Joseph J. Seymour
Alexander F. Treadwell

November 18, 1999

Executive Director

Robert J. Freeman

Mr. Karim Duvall
96-A-1528
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. Duvall:

I have received your letter of October 5. You wrote that you submitted requests under the Freedom of Information Law to the New York City Police Department and the Office of the Bronx County District Attorney relating to a murder charge for which you were convicted in a jury trial. Both agencies have indicated that their files concerning the matter cannot be located. If they cannot find the records, you asked if there is case law that would enable you "to argue this matter in court."

First, although the nature of your question is unclear, 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)].

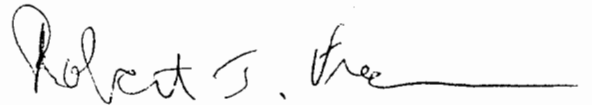
Second, while the courts and court records are not subject to the Freedom of Information Law, court records are generally available under other provisions of law (see e.g., Judiciary Law, §255). As such, an alternative source of the records of your interest, particularly since the matter

Mr. Karim Duvall
November 18, 1999
Page -2-

relates to a jury trial, would be the court in which the proceeding was conducted. When seeking court records, it suggested that a request be made to the clerk of the court, citing an applicable provision of law as the basis for the request.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and extends across the width of the page.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11817

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Alexander F. Treadwell

November 18, 1999

Executive Director

Robert J. Freeman

Mr. Darrell Venable
99-A-2752
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. Venable:

I have received your letter of October 4 in which you sought information concerning your ability to obtain a trial transcript and other records that a police department and a prosecutor have failed to produce.

In this regard, the Freedom of Information Law excludes the courts and court records from its coverage. In the case of Moore v. Santucci [151 AD2d 677 (1989)], it was held that the 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). As such, transcripts of judicial proceedings maintained by the office of a district attorney or a police department would fall outside the coverage of the Freedom of Information Law.

It is suggested that you seek the transcripts from the clerk of the court in which the proceeding was conducted. Although court records are not subject to the Freedom of Information Law, they are frequently available under other provisions of law (see e.g., Judiciary Law, §255).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11818

Committee Members

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Alexander F. Treadwell

November 18, 1999

Executive Director

Robert J. Freeman

Mr. Paul Bouros
94-A-2268
Fishkill Correctional Facility
Box 1245
Beacon, NY 12508

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Bouros:

I have received your letter of October 1 in which you complained that the records access officer for the New York City Department of Correction has not responded 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 acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully

Mr. Paul Bouros
November 18, 1999
Page -2-

explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and extends across the width of the page.

Robert J. Freeman
Executive Director

RJF:jm

cc: Thomas Antenen



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

7071-00-11819

Committee Members

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Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

November 18, 1999

Executive Director

Robert J. Freeman

Mr. Bradford Clark
99-B-0348
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. Clark:

I have received your letter of October 5 in which you sought assistance in obtaining witness statements made to City of Rochester police officers concerning the crime for which you were convicted.

In this regard, I am unfamiliar with the extent to which the records in question might previously have been disclosed, i.e., in the context of a judicial proceeding, to you or your attorney. Of potential relevance to the matter is the decision rendered in Moore v. Santucci [151 AD 2d 677 (1989)], in which it was held that if records have been disclosed during a public proceeding, they are generally available under the Freedom of Information Law. In that decision, it was also found, however, that an agency need not make available records that had been previously disclosed to the applicant or that person's attorney, unless there is an allegation "in evidentiary form, that the copy was no longer in existence." In my view, if you can "in evidentiary form" demonstrate that neither you nor your attorney maintain records that had previously been disclosed, the agency would be required to respond to a request for the same records. I also point out, however, that the decision in Moore specified that the respondent office of a district attorney was "not required to make available for inspection or copying any suppression hearing or trial transcripts of a witness' testimony in its possession, because the transcripts are court records, not agency records" (id. at 680).

Third, assuming that the records sought involving statements by witnesses have not been previously disclosed, I believe that the Freedom of Information Law would determine rights of access. As a general matter, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, several of the grounds for denial could be pertinent.

Section 87(2)(b) permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". From my perspective, the propriety of a denial of access would, under the circumstances, be dependent upon the nature of statements by witnesses or the contents of other records have already been disclosed. If disclosure of the records in question would not serve to infringe upon witnesses' privacy in view of prior disclosures, §87(2)(b) might not justifiably serve as a basis for denial. However, if the statements in question include substantially different information, that provision may be applicable.

Also potentially relevant is §87(2)(e), which permits an agency to withhold records that:

"are compiled for law enforcement purposes and which, if disclosed, would:

- i. interfere with law enforcement investigations or judicial proceedings;
- ii. deprive a person of a right to a fair trial or impartial adjudication;
- iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
- iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my view, the foregoing indicates that records compiled for law enforcement purposes can be withheld to the extent that disclosure would result in the harmful effects described in subparagraphs (i) through (iv) of §87(2)(e).

Section 87(2)(f) permits an agency to withhold records to the extent that disclosure would "endanger the life or safety of any person." Without knowledge of the facts and circumstances of your case, I could not conjecture as to the relevance of that provision.

Lastly, §87(2)(g) authorizes an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

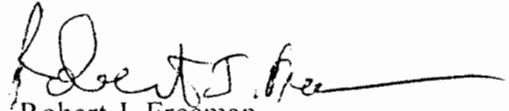
- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations; or
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

Mr. Bradford Clark
November 18, 1999
Page -3-

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those 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,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

7076-11820

Committee Members

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November 19, 1999

Mr. Patrick Maranzino
96-R-8852
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. Maranzino:

I have received your letter of September 28, which reached this office on October 12. Please note that the Committee's address has changed.

As I understand the matter, you have requested copies of records relating to your statement concerning a certain incident, "a Grand Larceny or House Burglary", that occurred in Suffolk County in 1996. Your request was made on the basis of 5 USC §§552 and 552a, and 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 statutes to which you referred are, respectively, the federal Freedom of Information and Privacy Acts, which apply only to federal agencies. The statute that generally governs rights of access to records maintained by state and local government in New York is this state's Freedom of Information Law.

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. Without knowledge of the nature or contents of the records of your interest, I cannot offer specific guidance. However, several grounds for denial may be pertinent.

Section 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. Under that

provision, if charges against a person have been dismissed, the records relating to the incident are sealed. If §160.50 is applicable, the records would be exempted from disclosure by statute.

If that statute does not apply, it is likely that the Freedom of Information Law would serve as the basis for determining rights of access.

Of potential significance is §87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". That provision might be applicable relative to the deletion of identifying details in a variety of situations, i.e., where a record identifies a confidential source or a witness, for example.

Perhaps the most relevant provision concerning access to records maintained by law enforcement agencies is §87(2)(e), which permits an agency to withhold records that:

"are compiled for law enforcement purposes and which, if disclosed, would:

- i. interfere with law enforcement investigations or judicial proceedings;
- ii. deprive a person of a right to a fair trial or impartial adjudication;
- iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
- iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in sub- paragraphs (i) through (iv) of §87(2)(e).

Another possible ground for denial is §87(2)(f), which permits withholding to the extent that disclosure "would endanger the life or safety of any person". The capacity to withhold on that basis is dependent upon the facts and circumstances concerning an event.

Also relevant ground for denial may be §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.

Third, I point out that in a decision concerning a request for records maintained by the office of a district attorney that would ordinarily be exempted from disclosure under the Freedom of Information Law, it was held that "once the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public" [see Moore v. Santucci, 151 AD 2d 677, 679 (1989)]. Based upon that decision, it appears that records introduced into evidence or disclosed during a public judicial proceeding should be available. However, in the same decision, it was also found that:

"...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

Lastly, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person

Mr. Patrick Maranzino

November 19, 1999

Page - 4 -

requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

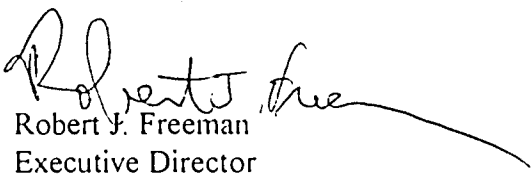
"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

For your information, I believe that the person designated to determine appeals in the situation that you described is the Suffolk County 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

Oml-100-3083
FOIL-100-11821

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November 19, 1999

Executive Director

Robert J. Freeman

Mr. Harry Bourletos

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Bourletos:

I have received your letter of October 7, as well as the correspondence attached to it. You have sought assistance in relation to a request to the Town of Kent for a variety of materials concerning "the process whereby the town board of Kent decided to kill Canada Geese." The records sought included surveys or opinion polls used to obtain the views of residents and the documentation describing the statistical factors associated with the distribution and response to the surveys or polls, documentation indicating the Town's intent to kill the geese, notices of meetings by the Board informing the public of its intent to consider killing the geese, correspondence on the matter between Town official and other governmental officials, as well contractors, "threatening letters" and similar materials received by Town officials and others pertaining to the killing of geese, documents relating to allegations of illness caused by contact with geese, invoices relating to the use of "non-lethal methods" of dealing with geese and a "copy of permit issued by the DEC and the U.S. Fish and Wildlife Service authorizing the slaughter of the geese."

In response to the request, the attorney for the Town denied the request in its entirety, stating that "your request is in the nature of a discovery demand." He added that "at present we are unaware of any statistical data associated with the Canadian geese."

From my perspective, that the request may be in the nature of a "discovery demand" is irrelevant. The issues, in my view, involve the extent to which the records exist and are maintained by or for the Town; the extent to which the request "reasonably describes" the records as required by §89(3) of the Freedom of Information Law; and the extent to which any such records may properly be withheld pursuant to §87(2) of that statute. In this regard, I offer the following comments.

It is noted at the outset 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 state's highest court, the Court of Appeals, in a case involving a request made under the Freedom of Information Law by a person involved in litigation against an agency: "Access to records of a government agency under the Freedom of Information Law (FOIL) (Public Officers Law, Article 6) is not affected by the fact that there is pending or potential litigation between the person making the request and the agency" [Farbman v. NYC Health and Hospitals Corporation, 62 NY 2d 75, 78 (1984)]. Similarly, in an earlier decision, the Court of Appeals determined that "the standing of one who seeks access to records under the Freedom of Information Law is as a member of the public, and is neither enhanced...nor restricted...because he is also a litigant or potential litigant" [Matter of John P. v. Whalen, 54 NY 2d 89, 99 (1980)]. The Court in Farbman, supra, discussed the distinction between the use of the Freedom of Information Law as opposed to the use of discovery in Article 31 of the 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.

Second, 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, for example, there are no statistics that have been prepared in relation to a survey or poll, the Town would not be required to prepare such records on your behalf.

When an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

I point out that in Key v. Hynes [613 NYS 2d 926, 205 AD 2d 779 (1994)], it was found that a court could not validly accept conclusory allegations as a substitute for proof that an agency could not locate a record after having made a "diligent search". However, in another decision, such an allegation was found to be sufficient when "the employee who conducted the actual search for the documents in question submitted an affidavit which provided an adequate basis upon which to conclude that a 'diligent search' for the documents had been made" [Thomas v. Records Access Officer, 613 NYS 2d 929, 205 AD 2d 786 (1994)].

Third, it is emphasized that the Freedom of Information Law is expansive in its scope, for it pertains to all agency records, including those of a town. Section 86(4) of the Law defines the term "record" broadly to include:

"any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Fourth, as suggested earlier, §89(3) 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.

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.

Next, insofar as the records sought are maintained by or for the Town and the request has met the standard of reasonably describing such 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. 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. 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, while some aspects of the records might properly be withheld, I believe that the blanket denial of access by the Town's attorney was inconsistent with law. In considering the records sought, the following grounds for denial may be pertinent.

Many of the records sought would appear to consist of documentation prepared by or sent to Town officials that were prepared by Town or other state government officials. To that extent, §87(2)(g) would be applicable. While that provision potentially serves as a ground for denial, due to its structure it often requires disclosure. Section 87(2)(g) states that an agency may withhold records that:

"are inter-agency or intra-agency materials which are not:

- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations; or
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

I note that the definition of the term "agency" in §86(3) makes reference to entities of state and local government. Consequently, communications between the Town and the U.S. Fish and Wildlife Service, a federal agency, would not constitute "inter-agency or intra-agency" material, and §87(2)(g) would not apply. Similarly, a private contractor or company would not be an agency, and communications between the town and those persons or entities would fall outside the scope of that provision as a basis for denial.

Further, the issuance of a license or permit, for instance, would reflect a final agency determination by either the Department of Environmental Conservation or the Fish and Wildlife Service and would clearly be available even if §87(2)(g) were applicable.

Also potentially significant is §87(2)(b), which permits an agency to withhold records insofar as disclosure would result in "an unwarranted invasion of personal privacy." Any information that could be characterized as medical in nature could in my view be withheld [see §89(2)(b)]. Therefore, if, for instance, a resident informed the Town in writing that he or she contracted an illness, any identifying details regarding that person could, in my opinion, be deleted to protect his or her privacy.

Since you requested notices of meetings informing the public of the Town Board's intent to discuss the matter of the geese, I point out that the Open Meetings Law would not require that notices of meetings include that information. Section 104 of that statute requires that notice of the time and place of every meeting of a public body be given to the news media and by means of posting; there is no requirement that the notice include an agenda or reference to the subjects to be considered.

Lastly, when a request for records is denied, the applicant has the right to appeal pursuant to §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

Mr. Harry Bourletos
November 19, 1999
Page -7-

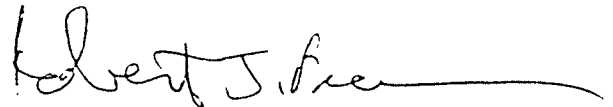
the Committee's regulations and the Freedom of Information Law, the Court of Appeals in Barrett v. Morgenthau held that:

"[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 Town officials.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Town Clerk
Timothy J. Curtiss
Ann Fanizzi



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11822

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Alexander F. Treadwell

Executive Director

Robert J. Freeman

November 22, 1999

E-MAIL

TO:

[REDACTED]

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 Mr. Falcon:

I have received your letter of October 15. You wrote that the volunteer organization that you serve was the subject of a complaint made to the Racing and Wagering Board that was found to be without merit. You have questioned your rights of access to the complaint and other records relating to the investigation of the complaint.

In this regard, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §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.

With regard to the records prepared during an investigation, without knowledge of the content of the records, I cannot offer specific guidance. However, if, for example, persons other than the complainant were interviewed or were witnesses, it is likely that identifying details concerning those persons could be withheld, also on the ground that disclosure would constitute an unwarranted invasion of personal privacy. The other provision of likely relevance pertains to internal communications made by staff at the Board or perhaps with other governmental entities. Specifically, §87(2)(g) permits an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations; or
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

I hope that I have been of assistance.

RJF:tt



STATE OF NEW YORK
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Alexander F. Treadwell

November 23, 1999

Executive Director

Robert J. Freeman

Mr. David J. Todeschini
98-A-4798
Groveland Correctional Facility
P.O. Box 104
Soyea, NY 14556-0001

Dear Mr. Todeschini:

I have received your letter October 13 in which you asked that this office answer a question under the Freedom of Information Law, specifically, whether this agency "knows of any official or unofficial use of a book entitled 'We Get Confessions'" by the Rochester Police Department, its officers or by any law enforcement agency.

In this regard, the primary function of the Committee on Open Government involves providing advice and opinions concerning public access to government records and meetings, and I have no knowledge concerning the publication to which you referred or its use.

Further, in my view, your inquiry did not constitute a valid or appropriate request for purposes of 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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-190-11824

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November 23, 1999

Executive Director

Robert J. Freeman

Mr. Martin Wilbur
Assistant Editor
North County News
1520 Front Street
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, unless otherwise indicated.

Dear Mr. Wilbur:

As you are aware, I have received your letter of October 12 in which you sought an advisory opinion concerning a request for records that has been denied by the Town of Putnam Valley.

According to your letter, the Town was negotiating with the City of Middletown to accept its garbage, and "[s]tatements made by the Supervisor led everyone to believe that the signing of a 20-year contract was imminent." Nevertheless, you indicated that the negotiations "have ceased" and that none are scheduled. Having requested a "proposed inter-municipal contract", the Town denied the request, in your words, on the ground that "release of that information would jeopardize the town's standing during contract talks." You have asked whether such a proposed agreement must be disclosed, "even if negotiations are not yet complete."

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 provision upon which the Town appears to have 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)].

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.

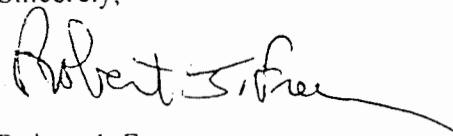
"In other words, since the Trump organization is the only party involved in these negotiations, there is no inequality of knowledge between other entities doing business with the City" [Community Board 7 v. Schaffer, 570 NYS 2d 769, 771 (1991); Aff'd 83 AD 2d 422; reversed on other grounds 84 NY 2d 148 (1994)].

Based on the foregoing, to the extent 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 be asserted to withhold the records.

Lastly, records consisting of communications internal to an agency or between agencies typically fall within the coverage of §87(2)(g), which enables agencies to withhold "inter-agency or intra-agency materials", depending on their contents. A proposed inter-municipal contract, copies of which are in possession of both parties is not, based on decisions rendered by the state's highest court, the kind of record that falls within that exception. Most recently, in Gould v. New York City Police Department [87 NY2d 267 (1990)], it was held that the 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])" and "to safeguard internal government consultations and deliberations" (*id.*, 276). The Town and the City in this instance would not have been seeking each other's advice or opinion; on the contrary, they were parties to a negotiation. Consequently, I do not believe that §87(2)(g) would serve as a basis for denial of access to a proposed contract that is in possession of both parties.

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: Town Board



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI-DO-11825

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Alexander F. Treadwell

Executive Director

Robert J. Freeman

November 23, 1999

Mr. Donald Palmer
94-A-4351
P.O. Box 480
Gouverneur, NY 13642-0370

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Palmer:

I have received your letter of October 11 in which you referred to my response to you of October 1 and complained that the Childrens Aid Society in New York City had failed to respond to your request for records made under the Freedom of Information Law.

In this regard, it is emphasized that the Freedom of Information Law is applicable to government agencies. Section 86(3) of that statute defines the term "agency" to mean:

"any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, as a general matter, entities of state and local government in New York are subject to the requirements of the Freedom of Information Law; private, not-for-profit and profit making entities are beyond the coverage of that statute.

In short, assuming that the Childrens Aid Society is not a governmental entity, it would not be required to give effect to the Freedom of Information Law.

Mr. Donald Palmer
November 23, 1999
Page - 2 -

I hope that the preceding remarks serve to enhance your understanding of the matter and that I have been of assistance.

Sincerely,

A handwritten signature in black ink that reads "Robert J. Freeman". The signature is written in a cursive style with a long horizontal line extending to the right.

Robert J. Freeman
Executive Director

RJF:tt

cc: Children's Aid Society



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMC-AO-3088
FOIL-AO-11826

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November 23, 1999

Ms. Betsy Calhoun
Garrison Union Free School Board of Education
241 South Highland Road
Garrison, NY 10524

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Calhoun:

I have received your letter of October 18 and the materials attached to it. In your capacity as a member of the Board of Education of the Garrison Union Free School District, you have asked that I discuss relevant principles of law in relation to certain aspects of its School Board Code of Ethics.

Based on §806 of the General Municipal Law, the pertinent portion of the Code provides as follows:

"Confidential information: An officer or employee shall not disclose confidential information acquired by him or her in the course of his or her official duties or use such information to further his or her personal interest.

"In addition, he/she shall not disclose information regarding any matters discussed in an executive session of the Board of Education whether such information is considered 'confidential' or not."

In view of the attachments, it appears that you are familiar with opinions rendered by this office that deal with the matter. While some of the ensuing commentary may be duplicative of points known to you, I offer the following remarks.

By way of background, §805-a of the General Municipal Law states in subdivision (1)(b) that "no municipal officer or employee shall...disclose confidential information acquired by him in the course of his official duties or use such information to further his personal interests." From my perspective, the term "confidential" has a narrow and precise technical meaning. For records or

information to be validly characterized as confidential, I believe that such a claim must be based upon a statute that specifically confers or requires confidentiality. Stated differently, an act of Congress of the State Legislature must forbid disclosure in order to characterize information as confidential.

While a variety of subjects may properly be discussed during executive sessions and numerous records or portions thereof may validly be withheld under the Freedom of Information Law, the ability to exclude the public from a meeting or withhold records does not necessarily represent or signify a requirement of confidentiality. I note that both the Open Meetings Law and the Freedom of Information Law are permissive. Under §105 of the former, a public body, such as a board of education, may enter into executive session to discuss one or more of the subjects appearing in paragraphs (a) through (h) of subdivision (1); there is no requirement that those subjects be discussed in executive session. Moreover, as you are aware, in order to conduct an executive session, a motion to do so must be made and carried by a majority vote of the total membership of a public body. If such a motion does not carry, even though a public body might have the authority to discuss an issue in executive session, it would not have the obligation to do so. Similarly, under the Freedom of Information Law, §87(2) provides that an agency may withhold records in accordance with the grounds for denial of access that follow. The State's highest court has found that an agency may choose to disclose records even though it has the ability to deny access [see Capital Newspapers v. Burns, 67 NY 2d 562 (1986)].

Even though discussions by a public body may in appropriate circumstances be conducted in private and certain records may justifiably be withheld, the matters considered might not be "confidential", but rather beyond the scope of public rights of access. In a case in which the issue was whether discussions occurring during an executive session held by a school board could be considered "privileged", it was held that "there is no statutory provision that describes the matter dealt with at such a session as confidential or which in any way restricts the participants from disclosing what took place" (Runyon v. Board of Education, West Hempstead Union Free School District No. 27, Supreme Court, Nassau County, January 29, 1987). While §805-a of the General Municipal Law may be useful for providing guidance, for the reasons described above, I do not believe that the use of the term "confidential" is entirely clear, or that information acquired during an executive session may generally be characterized as "confidential."

The situation in which information considered by a board of education might validly be characterized as "confidential" would relate to matters pertaining to a particular student (i.e., in the case of consideration of disciplinary action, an educational program, an award, etc.). In those instances, I believe that a discussion would have to occur in private and that records would have to be withheld insofar as public discussion or disclosure would identify the student. As you may be aware, the Family Educational Rights and Privacy Act (20 USC §1232g) generally prohibits an educational agency from disclosing education records or information derived from those records that are identifiable to a student, unless the parents of the student consent to disclosure. In the context of the Open Meetings Law, a discussion concerning a student would constitute a matter made confidential by federal law and would be exempted from the coverage of that statute [see Open Meetings Law, §108(3)]. In the context of the Freedom of Information Law, an education record would be specifically exempted from disclosure by statute in accordance with §87(2)(a). In both

contexts, I believe that a board of education, its members and school district employees would be prohibited from disclosing, because a statute requires confidentiality.

Although there may be no prohibition against disclosure of information acquired during executive sessions or records that could be withheld, the foregoing is not intended to suggest such disclosures would be uniformly appropriate or ethical. Obviously, the purpose of an executive session is to enable members of public bodies to deliberate, to speak freely and to develop strategies in situations in which some degree of secrecy is permitted. Similarly, the grounds for withholding records under the Freedom of Information Law relate in most instances to the ability to prevent some sort of harm. In both cases, inappropriate disclosures could work against the interests of a public body as a whole and the public generally. Further, a unilateral disclosure by a member of a public body might serve to defeat or circumvent the principles under which those bodies are intended to operate. Historically, I believe that public bodies were created to order to reach collective determinations, determinations that better reflect various points of view within a community than a single decision maker could reach alone. Members of boards should not in my opinion be unanimous in every instance; on the contrary, they should represent disparate points of view which, when conveyed as part of a deliberative process, lead to fair and representative decision making.

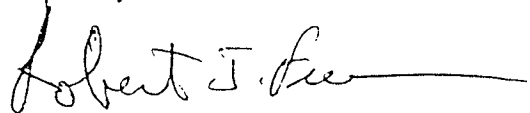
Disclosures made contrary to or in the absence of consent by the majority could result in unwarranted invasions of personal privacy, impairment of collective bargaining negotiations or even interference with criminal or other investigations. In those kinds of situations, even though there may be no statute that prohibits disclosure, release of information could be damaging to individuals and the functioning of government. On the other hand, however, if a public body has inappropriately discussed an issue during an executive session, a disclosure of the nature of the discussion may, in my view, be warranted.

Lastly, a portion of the Code indicates that a person who "knowingly and intentionally" violates its provisions "may be removed from office..." In this regard, due to the limited jurisdiction of this office, I cannot offer guidance or comment with respect to the capacity of a board of education to seek removal of a member from office.

As you requested, this opinion will be sent 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



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November 23, 1999

Executive Director

Robert J. Freeman

Mr. Paul M. Perfetti

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Perfetti:

I have received your letter of October 13, as well as the correspondence attached to it. You have asked that I review a denial of your request made to the Montgomery County Probation Department. You sought "[r]estitution dates and amounts for any and all payments made by or on behalf of Brandie Caldwell to an Order of Restitution/Reparation dated December 22 1998 by City Court Judge Howard M. Aison" and "a complete list of the distribution of the money received from Ms. Caldwell by the Probation Department including names, dates, and amounts."

In this regard, it is noted at the outset 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. Therefore, if, for example, the Department does not maintain a "list" of monies distributed to an individual, it would not be required to prepare a list or a new record on your behalf.

Second, even if the information sought has been prepared, it appears that a denial of access would have been 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.

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:

Mr. Paul M. Perfetti
November 23, 1999
Page -2-

"(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."

Further, §87(2)(b) of the Freedom of Information Law permits an agency to withhold records insofar as disclosure would result in "an unwarranted invasion of personal privacy." It appears that the cited provision would also authorized the Department to deny access.

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: Kathi J. Pallotta
Helen A. Bartone



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November 23, 1999

Executive Director

Robert J. Freeman

Mr. Larry Highsmith
95-B-1960
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. Highsmith:

I have received your letter of October 11 in which you sought an opinion concerning requests for records directed to the Office of the Erie County District Attorney, the State Police and a court.

It is noted at the outset 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 the records sought are maintained by a court, it is suggested that a request be made to the clerk, citing an applicable provision of law as the basis for the request.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Without knowledge of the nature or content of most of the records that you requested, I cannot offer specific guidance. However, in the following paragraphs, reference will be made to the provisions that appear to be pertinent.

Several of the records involve eavesdropping warrant applications. The provision that you cited states in part that "[a]pplications made and warrants issued under this article shall be sealed by the justice" [Criminal Procedure Law, §700.55(1)]. Those records would fall within the scope of §87(2)(a) of the Freedom of Information Law, which authorizes an agency to withhold records that "are specifically exempted from disclosure by state or federal statute."

Perhaps the provision of primary significance relative to investigative and related materials is §87(2)(e). That provision permits an agency to withhold records that:

"are compiled for law enforcement purposes and which, if disclosed, would:

- i. interfere with law enforcement investigations or judicial proceedings;
- ii. deprive a person of a right to a fair trial or impartial adjudication;
- iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
- iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

Insofar as the denial involves a claim that disclosure would reveal investigative techniques, 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 of 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 than 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.

With respect to records that were subpoenaed, in my view, to characterize all such records 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. Case law illustrates why a broad construction of §87(2)(e) 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 "pursuant to a Grand Jury subpoena." 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, some of 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,

Mr. Larry Highsmith
November 23, 1999
Page -5-

notwithstanding their use in that context for a purpose inconsistent with the reason for which they were prepared.

Also of possible relevance is section 87(2)(f). That provision permits an agency to withhold records when disclosure "would endanger the life or safety of any person." To the extent that disclosure would endanger the life or safety of law enforcement officers or others, it appears that §87(2)(f) would be applicable.

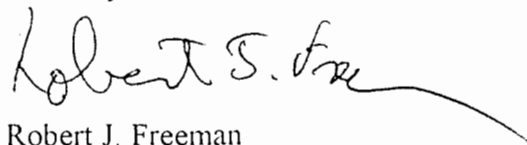
With respect to prior disclosures of records, it was held in Moore v. Santucci [151 AD2d 677 (1989)] that if records have been disclosed during a public proceeding, they are generally available under the Freedom of Information Law. In that decision, it was also found that an agency need not make available 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 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). Insofar as records requested from an office of a district attorney may properly be characterized as court records, it appears that the Freedom of Information Law would not apply.

Lastly, with respect to the specificity of a request, §89(3) of the Freedom of Information Law states in part that an applicant must "reasonably describe" the records sought. Therefore, an applicant is not required to identify the records requested with particularity; rather, he or she must provide sufficient detail to enable agency staff to locate and identify the records.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and has a long, sweeping underline that extends to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer, Office of the Erie County District Attorney



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

7076-10-11829

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Alexander F. Treadwell

November 24, 1999

Executive Director

Robert J. Freeman

Mr. Richard Jordan
89-B-0508
Wallkill Correctional Facility
Box G
Wallkill, NY 12589

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Jordan:

I have received your letter of October 14 in which you asked whether you might use the Freedom of Information Law "to help find a friend [you] have lost contact with for some ten years."

From my perspective, the extent to which you can use the Freedom of Information Law to find a lost friend is questionable. In this regard, I offer the following comments.

First, that statute is applicable to agency records, and §86(3) defines the term "agency" to mean:

"any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, the Freedom of Information Law generally pertains to records maintained by entities of state and local government in New York.

Second, to make what may be a successful request, such a request should be made 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 note that there is no single location or database that includes all government information pertaining to individuals. Consequently, it may be difficult to determine which agencies might possess records regarding an individual.

Mr. Richard Jordan
November 24, 1999
Page -2-

Third and perhaps most importantly, §89(3) of the Freedom of Information Law requires that an applicant must "reasonably describe" the records sought. A request that merely includes reference to an individual's name, without more, would not likely meet that standard. Rather, an appropriate request should include sufficient detail to enable the staff of an agency to locate and identify the records.

Lastly, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

While I am unaware of any details concerning your friend, I point out that §87(2)(b) authorizes an agency to withhold record insofar as disclosure would constitute "an unwarranted invasion of personal privacy." In most instances, individuals' home addresses may be withheld under that provision. An exception would involve voter registration records. When a person is registered to vote, a county board of elections is required to disclose his or name and residence address.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

707L-AO-11830

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

November 24, 1999

Executive Director

Robert J. Freeman

Mr. Richard Pena
93-R-2859
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. Pena:

I have received your letter of October 15, as well as the correspondence attached to it. The materials describe a series of delays by the Office of the Queens County District Attorney in dealing with your request for records under the Freedom of Information Law. The receipt of a request made on May 11 was acknowledged on June 8, with a statement that a response concerning the status of your request would be mailed to you within sixty days; a second letter was sent to you on June 29, stating that you would be notified of the result of the request within sixty days of the date of that letter; and on September 13, you were informed that you would be notified of the result of the request within thirty days. As of the date of your letter to this office, your request had been neither granted nor denied.

In this regard, §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 a case that described an experience that may be 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 stopped 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 request has been constructively denied and that you may appeal the denial pursuant to §89(4)(a). That provision states in relevant part that:

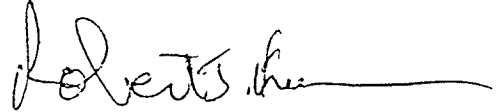
"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal 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.

Mr. Richard Pena
November 24, 1999
Page -3-

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Lisa Drury



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI 190-11831

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Alexander F. Treadwell

November 24, 1999

Executive Director

Robert J. Freeman

Mrs. Susan Crawford

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Crawford:

I have received your letter of October 18 concerning your efforts in gaining access to records of the AuSable Valley Central School District. In a memorandum addressed to you by Linda M. Fiacco, Superintendent, she wrote that I informed the District's attorney that "auditing worksheets from Management Advisory Group is [sic] not open to disclosure under FOIL." You have asked whether that statement correctly indicates what I said or wrote to the school district attorney."

In this regard, first, this office receives thousands of inquiries by phone each year. While I might have spoken with the District's attorney, I have no specific recollection of having had a conversation on the subject of your inquiry or having written to the attorney.

Second, if I had spoken with or written to the attorney, any District official, or any person, I do not believe that I would have responded as Ms. Fiacco suggested. On the contrary, I would have essentially offered the following remarks.

By way of brief 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 appears that the provision of primary significance in analyzing rights of access would be §87(2)(g). Although that provision potentially serves as a basis for denial of access, due to its structure, it often requires substantial disclosure. That provision enables an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations; or
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

One of the contentions offered in a recent decision was that certain reports could be withheld because they are not final and because they relate to matters or incidents for which no final determination had been made. The state's highest court, 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)].

Moreover, in a decision rendered in 1981 dealing with field auditors' work papers, it was found that "[t]he major portions of these forms are, on their face, simply 'factual tabulations or data' as referred to in section 87 (sub 2, par [g], cl i) of the Public Officers Law and as such are not exempted from disclosure" [Polansky v. Regan, 81 AD2d 102, 104].

The Court of Appeals 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:

Mrs. Susan Crawford
November 24, 1999
Page -3-

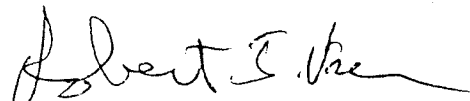
intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. 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 records in question consist of statistical or factual information, I believe that they must be disclosed.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this opinion will be forwarded to District officials.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Linda M. Fiacco



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DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI-AO-11832

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Alexander F. Treadwell

November 24, 1999

Executive Director

Robert J. Freeman

Mr. Dominic Brett
80-C-0511
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. Brett:

I have received your letter of October 19 concerning "res judicata". You have asked whether an agency may deny a request for records on the ground that a denial of a previous request for "similar information" was sustained by the Supreme Court more than ten years ago, and whether the ruling has "a binding effect on any other requester who chooses to seek release of the same information."

In this regard, I offer the following comments.

First, the principle of "res judicata" pertains to a situation in which a court has rendered a determination and one or more of the parties seeks to initiate a second judicial proceeding. In that situation, a party could not seek a second judicial review of the same matter in which he or she was previously involved. As such, assuming that a person other than a party to a judicial proceeding seeks records similar to those that were the subject of the proceeding, the principle of "res judicata" would not apply.

Second, however, the initial decision may serve as *precedent*, and if indeed the records are so similar to those initially considered and there has been no change in the law or facts, the *precedent* might be viewed as binding.

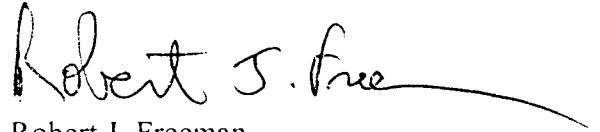
Third, "similar" may not mean "same." On the basis of your letter, I am unaware of differences that might exist between the records determined to be deniable by the court and those that may be of your interest now. Moreover, it is possible that legislation enacted since the determination may require a different result. It is possible, too, that facts and circumstances may require a different result. For instance, disclosure of records compiled for law enforcement purposes might interfere

Mr. Dominic Brett
November 24, 1999
Page -2-

with an active investigation and be withheld with justification under §87(2)(e)(i). However, after the investigation has ended, the same records might become available because disclosure would no longer interfere with an investigation. Records pertaining to an individual might be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" pursuant to §87(2)(b). Nevertheless, if that person has died, the exception may no longer be applicable. In short, the extent to which a judicial decision rendered ten years ago may have precedential effect is questionable.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink that reads "Robert J. Freeman". The signature is written in a cursive style and extends to the right with a long horizontal flourish.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

November 29, 1999

Mr. Mark L. Balen

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Balen:

I have received your letter of October 19, as well as the materials attached to it.

In your capacity as a member of the Board of Education of the Lackawanna City School District, you have sought assistance concerning your efforts in obtaining various records, particularly a "break down of work periods showing whether employees worked or not and overtime received, if any", and those indicating "how much in District funds were spent" in relation to a certain grievance proceeding. In response to the request, you were informed that the records are "considered part of the employee's personnel records" and that the Commissioner's regulations "provide that any board member may request that personnel records be examined by the board in executive session, but only for inspection and use in the deliberation of specific matters before the board."

From my perspective, the Superintendent's statement concerning the use of the records by board members is somewhat overbroad. More importantly, however, I believe that the regulations are inconsistent with the Freedom of Information Law and are, therefore, invalid to the extent of such inconsistency. In short, under those regulations, a member of a board of education would apparently have a lesser right of access to items characterized as "personnel records" than the public generally. In this regard, I offer the following comments.

First, the Freedom of Information Law does not distinguish among applicants for records, and it has been held that when records are accessible under that statute, they must be made equally available to any person, notwithstanding one's status or interest [*Burke v. Yudelson*, 51 AD2d 673 (1976)]. When one seeks records under the Freedom of Information Law, that person enjoys rights accorded to the public generally [*Farbman v. New York City*, 62 NY2d 75 (1984)]. In the context of your inquiry, when you seek records under the Freedom of Information Law, I believe that you would have the same rights as any member of the public, despite your status as a member of the Board of Education.

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.

Part 84 of the Commissioner's regulations, which deals with access to employees personnel records by boards of education and their members, provides as follows:

“§84.1 Right of access by school board members

A board of education shall have right of access to personnel records of employees of the district, subject to the procedures hereinafter set forth.

§84.2 Procedures to obtain access.

Examination of school employee personnel records by the board of education shall be conducted only at executive sessions of the board. Any board member may request the chief school officer to bring the personnel records of a designated employee or employees to an open meeting of the board. The board shall then determine whether to conduct an executive session for the purpose of examining such records. The chief school officer shall present such records to the board at the executive session. Such records shall, in their entirety, be returned to the custody of the chief school officer at the conclusion of the executive session of the board.

§84.3 Purposes and use.

Information obtained from employee personnel records by members of the board of education shall be used only for the purpose of aiding the members of the board to fulfill their legal responsibilities in making decisions in such employee personnel matters as appointments, assignments, promotions, demotions, remuneration, discipline, or dismissal, or to aid in the development and implementation of personnel policies, or such other uses as are necessary to enable the board to carry out legal responsibilities.”

According to judicial decisions, an agency's regulations may not render records deniable or confidential, unless there is a basis for so doing pursuant to one or more of the grounds for denial appearing in the Freedom of Information Law.

The first ground for denial in the Freedom of Information Law, §87 (2)(a), refers to records that may be characterized as confidential and enables an agency to withhold records that "are specifically exempted from disclosure by state or federal statute." A statute, based upon judicial interpretations of the Freedom of Information Law, is an act of the State Legislature or congress [see Sheehan v. city of Syracuse, 521 NYS 2d 207 (1987)], and it has been found that agencies' regulations are not equivalent of statutes for purposes of §87 (2)(a) of the Freedom of Information Law [see Zuckerman v. NYS Board of Parole, 385 NYS 2d 811, 53 AD 2d 405 (1976); Morris v. Martin, Chairman of the State Board of Equalization and Assessment, 440 NYS 2d 365, 82 AD 2d 965, reversed 55 NY 2d 1026 (1982)]. Therefore, insofar as the Department's regulations render records or portions of records deniable in a manner inconsistent with the Freedom of Information Law or some other statute, those regulations would, in my opinion, be invalid. The regulations cannot operate, in my view, in a manner that provides you with fewer rights of access than the public at large.

Third, it is emphasized that there is nothing in the Freedom of Information Law that deals specifically with personnel records or personnel files. The nature and content of so-called personnel files may differ from one agency to another, and from one employee to another. 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), 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. 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].

Based upon the foregoing, it is clear in my view that records reflective of payments to public employees must be made available, whether they pertain to overtime, or participation in work-related activities, for those records in my view are relevant to the performance of one's official duties. It is noted that one of the decisions cited above, Capital Newspapers v. Burns, supra, involved a request for records reflective of the days and dates of sick leave claimed by a particular municipal police officer. The Appellate Division found that those records must be disclosed, and the Court of Appeals affirmed. The decision indicates that the public has both economic and safety reasons for knowing whether public employees perform their duties when scheduled to do so. As such, attendance records, including those involving overtime work, are in my opinion clearly available, for they are relevant to the performance of public employees' official duties. Similarly, I believe that records reflective of payment of overtime must be disclosed, for the public has an economic interest in obtaining those records and because the records are relevant to the performance of public employees' official duties.

In affirming the Appellate Division decision in Capital Newspapers, the Court of Appeals found that:

"The Freedom of Information Law expresses this State's strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies (see, Matter of Farbman & Sons v New York City Health and Hosps. Corp., 62 NY 2d 75, 79). The statute, enacted in furtherance of the public's vested and inherent 'right to know', affords all citizens the means to obtain information concerning the day-to-day functioning of State and local government thus providing the electorate with sufficient information 'to make intelligent, informed choices with respect to both the direction and scope of governmental activities' and with an effective tool for exposing waste, negligence and abuse on the part of government officers" (Capital Newspapers v. Burns, supra, 565-566).

Based on the preceding analysis, it is clear in my view that payroll, attendance and similar records must be disclosed under the Freedom of Information Law.

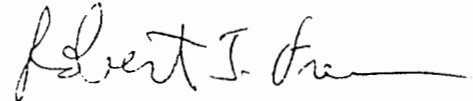
Lastly, with respect to records indicating amounts of District expenditures, insofar as those records exist, I believe that they must be disclosed, for none of the grounds for denial would be pertinent.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this response will be forwarded to the Board of Education and the Superintendent.

Mr. Mark L. Balen
November 29, 1999
Page- 5 -

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman".

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education
Nellie B. King, Superintendent



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11834

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

November 30, 1999

Mr. Patrick Morrison
83-A-3436
Shawangunk Correctional Facility
P.O. Box 700
Wallkill, NY 12589

Dear Mr. Morrison:

I have received your letter of November 26 in which you requested records from this office pertaining to a person who may be under consideration for parole.

In this regard, the Committee on Open Government is authorized to provide advice and guidance concerning public rights of access to government records, primarily under the state's Freedom of Information Law. The Committee does not maintain records generally, and this office does not possess any records that you have requested. Nevertheless, I offer the following comments.

First, as a general matter, a request for records should be made to the "records access officer" at the agency that you believe would maintain the records. The records access officer has the duty of coordinating an agency's response to requests.

Second, the statutes to which you referred are 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, which applies to entities of state and local government in New York. That statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. While I am unaware of the contents of the records of your interest, it is likely that §87(2)(b) would be pertinent, for it enables an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy."

Lastly, since you indicated that you do not expect to be charged a fee, I note that the federal Freedom of Information Act includes provisions dealing with the waiver of fees, but that the state law contains no waiver provisions. Under that statute, an agency may charge up to twenty-five cents per photocopy.

Mr. Patrick Morison
November 30, 1999
Page- 2 -

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and is positioned above the printed name and title.

Robert J. Freeman
Executive Director

RJF:tt



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DEPARTMENT OF STATE
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Warren Mitofsky
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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

December 2, 1999

Mr. Stephen M. Waite, Sr.
95-B-2305 B1-201
P.O. Box 700
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. Waite:

I have received your letter of October 18 and the materials attached to it. You have sought assistance concerning an unanswered request for records made to the Office of the Broome County District Attorney, and you "appealed" to this office.

In this regard, the Committee on Open Government is authorized to provide advice and opinions pertaining to the Freedom of Information Law; it is not empowered to determine appeals or otherwise compel an agency to grant or deny access. Nevertheless, 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:

Mr. Stephen M. Waite, Sr.

December 2, 1999

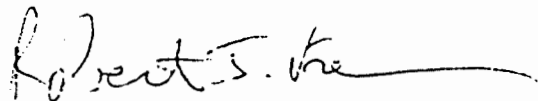
Page - 2 -

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and extends across the width of the text block.

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Gerald F. Mollen



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11835

Committee Members

Mary O. Donohue
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Walter Grunfeld
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December 2, 1999

Mr. Harvey M. Elentuck

The staff of the Committee on Open 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 note of October 16, which appears on an appeal addressed to Chancellor Rudolph F. Crew following a denial of a request for records directed to Community School District 2. As suggested in previous correspondence, some of the matters that you raised have been the subjects of opinions rendered in the past and will not be reconsidered.

One of the issues pertains to the absence of any expressed reason for withholding records. In this regard, 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." Based on the foregoing, the reasons for a denial of access must be stated in writing. This is not to suggest that any such reasons must be explained in an exhaustive manner. As you are aware, later in the process of seeking records, if an appeal is denied, §89(4)(a) provides that the reason must be "fully explain[ed] in writing."

Next, with respect to access to an employee's "6 - digit file number", without knowledge of the use of that identifier, I cannot offer unequivocal guidance. I note that §87(2)(i) of the Freedom of Information Law 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 the file number to gain access to information without the authority to do so, or to shift, add, delete or alter information, I believe that the number could justifiably be withheld. On the other hand, insofar as disclosure would not permit an individual to gain unauthorized access information or the ability to alter the information, §87(2)(i) would not likely be applicable.

Mr. Harvey M. Elentuck

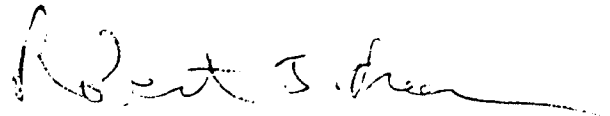
December 2, 1999

Page - 2 -

Lastly, you asked whether “‘factual descriptions’ and ‘objective statements’ necessarily imply the existence of ‘statistical or factual tabulations or data’”. In short, I do not believe so. By means of example, as I type this response, I could include a factual statement, i.e., “I looked out the window and the sky was blue”, that in no way would imply the existence of written statistical or factual data needed to support my statement.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink that reads "Robert J. Freeman". The signature is written in a cursive style with a long horizontal flourish at the end.

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Rudolph F. Crew
Andrew Lachman



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOLC-AO-11836

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David A. Schulz
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Alexander F. Treadwell

Executive Director

Robert J. Freeman

December 2, 1999

Mr. Howie King
99-A-2127
Riverview Correctional Facility
P.O. Box 247
Ogdensburg, NY 13669

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. King:

I have received your letter of October 16 and the materials attached to it. You have complained that the Department of Correctional Services has not responded to your appeal in a timely manner and that portions of documentation indicating the reasons for your transfer were improperly withheld.

In this regard, I offer the following comments.

First, with respect to the time for responding to an appeal, §89(4)(a) of the Freedom of Information Law states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

I note that it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Second, with respect to rights of access, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available,

except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Of relevance to records relating to transfers is §87(2)(g), which permits an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations; or
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

I point out that a decision rendered in 1989 might have dealt with the kinds of records concerning transfers in which you are interested. In that case, it was stated that:

"The petitioner seeks disclosure of unredacted portions of five Program Security and Assessment Summary forms, prepared semi-annually or upon the transfer of an inmate from one facility to another, which contain information to assist the respondents in determining the placement of the inmate in the most appropriate facility. The respondents claim that these documents are exempted from disclosure under the intra-agency memorandum exemption contained in the Freedom of Information Law (Public Officers Law, section 87[2][g]). We have examined in camera unredacted copies of the documents at issue (see Matter of Nalo v. Sullivan, 125 AD 2d 311, 509 NYS 2d 53; see also Matter of Allen Group, Inc. v. New York State Dept. of Motor Vehicles, App. Div., 538 NYS 2d 78), and find that they are exempted as intra-agency material, inasmuch as they contain predecisional evaluations, recommendations and conclusions concerning the petitioner's conduct in prison (see Matter of Kheel v. Ravitch, 62 NY 2d 1, 475 NYS 2d 814, 464 NE 2d 118; Matter of Town of Oyster Bay v. Williams, 134 AD 2d 267, 520 NYS 2d 599)"

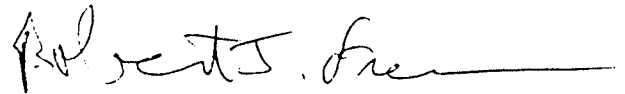
Mr. Howie King
December 2, 1999
Page - 3 -

[Rowland D. v. Scully, 543 NYS 2d 497, 498; 152 AD 2d 570
(1989)].

Insofar as the records sought are equivalent to those described in Rowland D., it appears that they could be withheld.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Robert J. Freeman
Executive Director

RJF:tt

cc: Anthony J. Annucci



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI 90-11837

Committee Members

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Alexander F. Treadwell

Executive Director

Robert J. Freeman

December 2, 1999

Mr. Eric Egan
75-A-1502
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. Egan:

I have received your undated letter in which you sought guidance concerning the use of the Freedom of Information Law. Enclosed are copies of that statute and an explanatory brochure that may be useful to you.

It is noted that the Committee on Open Government is authorized to provide advice regarding the Freedom of Information Law. The Committee does not maintain possession of records generally.

When seeking records, a request should be made to the "records access officer" at the agency that you believe maintains the records of your interest. The records access officer has the duty of coordinating an agency's response to requests. Since one aspect of the records in which you are interested involves dates of time spent in New York City jails, I note that those institutions are part of the New York City Department of Correction. The records access officer for that agency is Mr. Thomas Antenen.

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)].

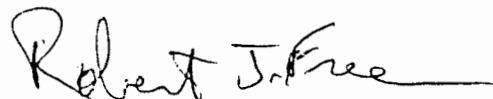
Mr. Eric Egan
December 2, 1999
Page - 2 -

It is noted that it has been reconfirmed that criminal history records are, in general, exempt from disclosure [Woods v. Kings County District Attorney's Office, 234 AD 2d 554 (1996)]. In Woods, the court upheld that 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 has 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 call 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:tt



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11838

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

December 3, 1999

Mr. Hilberto Ramos
98-A-6034
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. Ramos:

I have received your letter of October 18. You have asked whether you have the right under the Freedom of Information Law to obtain the date of a burglary that occurred at a particular location and the name of the investigating officer.

In this regard, I offer the following comments.

First, a request should be directed to the "records access officer" at the New York City Police Department. The records access officer has the duty of coordinating an 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 contain sufficient detail to enable Department staff to locate and identify the records of your interest.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, the only circumstances in which records containing the information sought would not be available would involve situations in which they have been sealed. If, for example, charges against a person are later dismissed in his favor, the records would be sealed pursuant to §160.50 of the Criminal Procedure Law; if the records related to a juvenile, the records would likely be exempt from disclosure under §784 of the Family Court Act. In either of those instances, §87(2)(a) of the Freedom of Information Law, which pertains to records that "are specifically exempted from disclosure by....statute", would authorize the Department to deny the request.

Mr. Hilberto Ramos

December 3, 1999

Page - 2 -

If the records have not been sealed, I believe that they would be available, for none of the remaining grounds for denial would appear to be applicable.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:tt



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL 100-11839

Committee Members

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Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

December 3, 1999

Robert J. Freeman

Mr. William V. Camfield



The staff of the Committee on Open 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 25. In brief, you complained with respect to ongoing delays in your efforts in gaining access to records of the Town of Stillwater.

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 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 a case that described an experience that may be 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 stopped 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, when an applicant for records encounters delays analogous to those that you described, a request may be considered to have been constructively denied and that person may appeal the denial 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, an applicant could seek judicial review of the denial. It has been suggested, however, that applicants appeal in an effort to avoid the time and cost of litigation.

Lastly, in my view, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, if records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a lengthy delay in disclosure. As the Court of Appeals has asserted:

"...the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as

Mr. William V. Camfield

December 3, 1999

Page - 3 -

broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objectives cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" [Westchester News v. Kimball, 50 NY 2d 575, 579 (1980)].

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman", with a long horizontal line extending to the right.

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board
Hon. Paul Lilac



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 11839A

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Joseph J. Seymour
Alexander F. Treadwell

December 3, 1999

Executive Director

Robert J. Freeman

Mr. John L. Parker
Counsel
Office of Assemblyman Richard I. Brodsky
Room 625
Legislative Office Building
Albany, NY 12248

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Parker:

As you are aware, I have received your recent letter in which you sought assistance in relation to unanswered requests for records maintained by Westchester County.

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 [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body,

Mr. John L. Parker
December 3, 1999
Page 2-

who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

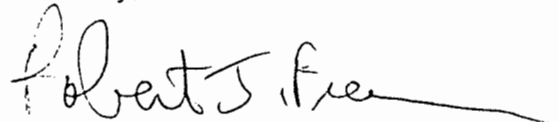
For your information, I believe that the Westchester County Attorney has been designated to determine appeals.

Lastly, from my perspective, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, if records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a lengthy delay in disclosure. As the Court of Appeals has asserted:

"...the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objectives cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" [Westchester News v. Kimball, 50 NY 2d 575, 579 (1980)].

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Andrew Spano



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AC-11840

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Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

December 13, 1999

Mr. Irving Serrano
93-R-0029
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. Serrano:

I have received your letter of October 25. You have asked whether your wife may go to a hospital to obtain copies of your medical records relating to an operation performed at that hospital.

In this regard, under §18 of the Public Health Law, only "qualified persons" have the right to obtain medical records. As the patient, you are a qualified person. From my perspective, if you write to the hospital, providing proof of your identity and direction to make records available to your wife, if she presents proof of her identity and authorization from you, I believe that she should have the ability to obtain the records on your behalf.

I note that a hospital or physician may withhold medical records to the extent that disclosure to the patient would cause "substantial and identifiable harm" to the patient or others, or if the records contain privileged doctors' notes. Subdivisions (3) and (4) of §18 provide the right to appeal a denial of access for those reasons.

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-11841

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Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

December 13, 1999

Mr. Larry G. Campbell
79-C-0029
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. Campbell:

I have received a copy of your appeal to Anthony J. Annucci, Counsel to the Department of Correctional Services, concerning a denial of your request for records containing the "business and post office address for CPS, and the name(s) of CPS contact person(s), including executive officer(s)..." CPS, according to your letter, is Correction Physician Services, Inc., which you described as a "non-traditional managed health care plan and/or doctors' group." At the end of the appeal you indicated that a copy would be sent to me for the purpose of seeking assistance.

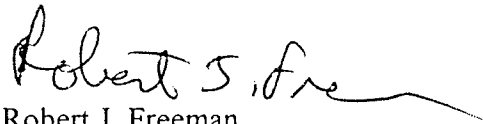
In this regard, the issue in my view involves the extent to which the Department maintains records that contain the information sought. If such records exist, I believe that they would be accessible, for none of the grounds for a denial of access appearing in §87(2) of the Freedom of Information Law would be applicable. I note, however, that the Freedom of Information Law pertains to existing records. Insofar as the Department does not maintain the information sought in a record or records, the Freedom of Information Law would not apply.

Lastly, since you referred to the "potential assessment of attorney's fees", I point out that a court must find that the records that should have been disclosed by an agency must be of "clearly significant interest to the general public" before it may consider an award of attorney's fees. I would conjecture that that condition would not be met in this instance.

Mr. Larry G. Campbell
December 13, 1999
Page - 2 -

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink that reads "Robert J. Freeman". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:tt

cc: Anthony J. Annucci



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11842

Committee Members

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Robert L. King
Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

December 13, 1999

Mr. Vilair Fonvil



The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Fonvil:

I have received your letter of October 26 in which you sought assistance concerning delays that you have encountered in your efforts in gaining access to records of the Village of Spring Valley.

In this regard, time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Notwithstanding the foregoing, in my view, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, if records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a lengthy delay in disclosure. As the Court of Appeals has asserted:

"...the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objectives cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" [Westchester News v. Kimball, 50 NY 2d 575, 579 (1980)].

If a request is voluminous and a significant amount of time is needed to locate records and review them to determine rights of access, a delay beyond five business days, 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).

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 Village officials.

Mr. Vilair Fonvil
December 13, 1999
Page - 3 -

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Trustees
Village Clerk



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11843

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Waide S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

December 13, 1999

Ms. Carol A. Bogle
Senior Assistant District Attorney
Dutchess County
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 Ms. Bogle:

I have received your letter of October 27 in which you sought my views concerning a request made under the Freedom of Information Law. The matter relates to "response times for emergency vehicles in Dutchess County", and you have asked whether the County may "withhold the name, address or phone number of the person who needs the emergency vehicle based on personal privacy or any other reason."

In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. Further, the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the grounds for denial that follow. The phrase quoted in the preceding sentence indicates that a single record or report may contain both accessible and deniable information. Moreover, that phrase in my opinion imposes an obligation upon agencies to review requested records in their entirety to determine which portions, if any, may justifiably be withheld.

Second, as you suggested, pertinent 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:

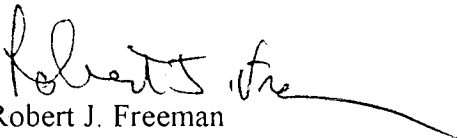
- "i. disclosure of employment, medical or credit histories or personal references or applicants for employment;
- ii. disclosure of items involving the medical or personal records of a client or patient in a medical facility..."

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, personally identifiable details, such as a name, a home telephone number, or medical information could in my view be withheld.

I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:tt



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11843A

Committee Members

Mary O. Donohue
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December 13, 1999

Executive Director

Robert J. Freeman

Mr. Harry C. Kuntzleman

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Kuntzleman:

I have received your note in which you complained that the Broome-Tioga BOCES had failed to respond to your request for records and your 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."

Mr. Harry C. Kuntzleman

December 13, 1999

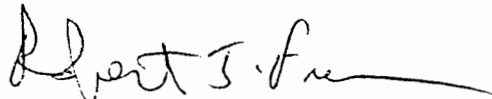
Page -2-

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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 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. Insofar as the records sought exist and can be located with reasonable effort, those dealing with "computer system costs" relating to a particular school district, I believe that they would be available. In short, none of the grounds for denial would appear to be pertinent or applicable.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Dr. L. A. Kiley
Dr. Paul H. King



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11844

Committee Members

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David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

December 16, 1999

Mr. Andre Lopez
98-A-5526
Green Haven Correctional Facility
Route 216
Stormville, NY 12582

Dear Mr. Lopez:

I have received your letter of December 13 in which you requested certain court records from this office 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 does not maintain possession or control of records generally. In short, I cannot provide the records of your interest because this agency does not possess them.

I note further 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

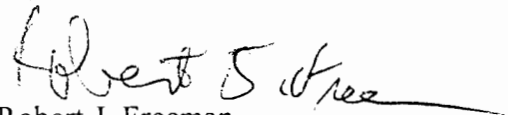
Mr. Andre Lopez
December 16, 1999
Page - 2 -

designation of a records access officer or the right to appeal a denial) would not ordinarily be applicable.

It is suggested that you resubmit your request to the clerk of the court, citing an applicable provision of law as the basis for your request.

I hope that the foregoing serves to clarify your understanding of the matter and that I have been of assistance.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:tt



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIC-AO-11845

Committee Members

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Walter Grunfeld
Robert L. King
Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

December 20, 1999

Executive Director

Robert J. Freeman

Mr. Stuart Milgrim
Birchwood on the Green of East
Meadow Civic Association
132 Norman Drive
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. Milgrim:

I have received your letter of October 28 and the materials attached to it. According to the correspondence, the Birchwood on the Green of East Meadow Civic Association requested various records relating to Masters Auto Collision from the Town of Hempstead, but the Town has not responded. The records sought include those pertaining to Masters maintained by the Town Attorney and the Building Department, as well as summonses issued since 1980.

In this regard, I offer the following comments.

First, 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, and requests should ordinarily be made to that person. While I believe that the Supervisor should have responded to your request in a manner consistent with the Freedom of Information Law or forwarded the request to the proper person or persons, in the future, it is suggested that your requests be made to the designated records access officer.

Second, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person

requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Third, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

I am unaware of the nature of the records maintained by the Town Attorney or the Building Department. With respect to the former, it is possible that some of the records might properly be withheld. Here I point out 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." The courts have found that legal advice given by a municipal attorney to his or her clients, municipal officials, is privileged when it is prepared in conjunction with an attorney-client relationship [see e.d., People ex rel. Updyke v. Gilon, and Pennock v. Lane, *supra*, Bernkrant v. City Rent and Rehabilitation Administration, 242 NYS 2d 752 (1963), *aff'd* 17 App. Div. 2d 392]. As such, I believe that a municipal attorney may engage in a privileged relationship with his or her client and that records prepared in conjunction with an attorney-client relationship are considered privileged under §4503 of the Civil Practice Law and Rules. Further, since the enactment of the Freedom of Information Law, it has also found that records may be withheld when the privilege can appropriately be asserted when the attorney-client privilege is read in conjunction with §87(2)(a) of the Law [see e.g., Mid-Boro Medical Group v. New York City Department of Finance, Sup. Ct., Bronx Cty., NYLJ, December 7, 1979; Steele v. NYS Department of Health, 464 NY 2d 925 (1983)]. Similarly, material prepared for litigation may be confidential under §3101 of the Civil Practice Law and Rules.

Nevertheless, legal papers filed against the Town would not have been prepared by the Town, its officials or its agents. As such, in my opinion, those papers would not be subject to the attorney-

Mr. Stuart Milgrim
December 20, 1999
Page -3-

client privilege. For similar reasons, litigation papers served by the Town on an adversary or filed with a court would be outside the scope of the attorney-client privilege. In general, when those papers are made available to the Town's adversary, I believe that they become a matter of public record. Moreover, although the Freedom of Information Law does not apply to the courts and court records, such records are generally available under other provisions of law [see e.g., Judiciary Law, §255]. From my perspective, if the records sought are publicly available from a court, they would also be available under the Freedom of Information Law from the Town.

With respect to summonses and similar records, when a person or entity has been found to have engaged in a violation of law, those records would be available, for none of the grounds for denial would apply. I note that there may be 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 Town or from the court in which the proceeding occurred, such as a Justice Court (see Uniform Justice Court Act, §2019-a) or District Court. 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].

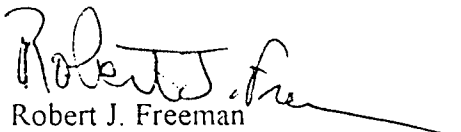
Although that decision did not pertain to the kinds of records to which you referred, I believe that the principle would be applicable in this instance. In short, unless they have been sealed pursuant to statute, records indicating violations of law would in my opinion be accessible.

Lastly, since the records sought may involve events occurring nearly twenty years ago, it is questionable whether all of them continue to exist or the extent to which older records can be located with reasonable effort. Insofar as the records sought no longer exist or cannot be found, the Freedom of Information Law would not apply.

In an effort to enhance compliance with the Freedom of Information Law, a copy of this opinion will be forwarded to the Town Supervisor.

I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:jm
cc: Hon. Richard Guardino, Supervisor



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI 00-11846

Committee Members

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Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

December 20, 1999

Executive Director

Robert J. Freeman

Mr. Gregory Hill
98-B-1398
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. Hill:

I have received your letter of October 24 in which you referred to your unsuccessful attempts to obtain records from the Office of the Erie County District Attorney and the City of Buffalo Police Department. The records sought involve descriptions of clothing at the time of your arrest.

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,

Mr. Gregory Hill
December 20, 1999
Page 2-

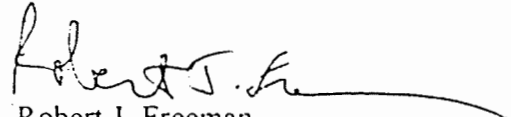
explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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. If my understanding of the matter is accurate, the records sought, if they exist, would be available, for the none of the grounds for denial would, at this juncture, appear to be pertinent.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Theresa M. Guenther
Cydny A. Kelly
Records Access Officer, City of Buffalo Police Department



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

70 JL AO -11847

Committee Members

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Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

December 20, 1999

Executive Director

Robert J. Freeman

Mr. Jose Velez
82-B-1155
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. Velez:

I have received your letter of October 22 in which you complained that a request for records made to your facility was not 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,

Mr. Jose Velez
December 20, 1999
Page 2-

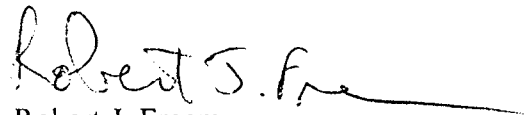
explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and extends across the width of the text block below it.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

7071-AO-11848

Committee Members

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Alexander F. Treadwell

Executive Director

Robert J. Freeman

December 20, 1999

Ms. Mary Beth Pfeiffer
Projects Editor
Poughkeepsie Journal
P.O. Box 1231
85 Civic Center Plaza
Poughkeepsie, NY 12602

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Pfeiffer:

I have received your letter of October 28 and the materials attached to it. You have sought an advisory opinion concerning a denial of your request for records reflective of disciplinary action taken by the Town of Poughkeepsie against Deputy Town Attorney Cynthia Kasnia. The request was denied by the Town Attorney "due to the fact that the matter involves a personnel matter and also constitutes an unwarranted invasion of privacy."

From my perspective, insofar as records indicate a finding of misconduct or the nature of a penalty imposed, they must be made available. That the issue involves a personnel matter is not determinative. As suggested in the ensuing paragraphs, the courts have found that the contents of personnel records are the factors that determine the extent to which those records must be disclosed. 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, two of the grounds for denial are relevant in consideration of rights of access to the records in question.

Relevant to an analysis 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.

Other decisions have dealt with 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 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.2d 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

Ms. Mary Beth Pfeiffer

December 20, 1999

Page - 6 -

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 records indicating the nature of disciplinary action or sanction imposed against the person in question must be disclosed.

Lastly, I note that the denial of your request by the Town Attorney failed to refer to your right to appeal. The provision dealing with the right to appeal, §89(4)(a), states in relevant part that:

"any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person 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:

Ms. Mary Beth Pfeiffer

December 20, 1999

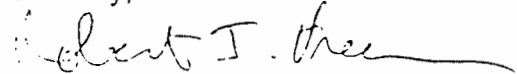
Page - 7 -

"[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 Town officials.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board
Frank E. Redl



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL NO - 11849

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Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

December 20, 1999

Mr. Thomas W. O'Connell



The staff of the Committee on Open 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'Connell:

I have received your letter of October 15, which reached this office on October 27. You have asked whether officials of the Town of Farmington should, in my opinion, supply the information that you have requested.

In this regard, first, having reviewed your requests, as you may be aware, 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 for information. Similarly, an agency is not required to provide "information" in response to questions; its obligation is to provide access to existing records to the extent required by law. Therefore, if, for instance, there is no record specifying the reasons for a reduction in an assessment, the Town would not be obliged to prepare a new record on your behalf. In short, you requested "information" rather than records. In the future, rather than seeking to elicit information, it is suggested that you request existing records, and if you have not yet received the information sought, it is suggested that you resubmit your requests and seek records rather than information.

Second, I note that the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) require that each agency, such as a town, 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 persons in receipt of your requests should have responded directly in a manner consistent with the Freedom of Information Law or forwarded the request to the records access officer, in the future, it is recommended that requests be made to an agency's designated records access officer. In most towns, the records access officer is the town clerk.

Mr. Thomas W. O'Connell

December 20, 1999

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Third, when a proper request is made, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Lastly, to the extent that the information sought exists in the form of a record or records, it appears that it would be available. In brief, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, it does not appear that any of the grounds for denial would be pertinent.

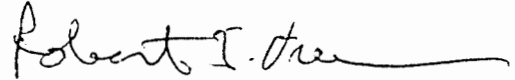
Mr. Thomas W. O'Connell

December 20, 1999

Page - 3 -

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:tt

cc: Robert Kleman
Barbara Bounds



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

7071-A0-11850

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December 20, 1999

Mr. William R. Phillips
75-A-0322
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. Phillips:

I have received your letter of October 26, as well as the materials attached to it. You have complained that a letter sent by the Office of the New York County District Attorney to the Parole Board recommending that you not be granted parole was withheld.

From my perspective, it appears that the denial of access 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.

When one agency, such as the office of a district attorney, communicates in writing with another, such as the Parole Board, the communication constitutes "inter-agency material" that falls within one of the exceptions, §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

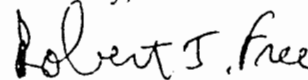
Mr. William R. Phillips
December 20, 1999
Page - 2 -

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those 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: Gary J. Galperin
David Molik



STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11851

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Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

December 20, 1999

Mr. Julio Cesar Borrell
98-A-6799
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. Borrell:

I have received your letter of October 26 in which you sought an opinion concerning whether your jail is required to disclose its records pertaining to you. You referred to documents that "can shed light into why [your] outgoing mail disappears", and you wrote that you have "reason to believe that the office of the Queens county district attorney may be behind this in trying to keep [you] from reaching people that would help [you] in [your] legal situation..."

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 am unaware of the nature or contents of the records in which you are interested or the extent to which they exist. Consequently, I cannot offer unequivocal guidance. Nevertheless, several grounds for denial may be pertinent to the matter, and they will be considered in the following paragraphs.

Of potential significance is §87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". That provision might be applicable relative to the deletion of identifying details in a variety of situations, i.e., where a record identifies a confidential source or a witness, for example.

Perhaps the most relevant provision concerning access to records maintained by law enforcement agencies is section 87(2)(e), which permits an agency to withhold records that:

"are compiled for law enforcement purposes and which, if disclosed, would:

- i. interfere with law enforcement investigations or judicial proceedings;
- ii. deprive a person of a right to a fair trial or impartial adjudication;
- iii" identify a confidential source or disclose confidential information relating to a criminal investigation; or
- iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in sub- paragraphs (i) through (iv) of §87(2)(e).

Another possible ground for denial is §87(2)(f), which permits withholding to the extent that disclosure "would endanger the life or safety of any person". The capacity to withhold on that basis is dependent upon the facts and circumstances concerning an event.

The remaining ground for denial of likely relevance is §87(2)(g). The cited provision permits an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations; or
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government... "

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial applies. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

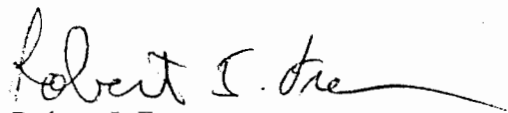
Mr. Julio Cesar Borrell

December 20, 1999

Page - 3 -

I hope that the foregoing serves to enhance your understanding of the Freedom of Information Law and that I have been of assistance.

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and has a long, sweeping horizontal line extending to the right.

Robert J. Freeman
Executive Director

RJF:tt



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11852

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Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

December 21, 1999

Executive Director

Robert J. Freeman

Mr. Mark Freedman

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Freedman:

I have received your letter of October 31 in which you sought my opinion concerning whether a delay by the Town of Ghent would be inconsistent with the Freedom of Information Law.

According to the correspondence attached to your letter, you requested "[a]ll building permits and certificate of occupancies issued by Mr. Rich Kring when he was the building inspector for the Town of Ghent." In response to the request, the Town's records access officer indicated that "the current building inspector is in the process of trying to organize those records, which is probably going to take several months..." He added that the request could be expedited if you are interested in a "particular time period or person."

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 [Bazon, J.] [plausible claim of nonidentifiability under

Mr. Mark Freedman
December 21, 1999
Page 2-

F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency']" (id. at 250).

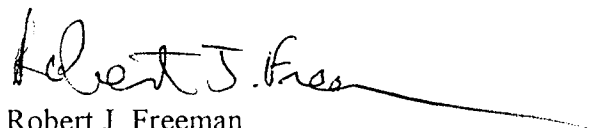
In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping system. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number.

While I am unfamiliar with the recordkeeping systems of the Town, to extent that the records sought can be located with reasonable effort, I believe that the request would have met the requirement of reasonably describing the records. On the other hand, if the records are not maintained in a manner that permits their retrieval except by reviewing perhaps hundreds or even thousands of records individually in an effort to locate those falling within the scope of the request, to that extent, the request would not in my opinion meet the standard of reasonably describing the records.

If, for instance, building permits and certificates of occupancy are filed chronologically, it may be relatively easy to locate the records falling within the scope of your request, and a delay of months would, in my opinion, be inconsistent with the Freedom of Information Law. However, if the records in question are maintained by parcel or address, records regarding every parcel would have to be reviewed in order to locate the records. In that latter situation, the request would not likely meet the standard of reasonably describing the records. If that is so, the Town would not be obliged to engage a search of that nature.

I hope that the foregoing serves to enhance your understanding of the Freedom of Information Law and that I have been of assistance.

Sincerely,

A handwritten signature in black ink that reads "Robert J. Freeman". The signature is written in a cursive style and is followed by a long horizontal line that extends to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Jonathan Walters



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI - NO - 11853

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Executive Director

Robert J. Freeman

December 21, 1999

Mr. Michael A. Kless

The staff of the Committee on Open 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 28 and the materials attached to it. You have complained that the City of Buffalo Municipal Civil Service Commission does not record "who voted which way."

In this regard, §87(3)(a) of the Freedom of Information Law requires that each agency, which includes a municipal commission, "shall maintain....a record of the final vote of each member in every proceeding in which the member votes." As such, in any instance in which a final vote is taken by the Commission, a record must be prepared, i.e., minutes of the meeting, indicating how each member cast his or her vote.

From my perspective, if the minutes indicate that action was taken, the only situation in which each member would have to be identified with his or her vote would involve the case in which the action is not unanimous. If the vote is unanimous, there would be no need, in my view, to record, by name, how each member voted.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: City of Buffalo Municipal Service Commission



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

7011-AO-11854

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December 21, 1999

Executive Director

Robert J. Freeman

Mr. John Owen
Administrative Law Judge
NYS Department of Environmental Conservation
Office of Hearings and Mediation Services, Rm. 423
Albany, New York 12233-1550

Dear Mr. Owen:

I have received your determination of an appeal made under the Freedom of Information Law by Mr. Alan Wechsler of the Albany *Times-Union*. In the determination, you denied his request for the names, job titles, division and unit of employees of the Department of Environmental Conservation who were vaccinated to prevent lyme disease. You wrote that:

“POL §87(2)(b) provides for exemption from disclosure of records which if released would constitute an unwarranted invasion of personal privacy and POL §96(92)(b) [sic] provides exemption from disclosure of...medical records where such disclosure is not required by law. A ‘medical record’ is simply any memorialization of information resulting from ‘attending a patient in a professional capacity’. (See CPLR 4504(a)).”

I respectfully disagree with your determination, and, in this regard, I offer the following comments.

First, while I am not fully familiar with the lyme disease vaccination program, I do not believe that the employees vaccinated could be characterized as “patients” as that term is commonly used. Those individuals were not being treated for any disease or symptom; on the contrary, as I understand the matter, it is more likely that being vaccinated was essentially a condition of employment. In my view, the vaccination program represents one of innumerable situations in which public employees may be required to take certain precautions in conjunction with the performance of their duties. For instance, if special clothing is distributed to certain employees to enable them to carry out their duties more safely and efficiently, I do not believe that there would be a basis for withholding information equivalent to that sought by Mr. Wechsler. If, in order to be a police officer, a physician may measure individuals to determine whether they meet a height qualification. Nevertheless, I do not believe that the disclosure of the officers’ identities could be characterized as a violation of the

Mr. John H. Owen
December 21, 1999
Page 2-

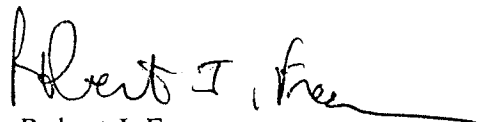
physician-patient privilege. Again, the identity of those vaccinated would not indicate any medical condition; rather, participation in the vaccination program appears to be a condition of employment. In a different context, children cannot attend public school unless they are vaccinated. Does that fact in and of itself constitute patient information that falls within the scope of the physician-patient privilege? In my opinion, it does not.

Second, assuming that the record sought could not be characterized as patient information, I do not believe that disclosure would constitute "an unwarranted invasion of personal privacy." It is emphasized in this regard that the courts have found that, as a general rule, records that are relevant to the performance of the official duties of a public officer or employee are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980; Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that items relating to public officers or employees are irrelevant to the performance of their official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977, dealing with membership in a union; Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1981, involving the back of a check payable to a municipal attorney that could indicate how that person spends his/her money; Selig v. Sielaff, 200 AD 2d 298 (1994), concerning disclosure of social security numbers].

In this situation, participation in the lyme disease program is, in my opinion, clearly relevant to the performance of the employees' duties. Consequently, I do not believe that the records could be withheld based upon a contention that disclosure would result in an unwarranted invasion of personal privacy. On the contrary, for the reasons described above, I believe that the records must be disclosed, and I ask that you reconsider your determination.

If you would like to discuss the matter, please feel free to contact me.

Sincerely,


Robert J. Freeman
Executive Director

RJF:jm

cc: James H. Ferreira
Ruth Earl
Alan Wechsler



STATE OF NEW YORK
DEPARTMENT OF STATE
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FOIL-AO-11855

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Executive Director

Robert J. Freeman

December 22, 1999

Mr. Paul Archer
99-B-0679
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. Archer:

I have received your letter of October 28 in which you sought assistance concerning an unanswered request for records made to the Oneida County Correction Department. Having reviewed your correspondence, 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. If I understand your request correctly, it appears that some of the records sought, notably those relating to police or correction officers, may be withheld.

The first ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §50-a of the Civil Rights Law. In brief, that statute provides that personnel records of police and correction officers that are used to evaluate performance toward continued employment or promotion are confidential. The Court of Appeals, the State's highest court, in reviewing the legislative history leading to its enactment, has held that 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 NY2d 562, 568 (1986)]. In another decision which dealt with unsubstantiated complaints against correction officers, the Court of Appeals held that the purpose of §50-a "was to prevent the release of sensitive personnel records that could be used in litigation for purposes of harassing or embarrassing correction officers" [Prisoners' Legal Services v. NYS Department of Correctional Services, 73 NY 2d 26, 538 NYS 2d 190, 191 (1988)]. The Court in an opinion rendered earlier this year reiterated its view of §50-a, citing that decision and stating that:

"...we recognized that the decisive factor in determining whether an officer's personnel record was exempted from FOIL disclosure under Civil Rights Law § 50-a was the potential use of the information contained therein, not the specific purpose of the particular individual requesting access, nor whether the request was actually made in contemplation of litigation.

'Documents pertaining to misconduct or rules violations by corrections officers – which could well be used in various ways against the officers – are the very sort of record which *** was intended to be kept confidential. *** The legislative purpose underlying section 50-a *** was *** to protect the officers from

Mr. Paul Archer
December 22, 1999
Page 3-

the use of records *** as a means for harassment and reprisals and for the purpose of cross-examination' (73 NY2d, at 31 [emphasis supplied])" (Daily Gazette v. City of Schenectady, 93 NY2d 145, 156- 157 (1999)).

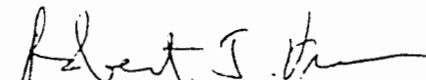
Again, insofar as the records pertain to police or correction officers, I believe that they would be exempt from disclosure pursuant to §50-a of the Civil Rights Law.

Other records relate to certain "incidences". Without knowledge of the contents of the records, I cannot offer specific guidance. It is possible, however, that persons other than yourself may be identified and that disclosure would constitute "an unwarranted invasion of personal privacy" pursuant to §87(2)(b). Further, records concerning the incidents may have been compiled for law enforcement purposes and, therefore, fall within the coverage of §87(2)(e).

Lastly, since you asked for a waiver of fees, I point out that the federal Freedom of Information Act, which applies to federal agencies, includes fee waiver provisions, but that the New York Freedom of Information Law, which is applicable in the context of your request, contains no similar provision. Moreover, it has been held that an agency may charge its established fee, even when a request is made by an indigent inmate [Whitehead v. Morgenthau, 552 NYS 2d 518 (1990)].

I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:tt

cc: Oneida County Sheriff
Records Coordinator



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11856

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Executive Director

Robert J. Freeman

December 22, 1999

Mr. Ronald J. Hall
96-A-5913
Coxsackie Correctional Facility
P.O. Box 999
Coxsackie, NY 12051-0999

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Hall:

I have received your letter of October 26 and the materials attached to it. You have asked for an advisory opinion concerning a request made under the Freedom of Information Law.

According to the correspondence, in a request made on October 6, you sought a variety of items, some of which are specific, while others are rather broad, and at the end of the request, you suggested that it was all encompassing, for you wanted all records from "soup to nuts."

In this regard, it is emphasized at the outset that §89(3) of the Freedom of Information Law requires that an applicant must "reasonably describe" the records sought. Therefore, a request must contain sufficient detail to enable agency staff to locate and identify the records. While some aspects of your request likely meet the standard of reasonably describing the records, others, such as those dealing with "other Departmental files, records, etc.", and the remainder involving "soup to nuts" would not meet that standard. In those instances, the request in my view would be inconsistent with the requirements of the Law.

Insofar as the request is appropriate and reasonably describes the records, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, there may be several grounds for denial that might be pertinent. For instance, disclosure of some of the records or portions thereof might, if disclosed, endanger life or safety [see §87(2)(f)]; others might be withheld on the ground that disclosure would constitute an "unwarranted invasion of personal privacy" [§87(2)(b)]; manuals or procedures reflective of non-routine criminal investigative techniques or procedures might

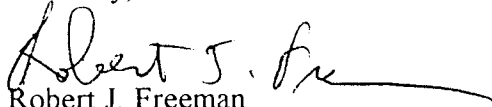
Mr. Ronald J. Hall
December 22, 1999
Page -2-

be withheld under §87(2)(e)(iv); and some records would likely constitute inter-agency or intra-materials that may be withheld under §87(2)(g).

Lastly, you asked that records made available should be organized and categorized chronologically and by topic, and that those withheld be listed with citations justifying the denial of access to each. In short, the Freedom of Information Law does not require that agencies carry out those functions.

I hope that the foregoing serves to enhance your understanding of the Freedom of Information Law and that I have been of assistance.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:tt



STATE OF NEW YORK
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7071-AO-11857

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Executive Director

Robert J. Freeman

December 22, 1999

Mr. Willie Smith
96-A-3430
Tappan Correctional Facility
354 Hunter Street
Ossining, NY 10562

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Smith:

I have received your letter of November 1 and the materials attached to it. You have asked that I offer an opinion as to whether you are entitled to obtain a variety of records that you requested from the New York City Police Department.

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 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 victim, a 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).

Mr. Willie Smith
December 22, 1999
Page - 3 -

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.

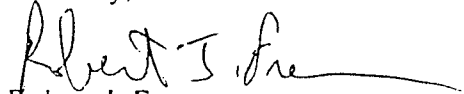
However, in the same decision, it was also found that:

"...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: Sgt. Richard Evangelista



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

7021-AO-11858

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December 22, 1999

Mr. John C. Milazzo
Suffolk County Water Authority
4060 Sunrise Highway
Oakdale, NY 11769

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Milazzo:

I have received your letter of November 2 in which you sought an advisory opinion concerning a request made under the Freedom of Information Law.

According to your letter, the Suffolk County Water Authority ("SCWA") "was a party defendant along with other defendants in three lawsuits concerning the same land transaction commence by a resident of a particular Town." In an appearance before a federal judge, the parties represented by counsel, including the SCWA, "entered into a colloquy on the record" and a "Transcript of Conference" was prepared. In brief, the Transcript indicates that the parties agreed to settle the action and "agreed to confidentiality of the terms of the stipulation." One of the attorneys added that "[n]o one shall report, *unless required by law*, the financial terms or any of the other terms except as may be reflected in duly prepared and recorded property documents." After similar and related statements, the Court asked: "Do the parties understand that a confidentiality agreement means that they can't *discuss this other than among themselves with anyone*,.... And if the plaintiffs reveal these terms there can be a request to rescind the money and start all over again." The attorneys said that they understood and the Transcript ended there.

The request involves "[a]ny and all agreements, stipulations of settlement, dedication agreements written or oral that has been entered into by all parties." In this regard, I offer the following comments.

The language quoted above that I italicized is, in my view, critical, for the confidentiality agreement specifies that no disclosure would be made "*unless required by law*", and the judge

referred to the inability to "*discuss*" the stipulation. From my perspective, the parties could validly agree not to speak about the settlement. However, the Freedom of Information Law pertains to records, not to speech. In a decision that is somewhat analogous to the matter that you described, Paul Smith's College of Arts and Sciences v. Cuomo, it was stated that:

"Plaintiff was the subject of a complaint made by a former employee who alleged that he was a victim of age discrimination. Prior to a scheduled hearing and with the assistance of an employee of defendant State Division of Human Rights (hereinafter SDHR), plaintiff entered into a stipulation of settlement with the complaining employee. Plaintiff's stated purpose for settling was to eliminate any negative publicity resulting from a public hearing on the allegations. The order after stipulation signed by defendant Commissioner of Human Rights on August 23, 1989 provided for absolute confidentiality except for enforcement purposes. The order also provided for the withdrawal of the charges and discontinuance of the administrative proceeding. Plaintiff did not admit to a Human Rights violation. On October 27, 1989, SDHR issued a press release detailing the allegations, disclosing that the matter had been settled and set forth certain parts of the settlement terms" [589 NYS2d 106,107, 186 AD2d 888 (1992)].

The Appellate Division determined that the issuance of the press release "was both arbitrary and capricious and an abuse of discretion" (*id.*), but it also found that the stipulation of settlement was subject to rights of access conferred by the Freedom of Information Law.

I note that 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 short, as I understand the matter, the parties are precluded from discussing the matter or divulging information regarding the settlement on their own initiative. However, if a record indicating

the terms of the stipulation of settlement is requested under the Freedom of Information Law, the SCWA or any other agency that may have possession of the record would, in my view, be required to disclose to the extent "required by law."

With respect to rights of access, 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.

The first ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." From my perspective, although §3101(c) and (d) of the CPLR authorize confidentiality regarding, respectively, the work product of an attorney and material prepared for litigation, those kinds of records remain confidential in my opinion only so long as they are not disclosed to an adversary or a filed with a court, for example. I do not believe that materials that are served upon or shared with an adversary could be characterized as confidential or exempt from disclosure.

Both of those provisions are intended to shield from an adversary records that would result in a strategic advantage or disadvantage, as the case may be. Reliance on either in the context of a request made under the Freedom of Information Law is in my view dependent upon a finding that the records have not been disclosed, particularly to an adversary. In a decision in which it was determined that records could justifiably be withheld as attorney work product, the "disputed documents" were "clearly work product documents which contain the opinions, reflections and thought process of partners and associates" of a law firm "which have not been communicated or shown to individuals outside of that law firm" [Estate of Johnson, 538 NYS 2d 173 (1989)]. In another decision, the relationship between the attorney-privilege and the ability to withhold the work product of an attorney was discussed, and it was found that:

"The attorney-client privilege requires some showing that the subject information was disclosed in a confidential communication to an attorney for the purpose of obtaining legal advice (*Matter of Priest v. Hennessy*, 51 N.Y.2d 62, 68-69, 431 N.Y.S.2d 511, 409 N.E.2d 983). The work-product privilege requires an attorney affidavit showing that the information was generated by an attorney for the purpose of litigation (*see, Warren v. New York City Tr. Auth.*, 34 A.D.2d 749, 310 N.Y.S.2d 277). The burden of satisfying each element of the privilege falls on the party asserting it (*Priest v. Hennessy, supra*, 51 N.Y.2d at 69, 431 N.Y.S. 2d 511, 409 N.E.2d 983), and conclusory assertions will not suffice (*Witt v. Triangle Steel Prods. Corp.*, 103 A.D.2d 742, 477 N.Y.S.2d 210)" [Coastal Oil New York, Inc. v. Peck, [184 AD 2d 241 (1992)].

In a discussion of the parameters of the attorney-client relationship and the conditions precedent to its initiation, it has been held that:

Mr. John C. Milazzo
December 22, 1999
Page - 4 -

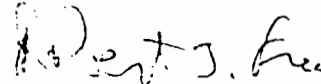
"In general, 'the privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication relates to a fact of which the 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 my view; since the record in question has been communicated among and is known by the parties, any claim of privilege or its equivalent would be effectively waived.

In sum, it appears that the SCWA would be "required by law", i.e., the Freedom of Information Law, to disclose the stipulation of settlement in response to a request for that record.

I hope that I have been of assistance. Should any further questions arise, please feel free to contact me.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt



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FOIL-AO-11859

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Robert J. Freeman

December 28, 1999

Mr. Daniel Johnston
86-A-6586
665 Route 216/Drawer B
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 facts presented in your correspondence.

Dear Mr. Johnston:

I have received your letter of November 4 in which you sought assistance concerning a request for records concerning your case made to the office of the Putnam County District Attorney. Although the request was received by that agency in May, 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, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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

Mr. Daniel Johnston

December 28, 1999

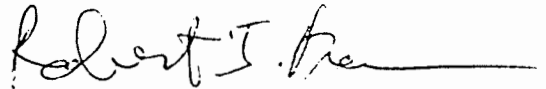
Page - 6 -

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: District Attorney
Records Access Officer



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707L-10-11860

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Executive Director

Robert J. Freeman

December 28, 1999

Ms. Elizabeth Burdman

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Burdman:

I have received your letter of October 27, which reached this office on November 8. You have sought assistance in obtaining copies of medicaid records from the New York City Human Resources Administration (HRA) relating to payments made for a medical procedure in 1973 and 1974.

In this regard, I offer the following comments.

First, pursuant to regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), each agency is required to designate one or more persons as records access officer. That person has the duty to coordinate an agency's response to requests, and it is suggested that you direct a request in writing to the records access officer at HRA. Even though that person may not have physical custody of the records, it is his or her duty to ensure that agency staff attempt to locate the records and make them available in a manner consistent with law.

Second, I point out that the Freedom of Information Law pertains to existing records. Since the records of your interest would have been prepared at least twenty-five years ago, they may no longer exist. If that is so, the Freedom of Information Law would not apply.

Assuming that the records of your interest exist and can be found, I believe that they would be available to you. 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.

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). However, 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.

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..."

Ms. Elizabeth Burdman

December 28, 1999

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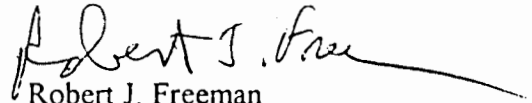
If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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



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December 28, 1999

Executive Director

Robert J. Freeman

Ms. Elizabeth Benjamin
Times-Union
90 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 Ms. Benjamin:

I have received your recent letter in which you sought an advisory opinion concerning rights of access to the contract between Albany County and the Firebirds, an indoor football team, under which the Firebirds have agreed to play at the Pepsi Arena until 2002. You indicated that the County "will not tell us anything else about the deal – like how much it was for – arguing that disclosure of that information would hurt their competitiveness with other arenas."

From my perspective, the contract must be disclosed in great measure, if not in its entirety. In this regard, I offer the following comments.

As you are aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, two of the grounds for denial are pertinent to an analysis of rights of access.

The provision that most often relates to the contracting process, §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 contracting process by diminishing the ability of the government to reach an optimal agreement on behalf of the taxpayers.

As I understand its application, §87(2)(c) generally encompasses situations in which a government 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 has been reached and a contract has been awarded in view of the requirements of the Freedom of Information Law, it has been held that "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.

In this instance, since an agreement has been reached, I do not believe that §87(2)(c) would serve as a basis for denial.

Based on your description of the County's contention, it appears that its refusal to disclose may involve §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..."

As I understand the matter, the County's stance does not relate to protecting the Firebirds, which is a commercial enterprise, but rather its own position as owner of the Pepsi Arena and a competitor with other arenas. There are numerous situations in which governmental entities own and/or operate what might be characterized as recreational or entertainment venues or facilities, such as skating rinks, marinas, theaters, campgrounds and the like, all of which may be in competition with private entities. Nevertheless, I know of no judicial decision in which it was held or inferred that records pertaining to the activities relating to those enterprises could be withheld under §87(2)(d) or any other exception.

Even if it could successfully be contended that disclosure of some elements of the contract would, if disclosed, cause substantial injury to the competitive position of Albany County as owner of the arena, the remainder of the contract would be accessible. 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'

Ms. Elizabeth Benjamin
December 28, 1999
Page -3-

(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 certain records 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 inquiry, it is questionable in my view whether §87(2)(d) could validly be asserted, and even if it could, whether or the extent to which any aspect of the contract would, if disclosed, cause "substantial injury" to the County's competitive position.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm
cc: Hon. Thomas Clingan, Records Access Officer



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DEPARTMENT OF STATE
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Executive Director

Robert J. Freeman

December 28, 1999

Mr. William M. Cullen
Behrens, Loew & Cullen
12 Seacrest Drive
Lloyd Harbor, 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 facts presented in your correspondence.

Dear Mr. Cullen:

I have received your letter of November 4 and the materials attached to it. In your capacity as attorney for the Board of Trustees of the Great Neck Library, you referred to an advisory opinion prepared on October 28 at the request of Ms. Ralene Adler and suggested that Ms. Adler "misunderstood the nature and composition" of what you characterized as "focus group interviews with small groups of individuals representing a wide spectrum of community interests." You also referred to the records prepared by a consultant retained by the Board and asked that I confirm our discussion in which it was advised that such records constitute "intra-agency materials" that would fall within the scope of §87(2)(g) of the Freedom of Information Law.

In this regard, I offer the following comments.

First, while I do not fully understand the role of members of the Board of Trustees in relation to serving as a focus group, it is reiterated that a gathering of a majority of the members of the Board, in their capacity as Board members, for the purpose of conducting the business of that body would, in my view, constitute a "meeting" that falls within the framework of the Open Meetings Law. If the gathering does not involve conducting the business of the body, the Open Meetings Law would not apply.

Second, the provision in the Freedom of Information Law to which reference was made earlier permits an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;

- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations; or
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those 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:

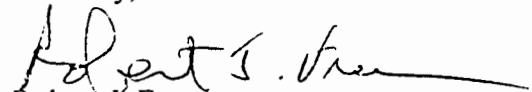
Mr. William M. Cullen
December 28, 1999
Page - 3 -

"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:tt



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI-AO-11863

Committee Members

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Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

December 28, 1999

Mr. James Robinson
95-A-2296
Drawer B
Stormville, NY 12582

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Robinson:

I have received your letter of November 8 concerning a situation in which the Office of the New York County District Attorney has indicated that it cannot locate your file.

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.

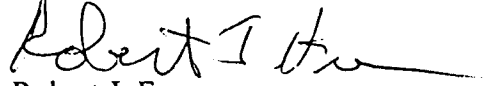
I point out that in Key v. Hynes, [613 NYS 2d 926, 205 AD 2d 779 (1994)], it was found that a court could not validly accept conclusory allegations as a substitute for proof that an agency could not locate a record after having made a "diligent search." However, in another decision, such an allegation 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)].

Lastly, 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). As such, it may be worthwhile to seek the records of your interest from the court in which the proceeding was conducted, citing an applicable provision of law as the basis for your request.

Mr. James Robinson
December 28, 1999
Page - 2 -

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:tt

cc: Gary J. Galperin
Maureen O'Connor



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-RO-11864

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Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Alexander F. Treadwell

Executive Director

Robert J. Freeman

December 28, 1999

Mr. Philip Crenshaw
97-A-4618
Upstate Correctional Facility
P.O. Box 2001
Malone, NY 12953

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Crenshaw:

I have received your undated letter in which you sought assistance concerning unanswered requests for records that are apparently maintained at your former facility.

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee does not obtain records for individuals. However, in an effort to offer guidance, I offer the following comments.

First, according to the regulations promulgated by the Department of Correctional Services, requests for records kept at a facility should be made to the superintendent or his designee.

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

Mr. Philip Crenshaw
December 28, 1999
Page- 2 -

constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

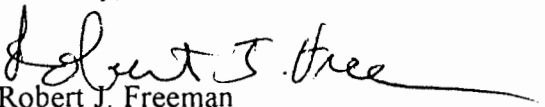
In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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.

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. Since the photographs to which you referred pertain solely to you, I do not believe that any of the grounds for denial would apply. With respect to the other records, their contents and the effects of disclosure would be the factors important in determining the extent to which they would be accessible.

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

7071-PO-11865

Committee Members

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Executive Director

Robert J. Freeman

December 28, 1999

Mr. Louis Labriola



The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Labriola:

I have received your letter of November 24, as well as the correspondence relating to it. You have sought my views concerning the "inappropriate handling" of a request for records made to the West Islip School District.

By way of background, on October 27, you requested from the District standard operating procedures applicable to school bus drivers, safety instructions, disciplinary guidelines and similar records, as well as the license and driving records pertaining to a particular bus driver. You indicated that "it took the school district 25 days to respond to [your] request" and that District Officials claimed that "it will take a total of 43 days from the time of [your] first request to gather the information."

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.

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 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 short, insofar as records are 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, from my perspective, the records sought are, in most instances, clearly 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.

Records in the nature of standard operating procedures, instructions to staff, an agency's rules and similar materials fall within the coverage of §87(2)(g), which specifies that they must be disclosed. The cited provision states that:

"are inter-agency or intra-agency materials which are not:

- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations; or
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

With respect to the driving record, I believe that most of the items sought would be available, irrespective of whether the driver is an employee of the District or a private bus company. I note that Article 19-A of the Vehicle and Traffic Law, entitled "Special Requirements for Bus Drivers", includes provisions that relate to school bus drivers, their disqualification, and the obligation of a school district to obtain their driving records. In terms of access to records, pertinent is §87(2)(b), which permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy."

It is emphasized in this regard that 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

Mr. Louis Labriola
December 28, 1999
Page - 4 -

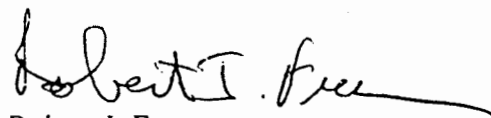
disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980; Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that items relating to public officers or employees are irrelevant to the performance of their official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977, dealing with membership in a union; Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1981, involving the back of a check payable to a municipal attorney that could indicate how that person spends his/her money; Selig v. Sielaff, 200 AD 2d 298 (1994), concerning disclosure of social security numbers].

In my view, due to the provisions applicable to all school bus drivers, the extent to which records must be disclosed would be essentially the same, whether the drivers are employed privately or by the District. Further, in conjunction with the previous commentary, I believe that a driver's driving record, including violations, reference to accidents and similar details relevant to the performance of his or her duties must be disclosed; contrarily, those items that are irrelevant to the performance of one's duties, such as a social security number, home address and date of birth, could be deleted.

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: Thomas E. Boedicker
Jeanne Koeper
Gale Winsper



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11866

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Alexander F. Treadwell

Executive Director

Robert J. Freeman

December 28, 1999

Mr. Howard C. Shmaruk
Assistant County Attorney
County of Rockland
Allison-Parris County Office Building
11 New Hempstead 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 facts presented in your correspondence.

Dear Mr. Shmaruk:

As you are aware, I have received your letter of November 10 in which you sought an advisory opinion concerning the Freedom of Information Law. On behalf your client, the Rockland County Department of Mental Health, which is licensed pursuant to Article 28 of the Public Health Law, you have asked whether a "root cause analysis" involving an "adverse sentinel event" must be disclosed.

By way of background, you wrote that:

"...an adverse sentinel event is an unexpected occurrence, involving death or serious physical or psychological injury, or the risk thereof.

The event is termed 'sentinel' because it issues a warning that requires immediate attention. In a health care facility, like the County's Department of Mental Health, such events do occur and mandate inquiry into how and why the event occurred in order to prevent the same type or similar event from occurring in the future.

When a sentinel event does occur, the Rockland County Department of Mental Health engages in a 'root cause analysis'. This is a process by which the causal factor(s) of the event are identified.

This analysis focuses primarily on systems and processes. Further, the analysis identifies changes that could be made which would improve

the level of performance and reduce the risk of a particular serious adverse event occurring in the future.

It should be noted that the root cause analysis of the sentinel event is reduced to a writing including recommended changes in the design or development of new systems and/or processes. This occurs in the ordinary course of business operations."

In response to the foregoing, 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 my understanding of the matter is accurate, relevant to an analysis of rights of access is §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." In this regard, §2805-j of the Public Health Law states in part that:

"1. Every hospital shall maintain a coordinated program for the identification and prevention of medical, dental and podiatric malpractice. Such program shall include at least the following:

(a) The establishment of a quality assurance committee with the responsibility to review the services rendered in the hospital in order to improve the quality of medical, dental and podiatric care of patients and to prevent medical, dental and podiatric malpractice. Such committee shall oversee and coordinate the medical, dental and podiatric malpractice prevention program and shall insure that information gathered pursuant to the program is utilized to review procedures. At least one member of the committee shall be a member of the governing board of the hospital who is not otherwise affiliated with the hospital in an employment or contractual capacity."

Other provisions of §2805-j involve the development of procedures concerning competence, the periodic review of credentials, and the collection of information concerning a hospital's experience with "negative health care outcomes and incidents injurious to patients." Section 2805-k involves investigations undertaken by hospitals prior to the granting or renewal of professional privileges. Section 2805-l requires that hospitals report certain kinds of "incidents" to the Health Department, and that investigations be performed and reported to the Department concerning those incidents.

Perhaps most important in terms of your inquiry is §2805-m, which states in part that:

"1. The information required to be collected and maintained pursuant to sections twenty-eight hundred five-j and twenty-eight hundred five-

k of this article, reports required to be submitted pursuant to section twenty-eight hundred five-l of this article and any incident reporting requirements imposed upon diagnostic and treatment centers pursuant to the provisions of this chapter shall be kept confidential and shall not be released except to the department or pursuant to subdivision four of section twenty-eight hundred five-k of this article.

2. Notwithstanding any other provisions of law, none of the records, documentation or committee actions or records required pursuant to sections twenty-eight hundred five-j and twenty-eight hundred five-k of this article, the reports required pursuant to section twenty-eight hundred five-l of this article nor any incident reporting requirements imposed upon diagnostic and treatment centers pursuant to the provisions of this chapter shall be subject to disclosure under article six of the public officers law or article thirty-one of the civil practice law and rules, except as hereinafter provided or as provided by any other provision of law."

Article six of the Public Officers Law is the Freedom of Information Law. Therefore, when records involve quality assurance pursuant to §§2805-j, k or l of the Public Health Law, they must be kept confidential, notwithstanding the provisions of the Freedom of Information Law.

If the provisions cited above are inapplicable, in addition to the authority to withhold personally identifying details concerning patients as "an unwarranted invasion of personal privacy" pursuant to §§87(2)(b) and 89(2)(b) of the Freedom of Information Law, §87(2)(g) would also be pertinent. That provision permits an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

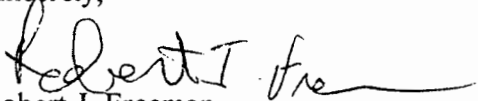
- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations; or
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

Mr. Howard C. Shmaruk
December 28, 1999
Page - 4 -

I hope that I have been of assistance. If you would like to consider 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

FOIL-AO-11867

Committee Members

Mary O. Donohue
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December 28, 1999

Mr. Dwayne A. Douglas
99-R-3102
Wyoming Correctional Facility
Attica, NY 14011-0501

The staff of the Committee 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. Douglas:

I have received our letter and the materials attached to it concerning requests for records directed to the Town of North Greenbush and Rensselaer County.

In this regard, I have contacted the Town Clerk on your behalf, and she informed me that the records have been retrieved and are available to you upon payment of the requisite fee. She indicated that it is your belief that no fee may be charged when an applicant is indigent. In short, that is not so. While there are provisions in the federal Freedom of Information Act, which applies solely to federal agencies, that involve fee waivers, there is no similar provision in the New York Freedom of Information Law. Further, it has been held judicially that an agency may charge its established fee, even if the applicant is an indigent inmate [see Whitehead v. Morgenthau, 518 NYS2d 552 (1990)].

In sum, I do not believe that the Town is obliged to prepare copies of the records sought until the proper fee is forwarded.

A second issue involves a request that had apparently not been answered. Here I point out that the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) require that each agency, such as a county, 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 persons in receipt of your requests should have responded directly in a manner consistent with the Freedom of Information Law or forwarded the request to the records access officer, in the future, it is recommended that requests be made to an agency's designated records access officer.

Mr. Dwayne A. Douglas
December 28, 1999
Page - 2 -

When a proper request is made, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

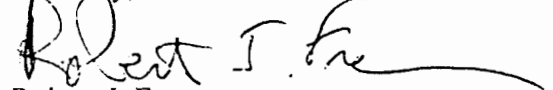
If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

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: Kate Connolly, Town Clerk
Christine Mahoney



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11868

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Alexander F. Treadwell

Executive Director

Robert J. Freeman

December 28, 1999

Ms. Lee Lama



Mr. Scott Copp



The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Lama and Mr. Copp:

I have received your letters and related materials, all of which pertain to the fees assessed by the Town of Perinton for providing copies of oversized records. Mr. Copp has indicated that the fee is based in part on "employee time and travel distance" needed to utilize the services of the local Kinko Copy Center. Ms. Lama wrote, however, that "Kinko's provides free pickup and delivery and ensures the integrity of the documents in their possession."

In this regard, I offer the following comments.

First, 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',

Ms. Lee Lama
Mr. Scott Copp
December 28, 1999
Page- 2 -

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 up to nine by fourteen inches, a fee that exceeds the actual cost of reproducing records larger than nine by fourteen inches or 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, 226AD 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)."

Ms. Lee Lama
Mr. Scott Copp
December 28, 1999
Page- 3 -

Second, in my opinion, every statute, including the Freedom of Information Law, must be carried out reasonably and in a manner consistent with its intent. Based upon the legislative declaration appearing at the beginning of that statute (§84), it is clear that it is intended to foster maximum access to records and ensure that "the state and its localities" make records available and "extend public accountability wherever and whenever feasible."

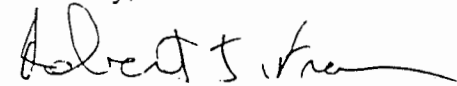
From my perspective, if there is no way for the Town to reproduce an oversized record other than having have staff travel to a location where copies could be made, it would be reasonable to charge for the time expended by its employees; that would be part of the actual cost. However, if the entity preparing the copies "provides pickup and delivery" at no charge and ensures the security and integrity of the records, it would be unreasonable, in my opinion, to use the services of a Town employee in traveling back and forth to the location of the copying service and to wait for copies to made. So doing would result in an unnecessary expenditure of time, and it would also serve as an impediment to the public's right to obtain copies of records under the Freedom of Information Law. Many people, in my view, would likely not avail themselves of the ability to obtain copies of records if the cost of so doing is prohibitive.

In sum, if Kinko's provides free pickup and delivery and guarantees the security of the records, I believe that the Town may charge an applicant for the record only the amount that Kinko's charges the Town.

Lastly, bills, receipts, vouchers and similar records indicating charges to the Town for services rendered by Kinko's or other providers of goods or services would in my view clearly be accessible under the Freedom of Information Law. In short, none of the grounds for denial of access appearing in §87(2) of the law would be applicable.

I hope that I have been of assistance. If you would like to consider 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

FOIL-AO-11869

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Alexander F. Treadwell

Executive Director

Robert J. Freeman

December 28, 1999

Mr. Born Allah Wright
94-A-29149
Upstate Correctional Facility
P.O. Box 2001
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. Wright:

I have received your letter of November 1 in which you complained concerning the treatment of your requests made to the New York City Police Department under the Freedom of Information Law. Although you did not include copies of the requests, you referred to "interrogatories" and posing questions.

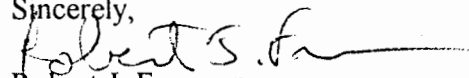
In this regard, one of the difficulties may be that an agency's obligation under the Freedom of Information Law involves providing access, to the extent required by law, to existing records. An agency is not required by that statute to answer questions or respond to interrogatories; again, its obligation is respond to requests for records and to grant or deny access to those records in whole or in part. Similarly, §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. Therefore, neither the Department nor any other agency is required to prepare a new record in response to a request for information or a question.

In short, in the future, rather than seeking information or attempting to elicit responses to questions, it is suggested that you seek existing records in a manner consistent with the Freedom of Information Law.

Mr. Born Allah Wright
December 28, 1999
Page - 2 -

I hope that the foregoing serves to enhance your understanding of the matter and that I have been of assistance.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:tt

cc: Susan Petito



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI-10-11870

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Executive Director

Robert J. Freeman

December 28, 1999

Mr. Alan D. Scheinkman
County Attorney
County of Westchester
Room 600, Michaelian Office Bldg.
148 Martine Ave.
White Plains, NY 10601

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Scheinkman:

I appreciate having received your determination of an appeal rendered under the Freedom of Information Law following a request by James F. LaRue of JFL Environmental, Inc. Mr. LaRue sought a "list of industries that have paid surcharge fees for exceeding federal and state limits for wastewater discharged into Westchester County's sewer system." You sustained the initial denial of the request on the basis of §87(2)(b) of the Freedom of Information Law, which authorizes agencies to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy", and §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."

I respectfully disagree with your determination.

From my perspective, and in view of judicial interpretations, §87(2)(b) is intended to pertain to natural persons, not entities or persons acting in business capacities. In a decision rendered by the Court of Appeals that focuses upon the privacy 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).

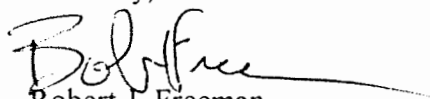
Mr. Alan D. Scheinkman
December 28, 1999
Page - 2 -

Similarly, 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 may be asserted to withhold records pertaining to entities other than natural persons. On the contrary, since the records sought relate to commercial entities, I do not believe that any of the grounds for denial would be applicable.

If you would like to discuss the matter, please feel free to contact me. I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script, appearing to read "Bob Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:tt



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

707L-00-11871

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Executive Director

Robert J. Freeman

December 28, 1999

Ms. Susan R. Saslaw



The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Saslaw:

As you are aware, I have received a variety of materials involving your efforts in obtaining records pursuant to the Freedom of Information Law relating to your applications to the Assigned Counsel Plan of the Appellate Division, First Department. Although one application was located and made available, you were informed that:

"All other papers in the file constitute intra-agency and inter-agency material not subject to disclosure under section 87 of the Public Officers Law. Moreover, such disclosure would constitute an unwarranted invasion of personal privacy under Section 87 and 89 of the Public Officers Law. Accordingly, other than your application, your F.O.I.L. request must be denied."

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 response to your request alluded initially to §87(2)(g). 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 the New York City Police Department in 1996 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)].

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 view of the direction offered by the Court of Appeals, insofar as the records sought are inter-agency or intra-agency materials consisting of statistical or factual information, I believe that they must be disclosed, unless a different exception may be asserted.

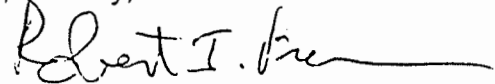
That other exception, which was cited in the response to your request, involves the ability to withhold records pursuant to §87(2)(b) to the extent that disclosure would result in "an unwarranted invasion of personal privacy." In addition, §89(2) provides that agencies may delete identifying details to prevent unwarranted invasions of privacy and includes a series of examples of such invasions. Of potential significance is the first such example, which involves:

"disclosure of employment, medical or credit histories or personal references of applicants for employment" [§89 (2)(b)(i)].

Based on the foregoing, I believe that a reference regarding employment may be withheld, unless the deletion of identifying details would effectively prevent the recipient of such record from determining the author of the reference. If, however, deletion of identifying details would not serve to protect the identity of the author of a reference, that document could, in my opinion, be withheld in its entirety.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Catherine O'Hagan Wolfe
George Golfinopoulos



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Alexander F. Treadwell

Executive Director

Robert J. Freeman

December 28, 1999

Ms. Cynthia Geones
District Clerk
Rockville Centre Union
Free School District
128 Shepherd Street
Rockville Centre, NY 11570

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Geones:

I have received your letter of November 3 in which you raised the following question: "if a school district has in its possession a copy of a referral to Child Protective Services on a student, can that copy be released to a parent (or child if 18 years old under FOIL)?" You indicated that the Nassau County Department of Child Protective Services has informed you that the District cannot disclose.

In this regard, in an effort to obtain expert advice, I contacted an attorney with the New York State Office of Children and Family Services who specializes in issues involving child protective services. Based on our discussion, with certain exceptions, I believe that the District may disclose the record in question to a parent. Such disclosure would not be made pursuant to the Freedom of Information Law, but rather pursuant to either the federal Family Educational Rights and Privacy Act ("FERPA", 20 USC §1232g) or §422 of the Social Services Law.

In brief, as you may be aware, 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:

Ms. Cynthia Geones

December 28, 1999

Page - 2 -

- "(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 even though a parent might not have custody of a child, that factor alone is not determinative of right conferred by FERPA. The term "parent" is defined in the regulations adopted pursuant to FERPA by the United States Department of Education to mean a "parent of a student and includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian" (34 CFR 99.3). Further, 34 CFR 99.4 states that:

"An educational agency or institution shall give full rights under the Act to either parent, unless the agency or institution has been provided with evidence that there is a court order, State statute, or legally binding document relating to such matters as divorce, separation, or custody that specifically revokes those rights."

Based on the foregoing, in the case of divorce or separation, a school district must, in my view, provide access to both natural parents, custodial and non-custodial, unless there is a legally binding document that specifically removes a parent's rights under FERPA, or a statutory prohibition against disclosure. I believe that a legally binding document would include a court order or other legal paper that prohibits access to educational records, or removes the parent's rights to have knowledge about his or her child's education.

Although the Freedom of Information Law generally deals with rights of access to agency records, relevant in this instance is §87 (2)(a) of that statute, which provides that an agency may deny access to records or portions thereof that "are specifically exempted from disclosure by state or federal statute...". Section 422 of the Social Services Law is a statute which pertains specifically to the statewide central register utilized by an agency having responsibility regarding such matters. Subdivision (4)(A) of section 422 states that reports as well as information concerning those reports are confidential, and may be disclosed only under specified circumstances listed in that statute. One of those circumstances involves disclosures to "any person who is the subject of the report or other persons named in the report" [§422 (A)(d)]. In addition, subdivision (7) of section 422 states:

Ms. Cynthia Geones

December 28, 1999

Page - 3 -

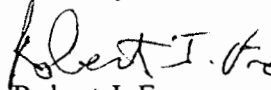
“At any time, a subject of a report and other persons names in the report may received, upon request, a copy of all information contained in the central register; provided, however, that the commissioner is authorized to prohibit the release of date that would identify the person who made the report or who cooperated in a subsequent investigation or the agency, institutes, organizations, program or other entity where such person is employed or with which he is associated, which he reasonably finds will be detrimental to the safety or interests of such person.”

Based on the foregoing, although a report may generally be available to a parent, those portions that would, if disclosed, identify the source of the report may be withheld to protect that person's privacy and safety.

Lastly, I note that a new subdivision (5) of §422 of the Social Services Law generally prohibits the disclosure of reports that have been determined to be unfounded. As such, when a request for a report is received by the District, it is suggested that contact be made with the County Department of Child Protective Services to determine the status of the report.

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-NO - 11873

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Alexander F. Treadwell

Executive Director

Robert J. Freeman

December 28, 1999

Mr. Milton Pacheco
79-B-00064
Clinton Correctional Facility
P.O. Box 2001
Dannemora, NY 12929-2001

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Pacheco:

I have received your letter of October 29 in which you sought my views concerning a request for records pertaining to your case that was largely denied by the Office of the New York County District Attorney. Having reviewed the correspondence, I offer the following comments.

First, some of the records that you requested apparently do not exist or are not maintained by the Office of the District Attorney. Since the Freedom of Information Law pertains to existing agency records, that statute would not apply to records that do not exist or are not maintained by that agency.

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 sought involving interviews of witnesses, as well as others, have not been previously disclosed, I believe that the Freedom of Information Law would determine

rights of access. As a general matter, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, several of the grounds for denial could be pertinent.

Section 87(2)(b) permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". From my perspective, the propriety of a denial of access would, under the circumstances, be dependent upon the nature of statements by witnesses or the contents of other records have already been disclosed. If disclosure of the records in question would not serve to infringe upon witnesses' privacy in view of prior disclosures, §87(2)(b) might not justifiably serve as a basis for denial. However, if the statements in question include substantially different information, that provision may be applicable. That provision would in my view enable an agency to withhold medical, mental health and other personnel records.

Also potentially relevant is §87(2)(e), which permits an agency to withhold records that:

"are compiled for law enforcement purposes and which, if disclosed, would:

- i. interfere with law enforcement investigations or judicial proceedings;
- ii. deprive a person of a right to a fair trial or impartial adjudication;
- iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
- iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my view, the foregoing indicates that records compiled for law enforcement purposes can be withheld to the extent that disclosure would result in the harmful effects described in subparagraphs (i) through (iv) of §87(2)(e).

Section 87(2)(f) permits an agency to withhold records to the extent that disclosure would "endanger the life or safety of any person." Without knowledge of the facts and circumstances of your case, I could not conjecture as to the relevance of that provision.

Lastly, §87(2)(g) authorizes an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;

- iii. final agency policy or determinations; or
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

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, 234 AD 2d 554 (1996)].

Lastly, §390.50 of the Criminal Procedure Law in my opinion represents the exclusive procedure concerning access to presentence 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."

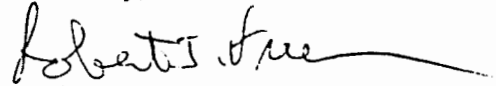
Mr. Milton Pacheco
December 28, 1999
Page - 4 -

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:tt

cc: Gary J. Galperin
Patricia Bailey



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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Executive Director

Robert J. Freeman

December 28, 1999

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 facts presented in your correspondence.

Dear Mr. Fitzgerald:

I have received your letter of November 11. Having received my opinion of the same date, you asked what your "avenue of appeal" may be if your request for records is denied.

In this regard, §89(4)(a) of the Freedom of Information Law pertains to the right to appeal and states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body 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 sought."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt



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DEPARTMENT OF STATE
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Executive Director

Robert J. Freeman

December 28, 1999

E-Mail

TO: [REDACTED]

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 facts presented in your correspondence.

Dear Mr. Ahearn:

I have received your letter of November 12 concerning your right to obtain a report relating to an investigation of fraud on the part of Sullivan County employees. You indicated that investigation was conducted by law enforcement officials and the District Attorney, and that your request was denied on several grounds.

In this regard, I offer the following comments.

First, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. It is emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In my view, the phrase quoted in the preceding sentence evidences a recognition on the part of the Legislature that a single record or report, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld. That being so, I believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder. The Court of Appeals, the state's highest court, expressed its general view of the intent of the Freedom of Information Law in 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 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 agency 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).

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.

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.

That provision would also be pertinent in relation to disciplinary matters involving public employees. 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 and 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]. 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*].

Other decisions have dealt with 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 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.2d 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.

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:

Mr. Kevin B. Ahearn

December 28, 1999

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- i. interfere with law enforcement investigations or judicial proceedings;
- ii. deprive a person of a right to a fair trial or impartial adjudication;
- iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
- iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in sub- paragraphs (i) through (iv) of §87(2)(e).

I hope that I have been of assistance.

RJF:tt

cc: Sullivan County Attorney



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

7076-90-11876

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Executive Director

Robert J. Freeman

December 29, 1999

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 facts presented in your correspondence.

Dear Mr. Smyth:

I have received your letter of November 12, which, in brief, pertains to your requests for records relating to the seizure of your property by the Department of Correctional Services. You contend that the Department engaged in the seizure without a warrant and turned the property over to the FBI.

Without any knowledge of the nature or content of either the property or any records falling within the scope of your request, I cannot offer specific guidance. However, in the following paragraphs, I will attempt to provide commentary of a general nature.

First, as you may be aware, the Freedom of Information Law pertains to existing records, and §89(3) of that statute provides in part that an agency need not create a record in response to a request. Therefore, insofar as the information sought does not exist in the form of a record or records, the Freedom of Information Law would not apply.

I note that when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

I point out that in Key v. Hynes [613 NYS 2d 926, 205 AD 2d 779 (1994)], it was found that a court could not validly accept conclusory allegations as a substitute for proof that an agency could not locate a record after having made a "diligent search". However, in another decision, such an allegation was found to be sufficient when "the employee who conducted the actual search for the documents in question submitted an affidavit which provided an adequate basis upon which to

conclude that a 'diligent search' for the documents had been made" [Thomas v. Records Access Officer, 613 NYS 2d 929, 205 AD 2d 786 (1994)].

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 appears that several grounds for denial may be pertinent to an analysis of rights of access to existing records falling within the coverage of your request.

Internal governmental communications between or among officials of the Department of Correctional Services or communications between those persons and officials of entities of state and local government in New York 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..."

The language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

Of potential significance is a decision rendered by the Court of Appeals, the state's highest court, in which the Court focused on what constitutes "factual data", stating that:

"...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132, 490 N.Y.S. 2d 488, 480 N.E.2d 74 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549, 442 N.Y.S.2d 130]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested

material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][i]). Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, 463 N.Y.S.2d 122, mod on other grounds, 61 NY2d 958, 475 N.Y.S.2d 272, 463 N.E. 2d 613; Matter of Miracle Mile Assocs. v. Yudelton, 68 AD2d 176, 181-182, 417 N.Y.S.2d 142) [Gould v. New York City Police Department, 89 NY2d 267, 276, 277 (1996)].

In short, statistical or factual information contained within inter-agency or intra-agency materials would be available, unless a different ground for denial could properly be asserted.

I do not believe that §87(2)(g) may be cited to withhold communications between the Department and a federal agency. Section 86(3) of the Freedom of Information Law defines "agency" to include:

"any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

The language quoted above indicates that an "agency" is an entity of state or local government in New York. Since the definition of "agency" does not include a federal agency, §87(2)(g) could not be cited as a means of withholding communications with a federal entity.

Also relevant may be §87(2)(e), which permits an agency to withhold records that:

"are compiled for law enforcement purposes and which, if disclosed, would:

- i. interfere with law enforcement investigations or judicial proceedings;
- ii. deprive a person of a right to a fair trial or impartial adjudication;
- iii. identify a confidential source or disclose confidential information relating to a criminal investigation or;
- iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures;"

The ability to withhold records under the provision quoted above is limited to a finding that the harmful effects described in subparagraphs (i) through (iv) would arise by means of disclosure.

Mr. Kevin Smyth
December 29, 1999
Page - 4 -

In a related vein, §87(2)(f) authorizes an agency to withhold records to the extent that disclosure would "endanger the life or safety of any person." The extent to which that provision may be asserted would be dependent on the effects of disclosure.

Lastly, since you referred to delays, 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..."

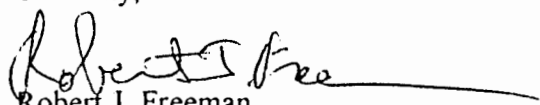
If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively 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
cc: Anthony J. Annucci
Mark Shepard



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

7071-40-11877

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Executive Director

Robert J. Freeman

December 29, 1999

Mr. Darryl Dickens
97-A-0167
Coxsackie Correctional Facility
P.O. Box 999
Coxsackie, NY 12051-0999

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Dickens:

I have received your letter of November 9 in which you suggested that I may have misinterpreted your earlier correspondence in which it was advised that records relating to grand jury proceedings are subject to §190.25(4) of the Criminal Procedure Law and, therefore, are outside the coverage of the Freedom of Information Law.

While I believe that to be so, you referred to 190.50(5)(a) of the Criminal Procedure Law, which also pertains grand jury proceedings, but states in part that a district attorney is not required to inform a person charged or about to be charged that:

“a grand jury proceeding against him is pending, in progress or about to occur unless such person is a defendant who has been arraigned in a local criminal court upon a currently undisposed of felony complaint charging an offense which is a subject of the prospective or pending grand jury proceeding. In such case, the district attorney must notify the defendant or his attorney of the prospective or pending grand jury proceeding and accord the defendant a reasonable time to exercise his right to appear as a witness therein...”

If the provision quoted above is applicable, and a written notification was prepared to be made available to you or your attorney, I believe that a copy would be available under the Freedom of Information Law. In short, none of the grounds for denial in §87(2) of that statute would appear to be applicable in such a circumstance.

Mr. Darryl Dickens
December 29, 1999
Page - 2 -

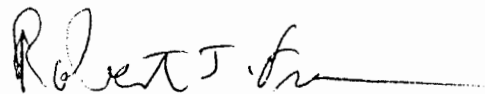
Notwithstanding the foregoing, I point out that it was held in Moore v. Santucci [151 AD2d 677 (1989)] that if a record was made available to you or your attorney, there must be a demonstration that neither you nor your attorney possesses the record in order to successfully obtain a second copy. Specifically, the decision states that:

"...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

Based on the foregoing, it is suggested that you contact your attorney to determine whether he or she continues to possess the record. If the attorney no longer maintains the record, you and the attorney should prepare affidavits so stating that can be submitted to the Office of the District Attorney.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Gary J. Galperin
Carmen Morales



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70JL AD - 11878

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Executive Director

December 29, 1999

Robert J. Freeman

E-MAIL

TO: Sandy Avampato <tlpzsand @nysnet.net>

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 facts presented in your correspondence.

Dear Ms. Avampato:

As you are aware, I have received your letter of November 16. In your capacity as shop steward for your union, you indicated that an employee informed you that a department head routinely photocopies for his files the paychecks of the employees in his department, as well as payroll stubs that include "savings and checking account transfers, loan payments, garnishes, etc."

You have sought guidance on the matter "before approaching the department head and asking him to cease what is apparently a long practice." From my perspective, unless the department head has a need to acquire them in the performance of his official duties, he has no right to review or obtain copies of various aspects of the records at issue. 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 to the matter is §87(2)(b), which states that agencies may withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." While the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public officers employees. It is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public officers and employees are required to be more accountable than others. Further, with regard to records pertaining to public officers and employees, the courts have found that, as a general rule, records that are relevant to the performance of a their official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980; Capital Newspapers v. Burns, 67 NY 2d 562 (1986)].

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, those items were determined to be available even before the enactment of the Freedom of Information Law, for it was found that they:

"...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)].

Because it is clearly relevant to the duties of all public employees, a record identifying them by name, public office address, title and salary must be maintained and made available to any person.

Conversely, however, items that are irrelevant to the performance of one's official duties ordinarily would result in an unwarranted invasion of personal privacy if disclosed. I note that §89(7) of the Freedom of Information Law specifies that home addresses of public employees need not be disclosed, and that it has been held that disclosure of social security numbers would constitute an unwarranted invasion of privacy [see Seelig v. Sielaff, 201 AD2d 298 (1994)]. In two decisions, Matter of Wool (Supreme Court, Nassau County, NYLJ, November 22, 1977) and Minerva v. Village of Valley Stream (Supreme Court, Nassau County, May 20, 1981), the issue involved disclosure of information concerning the manner in which public officers and employees choose to spend their money. In Wool, the issue involved a request for a record indicating salaries of certain public employees, as well as notations of deductions made for payment of union dues. The court held that salary information is clearly available, but that the information involving the payment of union dues could be withheld, stating that "[m]embership in the CSEA has no relevance to an employee's on the job performance or to the functioning of his or her employer." In Minerva, the request involved both sides of checks paid by a municipality to its attorney. While the court held that the front side of the checks must be disclosed, it found that the backs of checks indicating "how he disposes of his lawful salary or fees" could be withheld as an unwarranted invasion of personal privacy.

In sum, while the names, titles and salaries of public employees are clearly available to the public, the items to which you referred that are unrelated to the performance of public employees' duties may, in my opinion and based on the judicial interpretation of the Freedom of Information Law, be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy.

I hope that I have been of assistance.

RJF:tt



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COMMITTEE ON OPEN GOVERNMENT

FOI-NO-11879

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Alexander F. Treadwell

Executive Director

Robert J. Freeman

December 29, 1999

Mr. Michael Kitnurse
96-A-3983
Great Meadow Correctional Facility
P.O. Box 51
Comstock, NY 12821

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Kitnurse:

I have received your letter of November 9, as well as the correspondence attached to it. Having reviewed the materials, I offer the following comments.

It is noted at the outset that the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee is not empowered to compel an agency to grant or deny access to records, enforce that statute or obtain records on behalf of individuals. However, in an effort 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:

Mr. Michael Kitnurse

December 29, 1999

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"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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" (DD5's) 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:

Mr. Michael Kitnurse

December 29, 1999

Page - 5 -

- i. interfere with law enforcement investigations or judicial proceedings;
- ii. deprive a person of a right to a fair trial or impartial adjudication;
- iii. identify a 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:

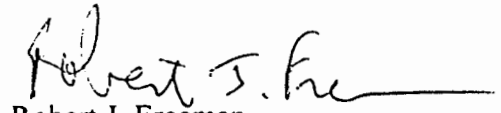
"...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of 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).

Mr. Michael Kitnurse
December 29, 1999
Page - 6 -

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a horizontal line extending to the right.

Robert J. Freeman
Executive Director

RJF:tt



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Executive Director

Robert J. Freeman

December 30, 1999

Ms. Jody Adams



The staff of the Committee on Open 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 November 13. You have questioned procedures used by the Town of Riverhead in implementing the Freedom of Information Law and made particular reference to a portion of its application form indicating that a person requesting records should wait at least fifteen days before contacting the office processing a request.

In this regard, based on a review of the form and your comments and notations, I offer the following remarks.

First, as you may be aware, §87(1) of the Freedom of Information Law requires the Committee on Open Government to promulgate general rules and regulations dealing with the procedural implementation of that statute. In turn, the governing body of each public corporation, i.e., a town board, is required to adopt its own rules consistent with the Law and those issued by the Committee. Enclosed is a copy of the Committee's regulations.

Second, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

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 fifteen 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, fifteen 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 fifteen 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).

Section 3 of the form indicates that the Town Board will respond to an appeal within seven days of the receipt of an appeal. While the Board may choose to respond within that time, I note that

Ms. Jody Adams
December 30, 1999
Page - 3 -

§89(4)(a) of the Freedom of Information Law states that the person or body that determines appeals must do so within ten business days of receipt of an appeal.

Lastly, the back of the form listing the reasons for denial is in many respects a reiteration of the grounds for denial appearing in §87(2) of the Freedom of Information Law. Since you circled a provision stating that names and addresses of those filing complaints may be withheld, it has generally been advised 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:

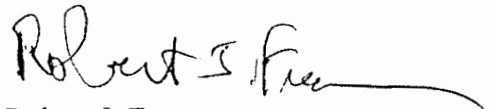
"iv. disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it; or

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:jm
Enc.

cc: Town Board



STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

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Executive Director

Robert J. Freeman

December 30, 1999

Mr. Anthony Vitiello
96-A-7830
Sing-Sing Correctional Facility
354 Hunter Street
Ossining, NY 10562-5442

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Vitiello:

I have received your letter of November 11 in which you asked whether an agency may rely on §87(2)(e)(i) of the Freedom of Information Law after the person who is the subject of an investigation or judicial proceeding has died, particularly if that was the only provision cited as a justification for a denial of a request when the deceased was alive. That provision permits an agency to withhold records or portions thereof that "are compiled for law enforcement purposes and which, if disclosed, would...interfere with law enforcement investigations or judicial proceedings."

In this regard, if the deceased was the only person under investigation or the only subject of a judicial proceeding, it is likely in my view that §87(2)(e)(i) would no longer serve as a basis for a denial of a request. In short, it is doubtful that the harmful effects described in that provision would continue to arise by means of disclosure.

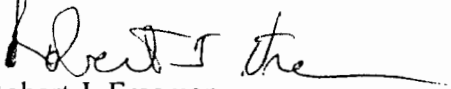
That provision, however, may also encompass other grounds for denial. For instance, when the deceased was alive, the disclosure of records indicating the identity of a witness or confidential source might have interfered with an investigation or judicial proceeding and, therefore, might properly have been withheld under §87(2)(e)(i). While that provision might not be pertinent after the person's death, it is possible that records or portions of thereof might nonetheless be withheld pursuant to §87(2)(b) on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" relative to persons other than the deceased, §87(2)(e)(iii) concerning the identification of a confidential source, §87(2)(f) involving endangering life or safety, or perhaps §87(2)(g), which pertains to the ability to withhold certain aspects of internal governmental communications.

Mr. Anthony Vitiello
December 30, 1999
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In short, even though §87(2)(e)(i) might no longer be applicable after a person's death and might have been the only provision cited while the person was living, other grounds for denial might nonetheless be justifiably asserted.

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-11882

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Alexander F. Treadwell

Executive Director

Robert J. Freeman

December 30, 1999

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 facts presented in your correspondence.

Dear Mr. Carty:

I have received your letter of November 11 in which you complained that your request for records of the Division of Parole 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 acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

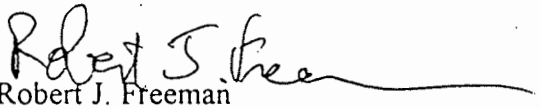
Mr. Anthony Carty
December 30, 1999
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In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the 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)].

For your information, the person designated to determine appeals at the Division of Parole is its counsel, Terrence X. Tracy.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:tt

cc: Ann Crowell



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI C-AD - 11883

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Executive Director

Robert J. Freeman

December 30, 1999

Mr. Derrick Hamilton
97-A-0208
Southport Correctional Facility
P.O. Box 2000
Pine City, NY14871

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Hamilton:

I have received your letter of November 10 in which you referred to a denial of a request for "discovery material" occurring in May of 1998, and you asked the Department of State to "order the Investigation Department at 60 Hudson Street to turn over all the documents [you] requested under the FOIL Law."

In this regard, neither the Department of State nor the Committee on Open Government is empowered to "order" an agency to disclose records. The Committee, however, is authorized to provide advice and opinions concerning the Freedom of Information Law, and based on your letter, I offer the following comments.

First, if a request was denied in 1998, you would have had the right to 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 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."

When an appeal is denied, the person denied access may seek judicial review of the denial pursuant to Article 78 of the Civil Practice Law and Rules (CPLR). If you did not appeal, it is suggested that you resubmit your request.

Second, the courts have provided direction concerning the Freedom of Information Law as opposed to the use of discovery under the 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, 89NY 2d 267, decided November 26, (1996)].

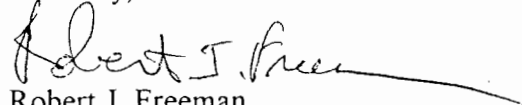
In sum, I believe that the Freedom of Information Law imposes a duty to disclose records, as well as the capacity to withhold them, irrespective of the status or interest of the person requesting them. To be distinguished are other provisions of law that may require disclosure based upon one's status, e.g., as a defendant, and the nature of the records or their materiality to a proceeding.

Mr. Derrick Hamilton
December 30, 1999
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Lastly, although I am unaware of the nature of the records of your interest, 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.

I hope that the foregoing serves to enhance your understanding of the Freedom of Information Law and that I have been of assistance.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:tt