



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

7076-AO-11884

Committee Members

41 State Street, Albany, New York 12231

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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

Executive Director

Robert J. Freeman

January 3, 2000

Mr. Kenneth McIntyre
97-A-0652
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 facts presented in your correspondence.

Dear Mr. McIntyre:

I have received your letter of November 15 in which you expressed the belief that the Town of Watertown has an agreement with the Department of Correctional Services imposing a restriction on housing inmates at the Watertown Correctional Facility who have been convicted of certain sex offenses. You have asked how you might obtain such an agreement.

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to existing records. If the agreement to which you referred does not exist in the form of a record, the Freedom of Information Law would not apply.

Second, assuming that such a record does exist, you may request it either from the Town of Watertown or the Department of Correctional Services. 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 for records should be directed to that person. The records access officer in towns is usually the town clerk; the regulations of 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. A request for records kept at the Department's central offices in Albany may be made to Mr. Mark Shepard.

And 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. If the agreement exists in writing, it would appear to be available, for the grounds for denial do not appear to be applicable.

Mr. Kenneth McIntyre
January 3, 2000
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



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

7071-AO-11885

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Executive Director

Robert J. Freeman

January 3, 2000

Mr. Frankie Tyler
97-A-5786
Green Haven Correctional Facility
Drawer B - Rte 216
Stormville, NY 12582-0010

Dear Mr. Tyler:

I have received your letter of December 28 in which you appealed a denial of access to records by the Office of the Suffolk County District Attorney to this office.

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 determine appeals or compel an agency to grant or deny access to records. The provision dealing with the right to appeal, §89(4)(a) of the Freedom of Information Law, states in relevant part that:

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

I hope that 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



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Executive Director

Robert J. Freeman

January 3, 2000

Mr. Ronnie Wade
89-T-4675
Wallkill Correctional Facility
Box G
Wallkill, NY 12589

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

Dear Mr. Wade:

I have received your letter of November 12 in which you indicated that a request sent to the Town of Ulster had not been answered and asked whether records sought from the Ulster County Sheriff must be disclosed. In this regard, I offer the following comments.

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

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

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

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

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

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

Secondly, in brief, the records requested from the Sheriff involve departmental charges initiated against a sheriff's deputy and the outcome of the charges. In my view, those records would be exempt from disclosure under the Freedom of Information Law.

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

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 intervener'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

Mr. Ronnie Wade
January 3, 2000
Page - 3 -

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, the Court reiterated its view of §50-a, citing that decision and stating that:

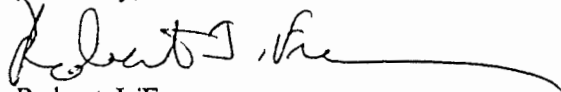
"...we recognized that the decisive factor in determining whether an officer's personnel record was exempted from FOIL disclosure under Civil Rights Law § 50-a was the potential use of the information contained therein, not the specific purpose of the particular individual requesting access, nor whether 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)).

In short, based on the decisions cited above, I believe that the records requested from the Sheriff would be exempt from disclosure.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Town Supervisor, Town of Ulster
J. Richard Bockelman, Sheriff



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Robert J. Freeman

January 3, 2000

Mr. Ronnie Wade
89-T-4675
Wallkill Correctional Facility
Box G
Wallkill, NY 12589

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Dear Mr. Wade:

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

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

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

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

Secondly, in brief, the records requested from the Sheriff involve departmental charges initiated against a sheriff's deputy and the outcome of the charges. In my view, those records would be exempt from disclosure under the Freedom of Information Law.

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

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"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 intervener'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).

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Mr. Ronnie Wade
January 3, 2000
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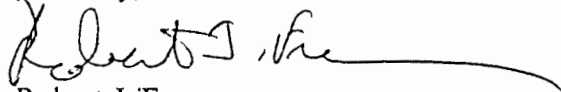
"...we recognized that the decisive factor in determining whether an officer's personnel record was exempted from FOIL disclosure under Civil Rights Law § 50-a was the potential use of the information contained therein, not the specific purpose of the particular individual requesting access, nor whether 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, 93 NY2d 145, 156- 157 (1999)).

In short, based on the decisions cited above, I believe that the records requested from the Sheriff would be exempt from disclosure.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Town Supervisor, Town of Ulster
J. Richard Bockelman, Sheriff



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FOIL-AO-11887

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Alexander F. Treadwell

January 3, 2000

Executive Director

Robert J. Freeman

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 information presented in your correspondence.

Dear Mr. Vitiello:

I have received your letter of November 15 in which you raised questions concerning the propriety of a denial of access to records by the Office of the Queens County District Attorney. As I understand the matter, you requested arrest and similar reports pertaining to a person who was arrested for impersonating a police officer and later pled guilty to a misdemeanor under the Vehicle and Traffic Law in satisfaction of all charges, as well records of wiretapped conversations and any "deals" relating to the matter. The agency withheld the records in their entirety on the basis of §87(2)(e)(i).

First, I do not believe that there was any communication between this office and the Office of the District Attorney concerning the matter.

Second, it is likely in my view, that some aspects of the records sought, particularly in the arrest report, should be disclosed. Based on a rationale similar to that expressed in my letter addressed to you on December 30, it is likely that other aspects of the request were properly denied.

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. 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

Mr. Anthony Vitiello

January 3, 2000

Page 2-

obligation on an agency to review records sought in their entirety to determine which portions, if any, may justifiably be withheld. As such, even though some aspects of a record might properly be denied, the remainder might nonetheless be available and would have to be disclosed.

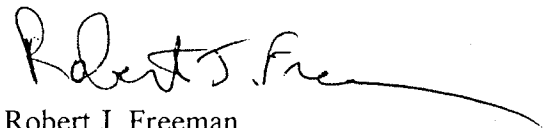
Although arrest records are not specifically mentioned in the current Freedom of Information Law, the original Law granted access to "police blotters and booking records" [see original Law, §88(1)(f)]. In my opinion, even though reference to those records is not made in the current statute, I believe that such records continue to be available, for the present law was clearly intended to broaden rather than restrict rights of access. Moreover, it was held by the state's highest court, the Court of Appeals, several years ago that, unless sealed under §160.50 of the Criminal Procedure Law, records of the arresting agency identifying those arrested must be disclosed [see Johnson Newspapers v. Stainkamp, 61 NY 2d 958 (1984)].

Notwithstanding what I believe is a general right of access to booking records, as in the case of the other records to which you referred, their content and the effects of disclosure are the factors that determine the extent to which they must be disclosed or may be withheld. Since the person to whom the arrest report pertains pled guilty, disclosure would not, in my view, interfere with an investigation. However, portions of that record and the others might be withheld under different exceptions, several of which were mentioned in the letter of December 30 and need not be reiterated here.

Lastly, since your appeal was determined nearly a year ago, the time for the initiation of a proceeding to seek review of the denial has expired. An Article 78 proceeding challenging an agency's action must be initiated within four months of the agency's final determination of the matter.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Andrew L. Zwerling



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January 3, 2000

Executive Director

Robert J. Freeman

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 in which you raised a series of questions concerning requests directed to the Office of the Attorney General .

First, you asked whether you may "begin a FOIL anew if the timeliness pass[es]." From my perspective, a request may be renewed, particularly if there are new records falling within the scope of the request or if circumstances have changed. As you may be aware, many of the grounds for withholding records appearing in §87(2) of the Freedom of Information Law are based on potentially harmful effects of disclosure, and in some instances, those harmful effects will diminish or disappear due to changes in circumstances or the passage of time.

For instance, if an agency is soliciting bids and the deadline for their submission is January 15, and a potential bidder seeks the bids that have been submitted so far, those bids, in my view, may be clearly be withheld, for §87(2)(c) permits an agency to withhold records when disclosure would "impair present or imminent contract awards..." Premature disclosure would give the person seeking the bids an unfair advantage, and the government agency may not have the capacity to engage in a contract optimal to the taxpayers. However, when the deadline for the submission of the bids has passed, all of the bidders would be on an equal footing, and the government agency may have no choice but to accept the low appropriate bid.. At that point, disclosure would no longer "impair" the bidding process, and the records that could properly have been withheld through January 15 may become available thereafter.

In that and other circumstances, records might properly be withheld for a time, but they may become available in the future. As such, nothing would preclude a person from seeking the same records twice in that kind of situation.

Ms. Estelle Levy

January 3, 2000

Page 2-

Second, you asked whether you are "correct to seek the documentation on which answers are based." In my view, again, the factual circumstances determine the extent to which such a request is valid. If a report is based on information contained within a particular map, for example, or a memorandum prepared by an agency employee that consists largely of statistical or factual information, the records used as the basis for the report would be identifiable and readily retrievable. In other cases, however, documentation used to prepare "answers" may exist in a variety of sources or locations, including newspapers, encyclopedias, materials used or obtained from libraries, reference materials and the like. Unless specific items have been collected or reproduced, it may be all but impossible to identify or locate items upon which an agency relied in preparing a report or answers.

Third, as you may be aware, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) require that each agency designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests, and it has been advised that requests should ordinarily be made to that person. If a request is made to a different person at an agency, I believe that he or she should respond directly in a manner consistent with the Freedom of Information Law or forward the request to the records access officer.

Lastly, you asked whether an answer or a letter "without official documentation [should] be considered documentation that is legal, official, valid in law." Without additional information concerning the nature of the materials, I cannot effectively respond. For purposes of the Freedom of Information Law, information kept, held or produced by, with or for a government agency, "in any physical form whatsoever", constitutes a "record" that falls within the coverage of that statute.

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 that extends to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Terryl L. Brown
Thomas Litzky



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Robert J. Freeman

January 3, 2000

Mr. David Searles



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

Dear Mr. Searles:

I have received your letter of November 17. You referred to "special education hearings" and provisions of law that require that those hearings be conducted in private at the request of the parents at the local level, but which also require that decisions rendered by hearing officers at the local level and by the "State Review Officer" be made public and drafted in a manner that removes personally identifiable information. You wrote that there is no provision that directly addresses whether appeal pleadings must be disclosed, and you have asked whether a state agency would be required to make those records "available in redacted form."

In this regard, I offer the following comments.

First, the statute that generally deals with rights of access to records of state and local government in New York, the Freedom of Information Law, is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. It is emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In my view, the phrase quoted in the preceding sentence evidences a recognition on the part of the Legislature that a single record or report, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld. That being so, I believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

The Court of Appeals, the state's highest court, reiterated its general view of the intent of the Freedom of Information Law 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)" [87 NY 2d 267, 275 (1996)].

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

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

Second, 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. As you may be aware, a statute that exempts records from disclosure is the Family Education Rights and Privacy Act (20 U.S.C. §1232g), which is commonly known as "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

Mr. David Searles
January 3, 2000
Page 3-

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.

In sum, based on FERPA, to the extent that the records in question contain personally identifiable information relating to students, those portions must, in my view be withheld. I believe, however, that the remaining portions of the records would be available in accordance with the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: James Whitney



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11890

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

January 3, 2000

Executive Director

Robert J. Freeman

Mr. Paul Ryan
Business Representative
Local Union No. 3
International Brotherhood of Electrical Workers
200 Bloomingdale Road
White Plains, NY 10605

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

Dear Mr. Ryan:

I have received your letter of November 18, as well as the materials relating to it. Having requested electrical permits from the Town of Greenburgh, the Town disclosed the permits following the deletion of the names of the home and business owners whose properties would undergo electrical work and the names of the contractors performing the work. You have sought my views concerning the propriety of the deletions.

In this regard, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, the only ground for denial pertinent 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." In addition, §89(2)(b) includes a series of examples of unwarranted invasions of personal privacy, one of which will be considered later in this opinion.

In my view, the names of owners of businesses where electrical work is or has been performed and the names of the electrical contractors must be disclosed. 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 Freedom of Information Act includes an exception to rights of access designed to protect personal privacy. Specifically, 5 U.S.C. 552(b)(6) states that rights conferred by the Act do not apply to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." In construing that provision, federal courts have held that the exception:

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

the decisions of this court have established that information connected with professional relationships does not qualify for the exemption" [Sims v. Central Intelligence Agency, 642 F.2d 562, 573-573 (1980)].

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

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

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

In short, in my opinion and as indicated in the decisions cited above, the exception concerning privacy does not extend to portions of the records identifying business owners or electrical contractors.

Insofar as the deletions involve the owners of residential properties, the intended use of the records has an impact on the authority of the Town to withhold their identities.

By way of background, 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. As suggested earlier, §89(2)(b) 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 of persons other than those identified in relation to business or professional activities, 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:

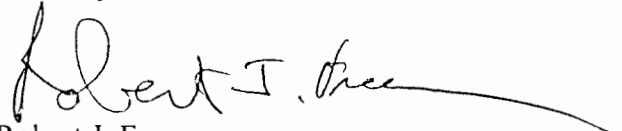
Mr. Paul Ryan
January 3, 2000
Page 5-

"[U]nder the circumstances, the Court finds that it was not unreasonable for respondents to require petitioner to submit a certification that the information sought would not be used for commercial purposes. Petitioner has failed to establish that the respondents denial or petitioner's request for information constituted an abuse of discretion as a matter of law, and the Court declines to substitute its judgement for that of the respondents" (id.).

Based on the foregoing, if it is determined that the permits are requested for a commercial purpose, the names and home addresses of homeowners could, in my opinion, be deleted. Again, however, I do not believe that the Town could justifiably delete the names of business owners or contractors, irrespective of the intended use of 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 extends across the right side of the page.

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
John Lucido
Alfreda Williams



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL AO-11891

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Alexander F. Treadwell

January 4, 2000

Executive Director

Robert J. Freeman

Gary David Kessler, Esq.
Office of the Village Attorneys
Farley, Kessler & Chetkof, P.C.
410 Jericho Turnpike, Suite 315
Jericho, NY 11753-1318

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

Dear Mr. Kessler:

I have received your letter of November 17. In your capacity as counsel to the Village of Oyster Bay Cove, you indicated that the Village has requested amendments to the Nassau County Charter enacted since January 1, 1995. In response to the request, you were informed that the Office of the County Attorney "has prepared the draft updates through June 30, 1999" and added that:

"These materials have been presented to Infrastructure Management Systems to computerize and place into a format that will enable the County Division of Printing and Graphics to produce a new and improved version of the County Charter, Nassau County Administrative Code, and ancillary materials contained within the present volume. The format will be different than the current book and will result in a comprehensive looseleaf binder system.

"At the present time the matter of the updates is still with Infrastructure Management Systems which is about to deliver same to the printers. The updates will not fit into the existing volume as I previously stated. Instead, you will be able to obtain a completely new volume which will be current through June 30, 1999. I anticipate that the new book will not be available for some time yet and when it is, you can only obtain a copy from the Clerk of the County Legislature. I can advise you when same will be available but certainly cannot provide you under FOIL documents which do not yet exist and which are not maintained by this office."

Gary David Kessler, Esq.

January 4, 2000

Page 2-

I agree with the statement that an agency is not required to provide documents that do not yet exist. However, if I understand the situation accurately, the records of your interest do exist, but have not yet been prepared in book form. If that is so, and if County officials have the ability to locate the records, I believe that the records in question must be disclosed, but in a manner or format different from the final book format.

As you may be aware, the Freedom of Information Law pertains to agency records, and §86(4) of that statute defines the term "record" expansively to mean:

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

Based on the foregoing, if the amendments to the Charter exist on paper, for example, but not yet in a final compendium, the paper documents would in my view constitute "records" that fall within the coverage of the Freedom of Information Law.

It is noted that the Freedom of Information Law 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 proper 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 & 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)].

I would conjecture that amendments to the Charter must be approved by the County's legislative body or other authority. If that is so, it is assumed that reference to the legislation would appear in minutes of meetings, and that records containing or reflective of the amendments separate

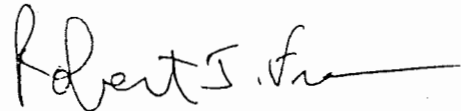
Gary David Kessler, Esq.
January 4, 2000
Page 3-

from the yet to be completed book exist. If my assumption is accurate, those other records should be made available on request upon payment of the requisite fee for copying.

In sum, assuming that the records sought are available under the Freedom of Information Law (and I believe that amendments to a charter would clearly be available), that they can be found, and that the Village is willing pay the fee for copies, I believe that the Village would have the right to obtain copies, irrespective of the form in which they exist.

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: Richard S. Leffer



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL AO - 11892

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Carole E. Stone
Alexander F. Treadwell

Executive Director

Robert J. Freeman

January 5, 2000

Mr. Harold J. Shell, Jr.
96-A-3942
Green Haven Correctional Facility
Drawer B
Stormville, NY 12582

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

Dear Mr. Shell:

I have received your letter of November 5, as well as the materials attached to it. You have sought my views concerning a request made under the Freedom of Information Law to the City of Poughkeepsie Police Department.

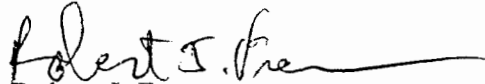
In this regard, the primary point is that the Freedom of Information Law pertains to existing records, and that §89(3) states in relevant part that an agency is not required to create a record in response to a request. It appears that the City has provided the records that it maintains that fall within the scope of your request. In some instances, the records sought are apparently no longer used or are maintained by entities other than the Poughkeepsie Police Department. In others, you asked for interpretations (i.e., "what is meant by the phrase...") or clarification of the meaning of certain provisions. In short, an agency's obligation under the Freedom of Information Law involves providing access to existing records in a manner consistent with that statute; it does not require an agency to create new records in order to explain the content of records.

It is also noted that you were given inaccurate information concerning the right to appeal a denial of access. Having contacted the appropriate City official on your behalf, I was informed that an appeal may be made to the City's Equal Opportunity Officer, who is the Personnel Administrator.

Mr. Harold J. Shell, Jr.
January 5, 2000
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: Lt. Chris Rygiel



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPRL-170-
FOIL AO-11893

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January 5, 2000

Mr. Levert Hooks, Jr.
C M F V Wing 127-L
P.O. Box 2000
Vacaville, CA 95696-2000

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

Dear Mr. Hooks:

I have received your letter of November 15 in which you contended that the district attorney in your case acted unethically, and you asked how you can use the Freedom of Information and Privacy Laws "to gather the DA case files" and what you may do if the DA "still refuses to return any files used against [you] in [your] criminal proceeding."

Although what you want is not entirely clear, I offer the following general comments.

First, although the records maintained by the office of a district attorney are clearly subject to the Freedom of Information Law, §92(1) of the Personal Privacy Protection Law specifies that that statute does not apply to offices of district attorneys or any unit of local government.

Second, in seeking records from an agency, such as the office of a district attorney, §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. Any such request should be directed to an agency's "records access officer." That person has the duty of coordinating an agency's response to requests (see 21 NYCRR Part 1401).

Third, while I am unfamiliar with the nature or content 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.

Mr. Levert Hooks, Jr.

January 5, 2000

Page - 2 -

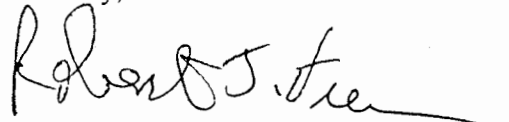
Lastly, of possible relevance is the decision rendered in Moore v. Santucci [151 AD2d 677 (1989)] in which it was held that if a record was made available to you or your attorney, there must be a demonstration that neither you nor your attorney possesses the record in order to successfully obtain a second 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 records that might have been made available previously to you or the attorney. If the attorney no longer maintains the records, he or she should prepare an affidavit so stating that can be submitted to the office of the district attorney.

I hope that I have been of assistance.

Sincerely,

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



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI-AO-11894

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Executive Director

January 5, 2000

Robert J. Freeman

Mr. Bruce T. Reiter



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

Dear Mr. Reiter:

I have received your letter of November 22 in which you sought assistance in obtaining the names and titles of various officials of a church pursuant to the Freedom of Information Law.

In this regard, as suggested in previous correspondence, that statute pertains to agencies, and §86(3) defines the term "agency" to mean:

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

Based on the foregoing, the Freedom of Information Law applies to entities of state and local government; it clearly does not apply to churches or other private organizations. Further, I know of no other provision of law that would require the disclosure of the information of your interest.

I hope that the preceding commentary enhances your understanding of the Freedom of Information Law.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: George F. Miller, Jr.



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-190-11895

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David A. Schulz
Joseph J. Seymour
Carole E. Stone
Alexander F. Treadwell

Executive Director

Robert J. Freeman

January 5, 2000

Mr. William Mulqueen
Mid-Island Consulting Services, Inc.
1911 Route 110
Farmingdale, NY 11735

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

Dear Mr. Mulqueen:

I have received your letter of November 17, as well as the materials attached to it. In brief, acting on behalf of an individual, you requested a communication sent by the Suffolk County Probation Department to a judge in which the Department apparently offered an unfavorable recommendation concerning the individual's application to amend a "class B" certificate of relief from disabilities to a "class C." In response to both the initial request and the appeal that followed, you were denied access on the basis of §390.50 of the Criminal Procedure Law. It is your view that the cited provision is inapplicable, and you have sought assistance in the matter.

In this regard, I offer the following comments.

First, I agree with your contention that §390.50 of the Criminal Procedure Law is irrelevant, for that statute pertains to pre-sentence reports and related memoranda that are prepared prior to sentencing.

Second, separate are provisions dealing with certificates of relief from disabilities, which are found in Article 23 of the Correction Law (§§700-706). Section 702(3) states that a court may request that a probation service of a county conduct an investigation for the purpose of determining whether a certificate should be issued and that "[a]ny probation officer requested to make an investigation pursuant to this section shall prepare and submit to the court a written report in accordance with such request." Pertinent to the ability to gain access to such a report is subdivision (6) of §702, which states that:

"Any written report submitted to the court pursuant to this section is confidential and may not be made available to any person or public or private agency except where specifically required or permitted by

Mr. William Mulqueen

January 5, 2000

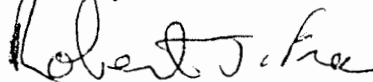
Page 2-

statute or upon specific authorization of the court. However, it shall be made available by the court for examination by the applicant's attorney, or the applicant himself, if he has no attorney. In its discretion, the court may except from a part or parts of the report which are not relevant to the granting of a certificate, or sources of information which have been obtained on a promise of confidentiality, or any other portion thereof, disclosure of which would not be in the interest of justice. The action of the court excepting information from disclosure shall be subject to appellate review. The court, in its discretion, may hold a conference in open court or in chambers to afford an applicant an opportunity to controvert or to comment upon any portions of the report. The court may also conduct a summary hearing at the conference on any matter relevant to the granting of the application and may take testimony under oath."

Based on the foregoing, it is suggested that the subject of the record in question seek authorization from the court in an attempt to obtain the record at issue.

I hope 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

FOI-AO-11896

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David A. Schulz
Joseph J. Seymour
Carole E. Stone
Alexander F. Treadwell

Executive Director

Robert J. Freeman

January 5, 2000

Mr. Levi Stackhouse
90-T-5040 A2-45B
Cayuga Correctional Facility
P.O. Box 1186
Moravia, NY 13118

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

Dear Mr. Stackhouse:

I have received your letter of November 19 in which you sought assistance concerning an unanswered request for Family Court records.

In this regard, it is emphasized at the outset that the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law, which pertains to agency records. Section 86(3) of the Freedom of Information Law defines the term "agency" to include:

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

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

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

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

Nevertheless, often other statutes provide rights of access to court records (see e.g., Judiciary Law, §255). Further, of possible relevance to the matter is §166 of the Family Court Act. That statute states that:

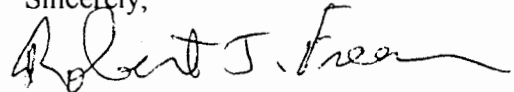
Mr. Levi Stackhouse
January 5, 2000
Page - 2 -

"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."

Based on the foregoing, it is suggested that a request be made to the clerk, citing §166 and indicating that the records pertain to you. In the alternative, since the records in question may be filed with other courts, requests may be made to the clerks of those courts on the basis of the section of the Judiciary Law cited earlier.

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

7076-AO-11897

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David A. Schulz
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Carole E. Stone
Alexander F. Treadwell

Executive Director

Robert J. Freeman

January 5, 2000

Ms. Linda Knotts

[REDACTED]

The staff of the Committee on 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. Knotts:

I have received your letter of October 25, which reached this office on November 23. You have sought guidance concerning the ability to obtain records relating to an adoption that occurred in Florida in 1957. The adopted child was apparently taken to New York soon thereafter, and due to the medical condition of the adoptee's son, you are interested in obtaining medical records pertaining to the adoptee's biological mother or other records that might indicate her whereabouts.

From my perspective, since the adoptee was born in Florida, the laws of New York relating to adoption records would not be applicable. While records concerning adoptions in this state are generally confidential pursuant to §114 of the Domestic Relations Law, I note that provisions in that statute authorize the disclosure of those records for good cause shown for medical reasons. In addition, provisions in the Public Health Law involve the creation of an adoption information registry in the State Department of Health under which "non-identifying information" may be disclosed. Although I have enclosed copies of those statutes, again, because the birth and adoption occurred in Florida, I do not believe that they would be relevant.

It is noted, too, that medical records in New York are confidential under §18 of the Public Health Law; they may be disclosed only in conjunction with exceptions that authorize disclosure in specified circumstances.

In terms of the ability to locate an individual, it is often difficult but perhaps not impossible to do so through the use of government records. It is emphasized that there is no central database consisting of personal information regarding New Yorkers. Requests made under the Freedom of Information Law may be made to the "records access officer" at the unit of state or local government that you believe may maintain the records of your interest. The records access officer has the duty of coordinating the agency's response to requests. Further, it is emphasized that a request must

Ms. Linda Knotts

January 5, 2000

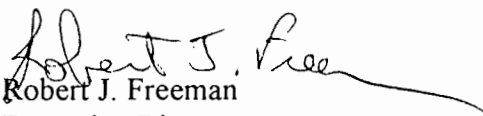
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“reasonably describe” the records sought. Therefore, a request should include sufficient detail to enable agency staff to locate and identify the records.

Home addresses of individuals generally may be withheld on the ground that disclosure would constitute “an unwarranted invasion of personal privacy” [see Freedom of Information Law, §87(2)(b)]. However, residence addresses contained in voter registration lists are available under the Election Law from county boards of elections. Therefore, if a person’s name and county of residence are known or likely known, it may be possible to learn of that person’s address via a voter registration list.

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

Encs.



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DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11898

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Executive Director

Robert J. Freeman

January 6, 2000

Mr. David J. Todeschini
98-A-4798
Groveland Correctional Facility
P.O. Box 104
Sonyea, NY 14556-0001

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

Dear Mr. Todeschini

I have received your letter of November 20 in which you sought assistance concerning an unanswered request for a record made to the Town of Minerva, specifically, "a record of phone calls made from Minerva Town Hall...on Saturday May 17, 1997 from 3pm to 6:30 pm."

In this regard, I offer the following comments.

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

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

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

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

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

Second, the Freedom of Information Law pertains to existing records. Since the record in question, if it ever existed, would have been prepared more than two years ago, it is possible that it has been destroyed. If that is so, the Freedom of Information Law would not apply. I note, too, that §89(3) of the Law states in part that an agency is not required to create a record in response to a request.

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

With respect to a telephone bill or log, of potential relevance is §87(2)(e), which permits an agency to withhold records that:

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

- i. interfere with law enforcement investigations or judicial proceedings;
- ii. deprive a person of a right to a fair trial or impartial adjudication;
- iii" identify a confidential source or disclose confidential information relating to a criminal investigation; or
- iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

For §87(2)(e) to be applicable, I believe that it must be found initially that a record was "compiled for law enforcement purposes". In my opinion, bills received from a telephone company, for example, and the records reflective of payments of those bills, could not be characterized as having been compiled for law enforcement purposes, but rather, in the ordinary course of business. Absent details

concerning their content or function, it is unclear whether the telephone records you seek could be characterized as having been compiled for law enforcement purposes.

Insofar as those records could be considered as having been compiled for law enforcement purposes, the capacity to deny access is limited to the circumstances involving harmful effects of disclosure described in subparagraphs (i) through (iv) of the Freedom of Information Law. It is possible, however, that disclosure of portions of the records sought might "identify a confidential source or disclose confidential information relating to a criminal investigation" in conjunction with subparagraph (iii) of §87(2)(e). To that extent, portions of the records might justifiably be withheld.

Aside from §87(2)(e), I believe that several of the grounds for denial may be relevant to a determination of rights of access to telephone logs or billing records. The extent to which those provisions could properly be asserted would be dependent upon the contents of the records and the effects of their disclosure.

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

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

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

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

Another ground for denial that may be relevant is §87(2)(b), which permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". Although the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public employees. First, it is clear that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. Second, with regard to records pertaining to public employees, the courts have found that, as a general rule, records that are relevant to the performance of a public employee's official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975);

Mr. David J. Todeschini
January 6, 2000
Page - 4 -

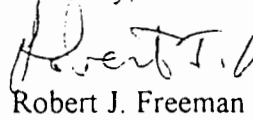
Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v.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

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

Also potentially significant is §87(2)(f), which permits an agency to withhold records to the extent that disclosure would "endanger the life or safety of any person." In the context of the duties law enforcement officials, §87(2)(f) might properly be asserted in a variety of contexts.

I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI NO - 11899

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Alexander F. Treadwell

Executive Director

Robert J. Freeman

January 10, 2000

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 facts presented in your correspondence.

Dear Mr. Laureano:

I have received your letter of November 22 and the materials attached to it. You have raised a series of questions concerning "inmate review worksheets." It appears that you are required to endorse the worksheets, but you allege that information is added to them following the endorsement, and that redactions have been made when you requested copies of the worksheets.

You have asked whether you should be furnished with copies of the records in question "free of charge" following your endorsement and whether all such forms that you have endorsed since 1997 should be made available without redaction. In this regard, I offer the following comments.

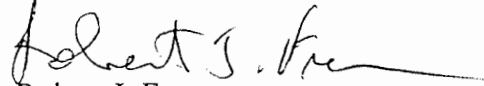
First, there is nothing in the Freedom of Information Law that would require that a copy of a record be made available free of charge. Since that statute is applicable to all agency records, including the worksheets, I believe that the Department of Correctional Services is authorized to assess its established fee for copies.

Second, the purpose of the verification of information, or endorsement, provided by an inmate is unclear. If it is intended to demonstrate that an inmate has read the entire content of the worksheet, it would appear that the form would be available in its entirety to the inmate and that additions should not be made after the inmate has read the form. If, on the other hand, it is intended to ensure that an inmate has read or agrees with factual information appearing on the form, and if the endorsement is intended to be made prior to expressions of opinion or "evaluative" material offered by Department employees, the practice that you described would appear to be consistent with that intent. In that situation, the advice offered to you in our last communication would be reiterated, that intra-agency materials consisting of opinion, advice, recommendation and the like may be withheld under §87(2)(g) of the Freedom of Information Law.

Mr. Pedro Laureano
January 10, 2000
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: Anthony J. Annucci



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-A0-11900

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Alexander F. Treadwell

Executive Director

Robert J. Freeman

January 6, 2000

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

Dear Mr.

I have received your letter of November 28, as well as the materials relating to it. You have sought assistance in obtaining an evaluation pertaining to yourself prepared by the Ulster County Mental Health Department, apparently at the direction of the Family Court. You were informed by the Department that its "historical understanding" has been that the kind of record at issue is the property of the Court, and that a request should be directed to the Court.

Based on a recent decision rendered by the Court of Appeals, the state's highest court, it appears that, with possible exceptions, the contents of the evaluation should be disclosed to you.

By way of background, 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 clearly applies to a county mental health department, but it excludes the courts and court records from its coverage. This is not to suggest that court records

Mr.

January 6, 2000

Page - 2 -

may not be accessible, for other provisions of law frequently require or authorize disclosure of those records. Of possible significance, for example 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 my view, a request for a record pertaining to yourself would not constitute "indiscriminate public inspection", and therefore, if the Family Court maintains the record in question, I believe that it would be authorized to disclose its contents to you.

I point out that the coverage of the Freedom of Information Law is broad, for §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, the report at issue would appear to constitute an agency record. As the matter relates to the County Mental Health 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. The first ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §33.13 of the Mental Hygiene Law, which prohibits mental health facilities from disclosing clinical records pertaining to a patient or client.

Consequently, a different statute, however, deals directly with rights of access to mental health records by the subject of those records. Specifically, §33.16 of the Mental Hygiene Law provides rights of access to clinical mental health records, with certain exceptions, to "qualified persons," and paragraph 7 of subdivision (a) of that section defines that phrase to include "any properly identified patient or client." It appears that you are a "qualified person" and that you may assert rights of access under that statute.

I note that the right of a qualified person to obtain records pertaining to himself or herself is not absolute, for subdivision (c)(1) of §33.16 provides that such records may be withheld insofar

Mr.

January 6, 2000

Page - 3 -

disclosure "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..."

As suggested earlier, the Court of Appeals dealt recently with a similar matter involving access by a patient to medical records maintained by the State Department of Health that were prepared by a hospital. In Mantica v. New York State Department of Health (___ NY 2d ___, October 26, 1999), the Court wrote that "[t]he issue here is whether patients may obtain their own medical records from a state agency pursuant to New York State's Freedom of Information Law...despite the prohibition of Public Health Law § 18(6) against redisclosure of patient information by third parties." The Court unanimously held that the records should be made available to patients, but "that right is not absolute." In a manner analogous to the provisions of the Mental Hygiene Law quoted above, the Public Health Law provision generally granting patients access to records pertaining to themselves enables a provider to deny access when disclosure could cause "substantial and identifiable harm" to the patient or others, or when the records contain "privileged doctors' notes". Due to the similarity between the situation that you described and that presented in Mantica, I believe that the principles and the outcome should be the same, i.e., that you have a right to the evaluation, except to the extent that the Department may deny access pursuant to §33.16(c)(1) of the Mental Hygiene Law.

Lastly, subdivision (d) of §33.16 pertains to the right to appeal a denial of access and states that:

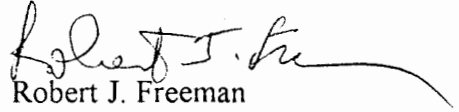
"(d) Clinical records access review committees. The commissioner of mental health the commissioner of mental retardation and developmental disabilities and the commissioner of alcoholism and substance abuse services shall appoint clinical record access review committees to hear appeals of the denial of access to patient or client records as provided in paragraph four of subdivision (c) of this section. Members of such committee shall be appointed by the respective commissioners. Such clinical record access review committees shall consist of no less than three nor more than five persons. The commissioners shall promulgate rules and regulations necessary to effectuate the provisions of this subdivision."

If you do not receive a satisfactory response to your request, it is suggested you request the rules and regulations from the appropriate commissioner in order to ensure that you are following the correct procedure and that you can properly attempt to assert your rights.

Mr.
January 6, 2000
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:tt

cc: Marshall Beckman



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI-10-11901

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Executive Director

Robert J. Freeman

January 10, 2000

Mr. James Farr
97-A-4513
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. Farr:

I have received your letter of November 24. You have sought guidance concerning the ability to obtain records concerning a witness who testified at your trial, particularly a "deal" made by the district attorney and the witness.

In this regard, I offer the following comments.

First, it is emphasized that the Freedom of Information Law pertains to agency records, and that §89 (3) of that statute provides in relevant part that an agency, such as the office of a district attorney, is not required to create a record in response to a request. Therefore, if there is no record of a "deal", the Freedom of Information Law would not apply.

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

From my perspective, if a record reflective of a deal exists, it could likely be withheld. Pertinent would be §87 (2)(b), which authorizes an agency to withhold records when disclosure would result in "an unwarranted invasion of person privacy," §87 (2)(e)(iii) concerning the ability to withhold records compiled for law enforcement purposes which, if disclosed, would reveal confidential information regarding a criminal investigation, and §87(2)(f). That provision permits an agency to withhold records to the extent that disclosure would "endanger the life or safety of any person."

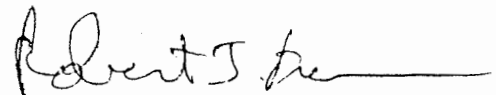
Mr. James Farr
January 10, 2000
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You may be able to obtain the criminal history of a witness who testified against you. With respect to criminal history records, the general repository of those records is the Division of Criminal Justice Services. While 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 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)]. [Woods v. Kings County District Attorney's Office, 234 AD 2d 554 (1996)]. In Woods, the Court upheld a denial of a request for the rap sheets "of numerous individuals who were not witnesses at [the petitioner's] trial." However, it distinguished its determination from the holding in Thompson, supra, in which it was found that a rap sheet must be disclosed when the request is "limited to the criminal convictions and any pending criminal actions against an individual called by the People as a witness in the petitioner's criminal trial." Therefore, insofar as your request involves records analogous to those found to be available in Thompson, I believe that the district attorney would be required to disclose.

It is also noted that while records relating to convictions may be available from the courts or other sources, when charges are dismissed in favor of an accused, records relating to arrests that did not result in convictions are generally sealed pursuant to §160.50 of the Criminal Procedure Law.

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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FOIL-AO-11902

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Wade S. Norwood
David A. Schulz
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Carole E. Stone
Alexander F. Treadwell

Executive Director

Robert J. Freeman

January 10, 2000

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 facts presented in your correspondence.

Dear Ms. Levy:

I have received your note received on December 1 concerning the delays in responding to requests for records.

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

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

I point out that it has been held that agency officials "did not conform to the mandates" of the provision quoted above "when the 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]. Further, if neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that 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. Estelle Levy
January 10, 2000
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."

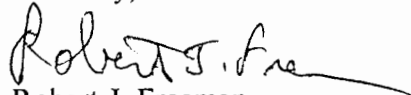
In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge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

I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:tt

cc: Terry L. Brown, Records Access Officer



STATE OF NEW YORK
DEPARTMENT OF STATE
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FOI C-20-11903

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January 10, 2000

Executive Director

Robert J. Freeman

Mr. Raymond Ferrari
95-R-6002
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. Ferrari:

I have received your letter of November 30 in which you sought assistance in relation to two requests made under the Freedom of Information Law. The first involves "all Unusual Incident Reports (UI's), Memoranda, records disciplinary records, gossip or other reference used in [the Department of Correctional Services'] decision to deny [your] transfer to Hudson Correctional Facility." The second relates to a variety of "institutional records" maintained by your facility.

In this regard, I offer the following comments.

First, since you requested copies of a substantial number of records, I point out that an agency may require payment of a fee of up to twenty-five cents per photocopy prior to making copies of records available. Further, it has been held that an agency may charge its established fee, even though the request is made by an indigent inmate [Whitehead v. Morgenthau, 552 NYS 2d 518 (1990)].

Second, at the end of the lengthy request, you wrote that the records "should be organized and categorized, chronologically under topics, headers, indexes, etc.", that a cover letter be prepared describing the contents of the records, and that each document withheld in whole or in part should be listed with a citation justifying the denial. In short, the Freedom of Information Law does not require that those actions be accomplished. An agency's obligation under the Freedom of Information Law involves disclosing records to the extent required by law; it does not require that records be arranged in any particular manner, that their contents be described or explained or that each record withheld in whole or in part be identified. When records are withheld, the reasons for the denial must be given in writing, but an agency is not required to provide the kind of detailed response that you suggested.

Third, I am unaware of the manner in which the records requested are maintained. That being so, 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. If records are not kept or filed in a manner in which those of your interest can be found without reviewing hundreds or perhaps thousands of records, to that extent, the request may not meet the standard of reasonably describing the records.

Insofar as an appropriate request for records is made, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. While I am unfamiliar with the contents of the records sought, several grounds for denial would, in my view, be pertinent to an analysis of rights of access.

Perhaps most significant with respect to communications between and among agency employees 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 some of 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.

Also relevant, particularly concerning those records that identify persons other than yourself, is §87(2)(b), which authorizes an agency to deny access to the extent that disclosure would constitute "an unwarranted invasion of personal privacy."

A provision that is often significant in relation to unusual incidents is §87(2)(e). That provision 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."

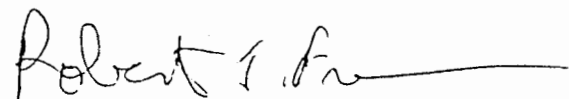
Lastly, §87(2)(f) authorizes an agency to withhold records insofar as disclosure would "endanger the life or safety of any person."

In sum, while some of the records or portions of the records may be available under the Freedom of Information Law, it is likely that others may justifiably be withheld.

Mr. Raymond Ferrari
January 10, 2000
Page -4-

I hope that I have been of some 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 extends across the width of the page.

Robert J. Freeman
Executive Director

RJF:jm

cc: Jack Alexander
Dominic Mantello



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707L-20-11904

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January 10, 2000

Executive Director

Robert J. Freeman

Mr. Gary Cody
97-A-4181
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. Cody:

I have received your letter of December 6 in which you asked that I review appeals made under the Freedom of Information Law to the Division of the State Police and the Office of the Warren County District Attorney. It appears that both requests involve the same records. The Division denied the request on the basis of §87(2)(e)(iv) of the Freedom of Information Law, and an assistant district attorney indicated that the records had been made available to your attorney and you should seek them from the attorney.

In this regard, since the records at issue appear to have been made available to your attorney, I direct your attention to Moore v. Santucci [151 AD 2d 677 (1989)]. In that decision, it was determined that an agency need not make available records that had been previously disclosed to the applicant or that person's attorney, unless there is an allegation "in evidentiary form, that the copy was no longer in existence." In my view, if you can "in evidentiary form" demonstrate that neither you nor your attorney maintains records that had previously been disclosed, the agency would be required to respond to a request for the same records.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Deputy Superintendent - Administration
Lt. Laurie M. Wagner
Marcy I. Flores



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FOIL-AO-11905

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Carole E. Stone
Alexander F. Treadwell

Executive Director

Robert J. Freeman

January 12, 2000

Mr. Adam Militello

[REDACTED]

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

Dear Mr. Militello:

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

You referred to an advisory opinion rendered on August 6 in which it was advised that booklists prepared or maintained by faculty members at the State University at Albany ("SUNY") are accessible under the Freedom of Information Law. Thereafter, you sent requests for booklists to nearly four hundred faculty members on or about December 1, and copies of those requests were forwarded to Stephen Beditz, SUNY's records access officer. In addition, in a separate letter to Mr. Beditz, you asked that he insure that an appropriate response be made to your requests in view of his duties as records access officer. With the exception of replies from "a handful" of faculty members, you received no response to the requests. Consequently, your attorney appealed on your behalf based on a contention that SUNY constructively denied the request.

You enclosed a copy of memorandum of December 8 addressed to all teaching faculty by Mr. Beditz in which he wrote that he most "emphatically does not agree" with your assertions, or, therefore my opinion that faculty members or SUNY are obliged to respond to your requests. He wrote, however, that he would respond to your requests and added that:

"We have provided information when appropriate but have steadfastly refused, consistent, we believe, with the applicable provisions of the Freedom of Information Law, to provide booklists compiled at considerable expense and effort by Barnes and Noble College Bookstores. To do so would place Barnes and Noble, who is under contract to provide these services to the University, at a significant competitive disadvantage."

From my perspective, Mr. Beditz' position is inconsistent with law. In this regard, I offer the following comments.

First, for reasons discussed in the opinion of August 6, I believe that your requests made directly to faculty members were valid, and that SUNY was required to respond in a manner consistent with the Freedom of Information Law. To briefly reiterate the points made in that opinion, booklists maintained by faculty members constitute "records" that fall within the coverage of the Freedom of Information Law; the persons in receipt of the requests must either respond to you, the applicant for the records, or forward the requests to the appropriate person, i.e., SUNY's records access officer, who, by law, has "the duty of coordinating agency response to public requests for access to records" [21 NYCRR §1401.2(a)]; and SUNY, through its records access officer and employees, must respond in accordance with the time limitations imposed by law.

If my understanding of the matter is accurate, Mr. Beditz has failed to accomplish the duties he is bound by law to carry out, and the records sought have been improperly withheld.

Second, while the state's highest court determined that an institution in the State University system is not required to disclose compilations of booklists, the Court of Appeals also indicated that the contents of those compilations may be acquired by anyone willing to expend the time, effort and expense of developing the compilations on their own initiative [see Encore College Bookstores, Inc. v. Auxiliary Service Corporation of the State University of New York at Farmingdale, 87 NY2d 410 (1996)]. In Encore, the Auxiliary Services Corporation (ASC) operated a campus bookstore for a branch of the State University pursuant to a contract, and its records were found to be records of the State University and, therefore, subject to the Freedom of Information Law. Barnes & Noble was awarded a contract to stock course books designated by the faculty, and "[i]n order to ensure that the bookstore had a complete inventory of the textbooks needed for the upcoming semester, Barnes & Noble sent each faculty member a purchase order form on which they listed the desired books" (*id.*, 415). The forms were returned to Barnes & Noble, and copies were sent to ASC. Encore requested the lists furnished to the University by Barnes & Noble, for like Mary Jane Books, it operated a bookstore near the campus.

Although the Court found that the booklists maintained by ASC were State University records subject to rights conferred by the Freedom of Information Law, it determined that they could be withheld under §87(2)(d) of that statute. That provision 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;"

The Court adopted the "substantial competitive harm" test enunciated by federal courts in interpreting the federal Freedom of Information Act and found that the proper assertion of §87(2)(d) "turns on the commercial value of the requested information to competitors and the cost of acquiring it through other means" (*id.*, 420),

Mr. Adam Militello
January 12, 2000
Page - 3 -

If you requested the booklists that Barnes & Noble has developed through a substantial expenditure of time, effort and resources, I believe that a denial of access would be fully appropriate and consistent with law and the holding in Encore. However, since you attempted through the Freedom of Information Law to make requests to individual faculty members, exerting your own time, effort and resources, you are not seeking to take advantage of the work already performed by a competitor; rather, it appears that you are attempting to duplicate that effort. Consequently, disclosure of those individual items of information could not be equated, in my view, with the disclosure of the lists or compilations that were prepared by Barnes & Noble in Encore. As stated by the Court of Appeals:

“The information in the booklist, accumulated by virtue of the effort and expense of Barnes & Noble, is also directly available to Encore. Disclosure through FOIL however, would enable Encore to obtain the requisite information without expending its resources, thereby reducing its cost of business and placing Barnes & Noble at a competitive disadvantage” (*id.*, 421).

“Disclosure through FOIL” in the context of Encore involved the “accumulation” of information by Barnes & Noble that its competitor sought to obtain with virtually no effort on its part. In your situation, you are seeking to duplicate the effort on your own. That being so, and in view of the decision rendered by the state’s highest court, I do not believe that SUNY could justifiably assert §87(2)(d) or any other ground for denial as a basis for withholding the individual booklists maintained by faculty members that you have requested. On the contrary, I believe that it is the responsibility of SUNY, through its records access officer, to ensure that those records are made available to you, either directly by faculty members or by the records access officer in the performance of his duty to coordinate SUNY’s response to your request.

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

I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:tt

cc: Stephen J. Beditz
Jeffrey Perez
Brian Culnan



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AJ-11906

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January 13, 2000

Executive Director

Robert J. Freeman

Mr. Stephen M. Seifert
91-A-4999
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. Seifert:

I have received your letters of December 7 and 27. Please note that responses to inquiries are prepared in accordance with the order in which they are received. You have complained with respect to delays encountered in your efforts in obtaining records from the Department of Correctional Services.

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

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

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

"...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. Stephen Seifert
January 13, 2000
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)].

Enclosed is "Your Right to Know", which describes 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 stroke.

Robert J. Freeman
Executive Director

RJF:jm

Enc.



STATE OF NEW YORK
DEPARTMENT OF STATE
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FOIL-AO-11907

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Alexander F. Treadwell

Executive Director

Robert J. Freeman

January 14, 2000

Mr. Herbert T. Jones
93-B-2972
Groveland Correctional Facility
P.O. Box 104
Sonyea, NY 14556-0001

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

Dear Mr. Jones:

I have received your letter of December 2 in which you sought assistance in obtaining a medical report concerning a person other than yourself, as well as grand jury testimony given by that person and a police officer.

In this regard, I do not believe that the Freedom of Information Law provides rights of access to the records in question. 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.

Relevant under the circumstances is the first ground for denial, §87 (2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute, §190.25(4) of the Criminal Procedure Law deals with grand jury proceedings and provides in relevant part that:

"Grand jury proceedings are secret, and no grand juror, or other person specified in subdivision three of this section or section 215.70 of the penal law, may, except in the lawful discharge of his duties or upon written order of the court, disclose the nature or substance of any grand jury testimony, evidence, or any decision, result or other matter attending a grand jury proceeding."

As such, grand jury minutes and related records would be outside the scope of rights conferred by the Freedom of Information Law. Any disclosure of those records would be based upon a court

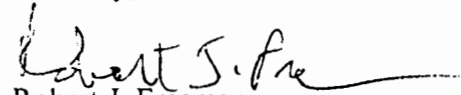
Mr. Herbert T. Jones
January 14, 2000
Page - 2 -

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

With respect to medical records, §89(2)(b) specifies that medical information may be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal 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 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 DeFranks



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

707L-AO-11908

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

January 14, 2000

Executive Director

Robert J. Freeman

Mr. Anthony Bennett
96-B-1530
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. Bennett:

I have received your letter of December 6. You asked whether "a correctional facility doctor is legally able to release an inmate's dental, medical records to the New York State Asst. Attorney General to review and make copies, without first receiving a sign [sic] authorization from [you], or a sign waiver which [you] agree to."

From my perspective, the issue arises not under the Freedom of Information or Personal Privacy Protection Laws, but rather under §18 of the Public Health Law. While I am not an expert with respect to that statute, unless the records are disclosed pursuant to a court order, I do not believe that an assistant attorney general would be a "qualified person" entitled to gain access to medical records pertaining to you [see Public Health Law, §18(1)(g)]. Further, subdivision (6) of §18 concerning disclosure to third persons states in relevant part that:

"Whenever a health care provider, as otherwise authorized by law, discloses patient information to a person or entity other than the subject of such information or to other qualified persons, either a copy of the subject's written authorization shall be added to the patient information or the name and address of such third party and a notation of the purpose for the disclosure shall be indicated in the file or record of such subject's patient information maintained by the provider provided, however, that for disclosures made to government agencies making payments on behalf of patients or to insurance companies licensed pursuant to the insurance law such a notation shall only be entered at the time the disclosure is first made. This subdivision shall not apply to disclosure to practitioners or other personnel employed

Mr. Anthony Bennett

January 14, 2000

Page -2-

by or under contract with the facility, or to government agencies for purposes of facility inspections or professional conduct investigations. Any disclosure made pursuant to this section shall be limited to that information necessary in light of the reason for disclosure.”

To obtain additional information concerning access to medical records, it is suggested that 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, appearing to read "R. 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

FOI - AD - 11909

Committee Members

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

Executive Director

Robert J. Freeman

January 18, 2000

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 facts presented in your correspondence.

Dear Mr. Robles:

I have received your letter of December 3 concerning your request for rap sheets from the Office of the Kings County District Attorney concerning witnesses who testified against you at your trial. You were informed that none of the witnesses had any convictions, but some may have rap sheets.

In this regard, by way of background, the general repository of criminal history records, or rap sheets, 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)]. 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.

Mr. Rafael Robles

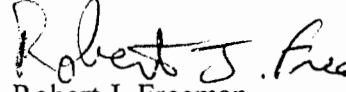
January 18, 2000

Page - 2 -

It is emphasized, however, 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. Therefore, if a rap sheet includes reference to arrests or charges that did not result in convictions, the records would be sealed and exempt from disclosure.

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

cc: Jodi L. Mandel



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI-20-11910

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Joseph J. Seymour
Carole E. Stone
Alexander F. Treadwell

January 18, 2000

Executive Director

Robert J. Freeman

E-Mail

TO: Frank Zgola [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. Zgola:

I have received your recent communication in which you asked what recourse there may be when the recipient of a request made under the Freedom of Information Law "never responds."

In this regard, the Committee on Open Government is authorized to provide advice and guidance concerning the implementation of the Freedom of Information Law. In conjunction with your inquiry, 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, such as a county, 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 generally be made to that person.

From my perspective, a person in receipt of a request is obliged to respond directly to the applicant in a manner consistent with the Freedom of Information Law, or immediately forward the request to the records access officer. It is suggested, however, that you might resubmit a request to the records access officer, and that you contact the Clerk of the County Legislature to ascertain the identity of 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:

Mr. Frank Zgola
January 18, 2000
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 hope that I have been of assistance.

RJF:jm

cc: County Supervisor



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIDL-AO-11911

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Carole E. Stone
Alexander F. Treadwell

January 18, 2000

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 November 30 in which you raised questions concerning access to certain records.

First, with regard to the pre-sentence report, 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. Philip King
January 18, 2000
Page 2-

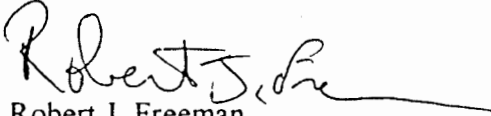
In addition, subdivision (2) of §390.50 states in part that: "The pre-sentence report shall be made available by the court for examination and copying in connection with any appeal in the case..."

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.

Second, criminal history records are exempt from disclosure. However, they are available to the subjects of those records pursuant to the regulations promulgated by the Division of Criminal Justice Services. I believe that those regulations would give you the right to obtain a copy of a rap sheet pertaining to you. I note, too, that the regulations also include provisions regarding the correction or amendment of criminal history records.

I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:jm

cc: Louis M. Gelormino



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

707C-AO-11912

Committee Members

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

January 18, 2000

Executive Director

Robert J. Freeman

Ms. Susan M. Coyle
Attorney at Law
609 Cross Bay Boulevard
Broad Channel, NY 11693

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

Dear Ms. Coyle:

I have received your letter of December 13 in which you sought assistance in obtaining certain records from the New York City Department of Environmental Protection ("DEP").

By way of background, in a letter addressed to a DEP attorney by your associate concerning his request for "various environmental test results" in an area described as the "largest illegal toxic land fill" in the state, he wrote that both the State Department of Environmental Conservation ("DEC") and DEP "have been conducting soil samples and various other environmental tests in that area many times over the past fifteen years." DEP has denied access on the ground that the tests were conducted at the request of an attorney for the New York City Law Department and DEP "in anticipation of settlement of litigation", and therefore constitute attorney work product that would be exempt from disclosure pursuant to §3101 of the Civil Practice Law and Rules (CPLR) and §87(2)(a) of the Freedom of Information Law.

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

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." Among such statutes would be subdivisions (c) and/or (d) of §3101 of the Civil Practice Law and Rules ("CPLR"). 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 N.Y.S.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 A.D.2d 742, 477 N.Y.S.2d 210)" [Coastal Oil New York, Inc. v. Peck, [184 AD 2d 241 (1992)].

It is emphasized, however, that it has been determined in several contexts, including situations in which government records have been sought under the Freedom of Information Law, that if

Ms. Susan M. Coyle

January 18, 2000

Page 3-

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)]. I believe that the same general principle would apply with respect to the work product of an attorney. While some of the tests prepared over the course of fifteen years falling within the scope of the second category of your request might possibly have been prepared solely for litigation, it appears unlikely that all such records were prepared solely for that purpose. To that extent, I believe that the records would subject to rights conferred by the Freedom of Information Law, for subdivisions (c) and (d) of §3101 would not apply.

Assuming that those provisions of the CPLR are inapplicable, the tests would likely constitute intra-agency materials that fall within the coverage of §87(2)(g) of the Freedom of Information Law. Although that provision potentially represents a basis for denial, due to its structure, I believe that it would require the disclosure of test results. Specifically, §87(2)(g) permits an agency to withhold records that:


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

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

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

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Robin M. Levine



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL NO - 11913

Committee Members

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

Executive Director

Robert J. Freeman

January 18, 2000

Mr. Charles L. White



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

Dear Mr. White:

I have received your letter of December 9. You referred to a request made to the Village of Valatie that had not been answered and sought advice concerning the procedure to follow in that circumstance.

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:

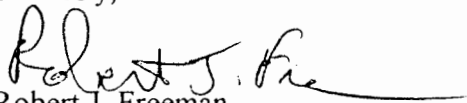
"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial,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

Mr. Charles L. White
January 18, 2000
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:tt

cc: Mayor, Village of Valatie
Village Clerk



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI 20-11914

Committee Members

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Carole E. Stone
Alexander F. Treadwell

Executive Director

Robert J. Freeman

January 18, 2000

Mr. William Valerio
91-B-2081
Drawer B
Stormville, NY 12582-0010

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

Dear Mr. Valerio:

I have received your letter of December 7. You have asked whether you have the right to know whether your co-defendant was placed in the witness protection program. You added that you believe that the person in question is deceased.

Assuming that the individual is living, I do not believe that you would have the right to know of his or her participation in a witness protection program. In this regard, I offer the following comments.

First, as a general matter, when records are accessible under the Freedom of Information Law, they must be made available to any person, irrespective of one's status or interest. Therefore, if a record indicating the person's participation in the program was available to you, it would be available to any member of the public.

Second, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, two of the grounds for denial would be pertinent. Section 87(2)(b) permits an agency to withhold records when disclosure would constitute "an unwarranted invasion of personal privacy", and §87(2)(f) authorizes an agency to deny access insofar as disclosure "would endanger the life or safety of any person." Either of those provisions in my opinion would serve to justify a denial of access to records indicating participation in a witness protection program.

If the individual is deceased, unless records may be withheld under the provisions cited above to protect family members or others, it is likely that a record of participation in the program would be available.

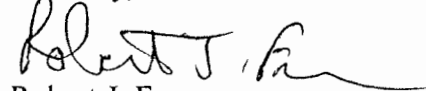
Mr. William Valerio

January 18, 2000

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



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

7011-AO-11915

Committee Members

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Alexander F. Treadwell

January 19, 2000

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.

Dear Mr. Henner:

I have received your letter of December 1 in which you sought advisory opinions relating to a series of questions precipitated by numerous and somewhat repetitive requests directed to the City of Oswego by Mr. Mark J. Langlitz, an attorney for Niagara Mohawk. The requests, in brief, pertain to a project involving the Varick Hydroelectric Plant.

Rather than reiterating your questions in every instance, in the following paragraphs, an attempt will be made to offer opinions and principles based on the language of the Freedom of Information Law and its judicial interpretation.

First, it is emphasized that the Freedom of Information Law pertains to existing records, and that §89(3) of that statute states in part that an agency is not required to create or prepare a new record in response to a request. Similarly, an agency is not generally required by the Freedom of Information Law to explain its actions, the contents of records or to answer questions. Further, I do not believe that an agency is required to agree to a request that is prospective in nature in which an applicant seeks records that have not yet been prepared or received, but which will in the future be prepared or received. In short, an agency's primary responsibility under the Freedom of Information Law involves disclosing existing records to the extent required by law.

Second, you questioned the obligation of an agency to "continue to respond to ...repeated requests for records for which a determination has been rendered, and the time for appeal has expired." From my perspective, a request may be renewed, particularly if there are new records falling within the scope of the request or if circumstances have changed. As you are aware, many of the grounds for withholding records appearing in §87(2) of the Freedom of Information Law are based on potentially harmful effects of disclosure, and in some instances, those harmful effects will diminish or disappear due to changes in circumstances or the passage of time.

For instance, if an agency is soliciting bids and the deadline for their submission is January 25, and a potential bidder seeks the bids that have been submitted so far, those bids, in my view, may be clearly be withheld, for §87(2)(c) permits an agency to withhold records when disclosure would "impair present or imminent contract awards..." Premature disclosure would give the person seeking the bids an unfair advantage, and the government agency may not have the capacity to engage in a contract optimal to the taxpayers. However, when the deadline for the submission of the bids has passed, all of the bidders would be on an equal footing, and the government agency may have no choice but to accept the low appropriate bid.. At that point, disclosure would no longer "impair" the bidding process, and the records that could properly have been withheld through January 25 may become available thereafter. In that and other circumstances, records might properly be withheld for a time, but they may become available in the future. As such, nothing would preclude a person from seeking the same records twice in that kind of situation.

On the other hand, if a second request made that "constitute[s] nothing more than an effort to obtain reconsideration of the prior request without any change in circumstances" [Corbin v. Ward, 554 NYS2d 240, 241, 160 AD2d 596 (1990)], I do not believe that an agency would be required to reconsider the request. As a general matter, when a request is denied, the applicant, pursuant to §89(4)(a) of the Freedom of Information Law, has the right to appeal. If the appeal is denied, the applicant may seek judicial review of the denial by initiating a proceeding under Article 78 of the CPLR.

Third, with respect to whether the requests have "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 City, to extent that the records sought can be located with reasonable effort, I believe that the request would have met the requirement of reasonably describing the records. On the other hand, if the records are not maintained in a manner that permits their retrieval except by reviewing 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. It is possible that records falling within the scope of a request may be maintained in several locations by a variety of units within a municipality, and that those units maintain their records by means of different filing and retrieval methods. If an office maintains all of its records regarding a particular facility, 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.

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

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

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.

Lastly, you asked whether the City "has fully complied with its obligations under FOIL" relative to Mr. Långlitz' requests. While it appears that there has been substantial compliance, I have no way of knowing whether there has been "full" compliance. For instance, as indicated earlier, I am unfamiliar with the means by which the City maintains its records or, therefore, the extent to which the requests might have met the standard of reasonably describing the records.

Additionally, while I am unaware of whether the matter continues to be pertinent, one of the records that was withheld is a "draft Environmental Assessment Form". Although I agree with the City's contention that the record in question constitutes "intra-agency material" that falls within the scope of §87(2)(g), a blanket denial of access to that record may have been inappropriate.

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

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

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

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

One of the contentions offered by a 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 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)].

Mr. Peter Henner
January 19, 2000
Page 5-

In short, that a record is predecisional or "draft" would not represent an end of an analysis of rights of access or an agency's obligation to review the contents of a record.

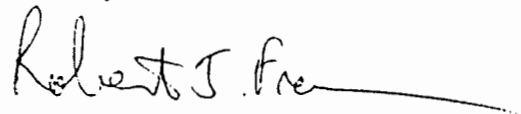
The Court also dealt with the issue of what constitutes "factual data" that must be disclosed under §87(2)(g)(i). In its consideration of the matter, the Court found that:

"...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 record at issue or others falling with the coverage of §87(2)(g) consist of recommendations, advice or opinions, for example, they may be withheld; insofar as they consist of statistical or factual information, I believe that they must be disclosed.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Mark J. Langlitz



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Alexander F. Treadwell

Executive Director

Robert J. Freeman

January 20, 2000

Mr. Joseph Frederick Gazza
Attorney at Law
P.O. Box 969, 5 Ogden Lane
Quogue, NY 11959

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

Dear Mr. Gazza:

I have received your letter of October 19 and apologize for the delay in response to your "appeal" to this office. The matter, as I understand it, relates to your request to the Central Pine Barrens Joint Planning and Policy Commission for a list of those owning "pine barrens credits" who responded to a notice from the Pine Barrens Credit Clearinghouse that an individual expressed interest in purchasing credits.

In this regard, first, it is noted 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 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:

Mr. Joseph Frederick Gazza

January 20, 2000

Page -2-

"(a) The governing body of a public corporation or the head, chief executive or governing body of other agencies shall hear appeals or shall designate a person or body to hear appeals regarding denial of access to records under the Freedom of Information Law.

(b) Denial of access shall be in writing stating the reason therefor and advising the person denied access of his or her right to appeal to the person or body established to hear appeals, and that person or body shall be identified by name, title, business address and business telephone number. The records access officer shall not be the appeals officer" (section 1401.7).

It is also noted that the state's highest court has held that a failure to inform a person denied access to records of the right to appeal enables that person to seek judicial review of a denial. Citing the Committee's regulations and the Freedom of Information Law, the Court of Appeals in Barrett v. Morgenthau held that:

"[i]nasmuch as the District Attorney failed to advise petitioner of the availability of an administrative appeal in the office (see, 21 NYCRR 1401.7[b]) and failed to demonstrate in the proceeding that the procedures for such an appeal had, in fact, even been established (see, Public Officers Law [section] 87[1][b]), he cannot be heard to complain that petitioner failed to exhaust his administrative remedies" [74 NY 2d 907, 909 (1989)].

Based on the correspondence attached to your letter, you were not informed of the right to appeal when your request was denied.

Second, although I have attempted on several occasions to acquire information from the Commission's attorneys in an effort to learn more of the matter, I do not believe that I have information adequate to offer an unequivocal opinion. An attorney for the Commission, James Rigano, indicated that those who responded to the notice indicating that an individual expressed an interest in purchasing credits did so based on an understanding that their privacy would be protected and that their identities would not be further disclosed or disseminated. I am unaware of the specific nature of their understanding or agreement or the basis for distinguishing the disclosure to that potential purchaser as opposed to a disclosure to you.

Third, in terms of rights of access, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. It appears that §87(2)(b) is the only ground for denial pertinent to an analysis of rights of access, for it permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." Additionally, §89(2)(b) provides a series of examples of unwarranted invasions of personal privacy, one of which involves the "sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes."

Mr. Joseph Frederick Gazza
January 20, 2000
Page -3-

It would appear that your purpose in seeking the list would be essentially the same as that of the potential purchaser of credits. In either instance, it appears that the list would be used for what might be characterized as a commercial purpose or a solicitation. If those identified on the list consented to provide their names and addresses for a limited use, with an understanding that the information would be used solely for the purpose of responding to a single expression of interest in purchasing credits, a denial of your request would likely have been appropriate. If, however, there was no consent or understanding of that nature, it would appear that you should have the same ability to acquire the list as the potential purchaser.

Again, the foregoing is based on the information that I was able to obtain. If it is inaccurate, please feel free to contact me.

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: Mark H. Rizzo
James Rigano



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FOIL-AO-11917

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Carole E. Stone
Alexander F. Treadwell

January 20, 2000

Executive Director

Robert J. Freeman

Dennis J. Morris, J.D.
Assistant County Attorney
Office of County Attorney of Schuyler County
105 Ninth Street, Unit 5
Watkins Glen, NY 14891

The staff of the Committee on Open 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 December 9 in which you requested an opinion concerning responses to certain requests for records.

You wrote that when a special prosecutor is appointed for a particular case, a record indicating the appointment is forwarded to the county clerk and a local court. In many instances, there is no disposition even though many years have passed, and the question involves how a county clerk in receipt of requests for criminal docket searches should be given. Essentially the same question has arisen with regard to requests for records that have been sealed pursuant to §§160.50 and 720.20 of the Criminal Procedure Law.

In this regard, it is noted at the outset 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 mean:

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

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

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

Dennis J. Morris, J.D.
January 20, 2000
Page -2-

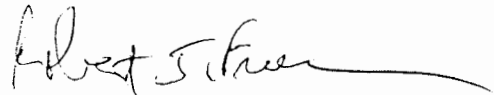
Assuming that the records in question are maintained by the County Clerk acting as the clerk of the court or by a justice court, the Freedom of Information Law would not apply, and the provisions of that statute requiring that the reasons for a denial of a request be fully explained in writing would not be pertinent [see Freedom of Information Law, §89(4)(a)].

From my perspective, the purposes of the statutes to which you referred requiring that records be sealed reflect an intent to protect the privacy of individuals who may have been the subjects of criminal investigations or charges but who were not convicted. In those situations in which there was no conviction, I believe that the Legislature intended to prevent the fact of a charge or an arrest from being disclosed to the detriment of an individual.

It has been suggested that in situations in which records that have been sealed are requested, the appropriate response should merely indicate that "any such records, if they exist, would be exempt from disclosure by statute." Again, because the Freedom of Information Law does not apply, I do not believe that a response of greater detail would be required. Further, a response of that nature does not infer that an individual might have been charged.

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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Alexander F. Treadwell

Executive Director

January 20, 2000

Robert J. Freeman

Mr. Robert Gagne

[REDACTED]

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

Dear Mr. Gagne:

I have received your letter of December 9. In brief, you asked whether requests and appeals made under the Freedom of Information Law are themselves available.

In this regard, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, with the exception of portions of certain kinds of requests, the records sought are accessible under the law.

In my view, the only instances in which the records at issue may be withheld in part would involve situations in which, due to the nature of their 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. In instances in which the request or appeal do not include intimate personal information, I believe that those records would ordinarily be accessible in their entirety.

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

January 12, 2000

Mr. Adam Militello

[REDACTED]

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

Dear Mr. Militello:

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

You referred to an advisory opinion rendered on August 6 in which it was advised that booklists prepared or maintained by faculty members at the State University at Albany ("SUNY") are accessible under the Freedom of Information Law. Thereafter, you sent requests for booklists to nearly four hundred faculty members on or about December 1, and copies of those requests were forwarded to Stephen Beditz, SUNY's records access officer. In addition, in a separate letter to Mr. Beditz, you asked that he insure that an appropriate response be made to your requests in view of his duties as records access officer. With the exception of replies from "a handful" of faculty members, you received no response to the requests. Consequently, your attorney appealed on your behalf based on a contention that SUNY constructively denied the request.

You enclosed a copy of memorandum of December 8 addressed to all teaching faculty by Mr. Beditz in which he wrote that he most "emphatically does not agree" with your assertions, or, therefore my opinion that faculty members or SUNY are obliged to respond to your requests. He wrote, however, that he would respond to your requests and added that:

"We have provided information when appropriate but have steadfastly refused, consistent, we believe, with the applicable provisions of the Freedom of Information Law, to provide booklists compiled at considerable expense and effort by Barnes and Noble College Bookstores. To do so would place Barnes and Noble, who is under contract to provide these services to the University, at a significant competitive disadvantage."

From my perspective, Mr. Beditz' position is inconsistent with law. In this regard, I offer the following comments.

First, for reasons discussed in the opinion of August 6, I believe that your requests made directly to faculty members were valid, and that SUNY was required to respond in a manner consistent with the Freedom of Information Law. To briefly reiterate the points made in that opinion, booklists maintained by faculty members constitute "records" that fall within the coverage of the Freedom of Information Law; the persons in receipt of the requests must either respond to you, the applicant for the records, or forward the requests to the appropriate person, i.e., SUNY's records access officer, who, by law, has "the duty of coordinating agency response to public requests for access to records" [21 NYCRR §1401.2(a)]; and SUNY, through its records access officer and employees, must respond in accordance with the time limitations imposed by law.

If my understanding of the matter is accurate, Mr. Beditz has failed to accomplish the duties he is bound by law to carry out, and the records sought have been improperly withheld.

Second, while the state's highest court determined that an institution in the State University system is not required to disclose compilations of booklists, the Court of Appeals also indicated that the contents of those compilations may be acquired by anyone willing to expend the time, effort and expense of developing the compilations on their own initiative [see Encore College Bookstores, Inc. v. Auxiliary Service Corporation of the State University of New York at Farmingdale, 87 NY2d 410 (1996)]. In Encore, the Auxiliary Services Corporation (ASC) operated a campus bookstore for a branch of the State University pursuant to a contract, and its records were found to be records of the State University and, therefore, subject to the Freedom of Information Law. Barnes & Noble was awarded a contract to stock course books designated by the faculty, and "[i]n order to ensure that the bookstore had a complete inventory of the textbooks needed for the upcoming semester, Barnes & Noble sent each faculty member a purchase order form on which they listed the desired books" (*id.*, 415). The forms were returned to Barnes & Noble, and copies were sent to ASC. Encore requested the lists furnished to the University by Barnes & Noble, for like Mary Jane Books, it operated a bookstore near the campus.

Although the Court found that the booklists maintained by ASC were State University records subject to rights conferred by the Freedom of Information Law, it determined that they could be withheld under §87(2)(d) of that statute. That provision 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;"

The Court adopted the "substantial competitive harm" test enunciated by federal courts in interpreting the federal Freedom of Information Act and found that the proper assertion of §87(2)(d) "turns on the commercial value of the requested information to competitors and the cost of acquiring it through other means" (*id.*, 420),

Mr. Adam Militello
January 12, 2000
Page - 3 -

If you requested the booklists that Barnes & Noble has developed through a substantial expenditure of time, effort and resources, I believe that a denial of access would be fully appropriate and consistent with law and the holding in Encore. However, since you attempted through the Freedom of Information Law to make requests to individual faculty members, exerting your own time, effort and resources, you are not seeking to take advantage of the work already performed by a competitor; rather, it appears that you are attempting to duplicate that effort. Consequently, disclosure of those individual items of information could not be equated, in my view, with the disclosure of the lists or compilations that were prepared by Barnes & Noble in Encore. As stated by the Court of Appeals:

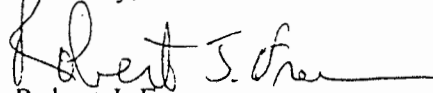
“The information in the booklist, accumulated by virtue of the effort and expense of Barnes & Noble, is also directly available to Encore. Disclosure through FOIL however, would enable Encore to obtain the requisite information without expending its resources, thereby reducing its cost of business and placing Barnes & Noble at a competitive disadvantage” (*id.*, 421).

“Disclosure through FOIL” in the context of Encore involved the “accumulation” of information by Barnes & Noble that its competitor sought to obtain with virtually no effort on its part. In your situation, you are seeking to duplicate the effort on your own. That being so, and in view of the decision rendered by the state’s highest court, I do not believe that SUNY could justifiably assert §87(2)(d) or any other ground for denial as a basis for withholding the individual booklists maintained by faculty members that you have requested. On the contrary, I believe that it is the responsibility of SUNY, through its records access officer, to ensure that those records are made available to you, either directly by faculty members or by the records access officer in the performance of his duty to coordinate SUNY’s response to your request.

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

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Stephen J. Beditz
Jeffrey Perez
Brian Culnan



STATE OF NEW YORK
DEPARTMENT OF STATE
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FOIL-AJ-11906

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Alexander F. Treadwell

January 13, 2000

Executive Director

Robert J. Freeman

Mr. Stephen M. Seifert
91-A-4999
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. Seifert:

I have received your letters of December 7 and 27. Please note that responses to inquiries are prepared in accordance with the order in which they are received. You have complained with respect to delays encountered in your efforts in obtaining records from the Department of Correctional Services.

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

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

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

"...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. Stephen Seifert
January 13, 2000
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)].

Enclosed is "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:jm

Enc.



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11907

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Alexander F. Treadwell

Executive Director

Robert J. Freeman

January 14, 2000

Mr. Herbert T. Jones
93-B-2972
Groveland Correctional Facility
P.O. Box 104
Sonyea, NY 14556-0001

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

Dear Mr. Jones:

I have received your letter of December 2 in which you sought assistance in obtaining a medical report concerning a person other than yourself, as well as grand jury testimony given by that person and a police officer.

In this regard, I do not believe that the Freedom of Information Law provides rights of access to the records in question. 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.

Relevant under the circumstances is the first ground for denial, §87 (2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute, §190.25(4) of the Criminal Procedure Law deals with grand jury proceedings and provides in relevant part that:

"Grand jury proceedings are secret, and no grand juror, or other person specified in subdivision three of this section or section 215.70 of the penal law, may, except in the lawful discharge of his duties or upon written order of the court, disclose the nature or substance of any grand jury testimony, evidence, or any decision, result or other matter attending a grand jury proceeding."

As such, grand jury minutes and related records would be outside the scope of rights conferred by the Freedom of Information Law. Any disclosure of those records would be based upon a court

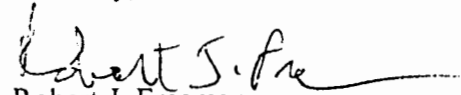
Mr. Herbert T. Jones
January 14, 2000
Page - 2 -

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

With respect to medical records, §89(2)(b) specifies that medical information may be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal 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 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 DeFranks



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

707L-AO-11908

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Joseph J. Seymour
Carole E. Stone
Alexander F. Treadwell

January 14, 2000

Executive Director

Robert J. Freeman

Mr. Anthony Bennett
96-B-1530
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. Bennett:

I have received your letter of December 6. You asked whether "a correctional facility doctor is legally able to release an inmate's dental, medical records to the New York State Asst. Attorney General to review and make copies, without first receiving a sign [sic] authorization from [you], or a sign waiver which [you] agree to."

From my perspective, the issue arises not under the Freedom of Information or Personal Privacy Protection Laws, but rather under §18 of the Public Health Law. While I am not an expert with respect to that statute, unless the records are disclosed pursuant to a court order, I do not believe that an assistant attorney general would be a "qualified person" entitled to gain access to medical records pertaining to you [see Public Health Law, §18(1)(g)]. Further, subdivision (6) of §18 concerning disclosure to third persons states in relevant part that:

"Whenever a health care provider, as otherwise authorized by law, discloses patient information to a person or entity other than the subject of such information or to other qualified persons, either a copy of the subject's written authorization shall be added to the patient information or the name and address of such third party and a notation of the purpose for the disclosure shall be indicated in the file or record of such subject's patient information maintained by the provider provided, however, that for disclosures made to government agencies making payments on behalf of patients or to insurance companies licensed pursuant to the insurance law such a notation shall only be entered at the time the disclosure is first made. This subdivision shall not apply to disclosure to practitioners or other personnel employed

Mr. Anthony Bennett

January 14, 2000

Page -2-


by or under contract with the facility, or to government agencies for purposes of facility inspections or professional conduct investigations. Any disclosure made pursuant to this section shall be limited to that information necessary in light of the reason for disclosure.”

To obtain additional information concerning access to medical records, it is suggested that you may write to:

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

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI - AD - 11909

Committee Members

41 State Street, Albany, New York 12231

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David A. Schulz
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Alexander F. Treadwell

Executive Director

Robert J. Freeman

January 18, 2000

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 facts presented in your correspondence.

Dear Mr. Robles:

I have received your letter of December 3 concerning your request for rap sheets from the Office of the Kings County District Attorney concerning witnesses who testified against you at your trial. You were informed that none of the witnesses had any convictions, but some may have rap sheets.

In this regard, by way of background, the general repository of criminal history records, or rap sheets, 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)].

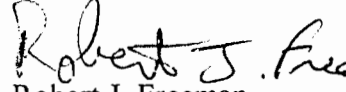
It is noted that in a decision rendered by the Appellate Division, Second Department, the Court reconfirmed its position that criminal history records are, in general, exempt from disclosure [Woods v. Kings County District Attorney's Office, 234 AD 2d 554, (1996)]. In Woods, the Court upheld a denial 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.

Mr. Rafael Robles
January 18, 2000
Page - 2 -

It is emphasized, however, 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. Therefore, if a rap sheet includes reference to arrests or charges that did not result in convictions, the records would be sealed and exempt from disclosure.

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

cc: Jodi L. Mandel



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI-20-11910

Committee Members

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

January 18, 2000

Executive Director

Robert J. Freeman

E-Mail

TO: Frank Zgola [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. Zgola:

I have received your recent communication in which you asked what recourse there may be when the recipient of a request made under the Freedom of Information Law "never responds."

In this regard, the Committee on Open Government is authorized to provide advice and guidance concerning the implementation of the Freedom of Information Law. In conjunction with your inquiry, 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, such as a county, 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 generally be made to that person.

From my perspective, a person in receipt of a request is obliged to respond directly to the applicant in a manner consistent with the Freedom of Information Law, or immediately forward the request to the records access officer. It is suggested, however, that you might resubmit a request to the records access officer, and that you contact the Clerk of the County Legislature to ascertain the identity of 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:

Mr. Frank Zgola
January 18, 2000
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 hope that I have been of assistance.

RJF:jm

cc: County Supervisor



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIDL-AO-11911

Committee Members

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

January 18, 2000

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 November 30 in which you raised questions concerning access to certain records.

First, with regard to the pre-sentence report, 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. Philip King
January 18, 2000
Page 2-

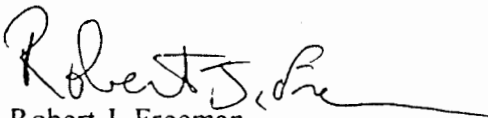
In addition, subdivision (2) of §390.50 states in part that: "The pre-sentence report shall be made available by the court for examination and copying in connection with any appeal in the case..."

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.

Second, criminal history records are exempt from disclosure. However, they are available to the subjects of those records pursuant to the regulations promulgated by the Division of Criminal Justice Services. I believe that those regulations would give you the right to obtain a copy of a rap sheet pertaining to you. I note, too, that the regulations also include provisions regarding the correction or amendment of criminal history records.

I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:jm

cc: Louis M. Gelormino



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

707C-AO-11912

Committee Members

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David A. Schulz
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Carole E. Stone
Alexander F. Treadwell

January 18, 2000

Executive Director

Robert J. Freeman

Ms. Susan M. Coyle
Attorney at Law
609 Cross Bay Boulevard
Broad Channel, NY 11693

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

Dear Ms. Coyle:

I have received your letter of December 13 in which you sought assistance in obtaining certain records from the New York City Department of Environmental Protection ("DEP").

By way of background, in a letter addressed to a DEP attorney by your associate concerning his request for "various environmental test results" in an area described as the "largest illegal toxic land fill" in the state, he wrote that both the State Department of Environmental Conservation ("DEC") and DEP "have been conducting soil samples and various other environmental tests in that area many times over the past fifteen years." DEP has denied access on the ground that the tests were conducted at the request of an attorney for the New York City Law Department and DEP "in anticipation of settlement of litigation", and therefore constitute attorney work product that would be exempt from disclosure pursuant to §3101 of the Civil Practice Law and Rules (CPLR) and §87(2)(a) of the Freedom of Information Law.

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

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." Among such statutes would be subdivisions (c) and/or (d) of §3101 of the Civil Practice Law and Rules ("CPLR"). 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 N.Y.S.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 A.D.2d 742, 477 N.Y.S.2d 210)" [Coastal Oil New York, Inc. v. Peck, [184 AD 2d 241 (1992)].

It is emphasized, however, that it has been determined in several contexts, including situations in which government records have been sought under the Freedom of Information Law, 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)]. I believe that the same general principle would apply with respect to the work product of an attorney. While some of the tests prepared over the course of fifteen years falling within the scope of the second category of your request might possibly have been prepared solely for litigation, it appears unlikely that all such records were prepared solely for that purpose. To that extent, I believe that the records would subject to rights conferred by the Freedom of Information Law, for subdivisions (c) and (d) of §3101 would not apply.

Assuming that those provisions of the CPLR are inapplicable, the tests would likely constitute intra-agency materials that fall within the coverage of §87(2)(g) of the Freedom of Information Law. Although that provision potentially represents a basis for denial, due to its structure, I believe that it would require the disclosure of test results. Specifically, §87(2)(g) permits an agency to withhold records that:

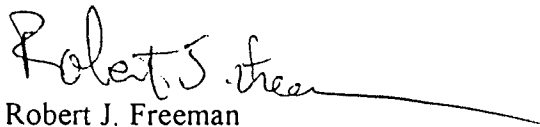
"are inter-agency or intra-agency materials which are not:

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

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

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 NO - 11913

Committee Members

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Alexander F. Treadwell

Executive Director

Robert J. Freeman

January 18, 2000

Mr. Charles L. White



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

Dear Mr. White:

I have received your letter of December 9. You referred to a request made to the Village of Valatie that had not been answered and sought advice concerning the procedure to follow in that circumstance.

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:

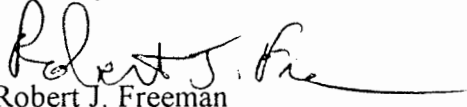
"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial,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

Mr. Charles L. White
January 18, 2000
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:tt

cc: Mayor, Village of Valatie
Village Clerk



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI 20-11914

Committee Members

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Wade S. Norwood
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Alexander F. Treadwell

Executive Director

Robert J. Freeman

January 18, 2000

Mr. William Valerio
91-B-2081
Drawer B
Stormville, NY 12582-0010

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

Dear Mr. Valerio:

I have received your letter of December 7. You have asked whether you have the right to know whether your co-defendant was placed in the witness protection program. You added that you believe that the person in question is deceased.

Assuming that the individual is living, I do not believe that you would have the right to know of his or her participation in a witness protection program. In this regard, I offer the following comments.

First, as a general matter, when records are accessible under the Freedom of Information Law, they must be made available to any person, irrespective of one's status or interest. Therefore, if a record indicating the person's participation in the program was available to you, it would be available to any member of the public.

Second, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, two of the grounds for denial would be pertinent. Section 87(2)(b) permits an agency to withhold records when disclosure would constitute "an unwarranted invasion of personal privacy", and §87(2)(f) authorizes an agency to deny access insofar as disclosure "would endanger the life or safety of any person." Either of those provisions in my opinion would serve to justify a denial of access to records indicating participation in a witness protection program.

If the individual is deceased, unless records may be withheld under the provisions cited above to protect family members or others, it is likely that a record of participation in the program would be available.

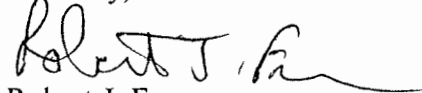
Mr. William Valerio

January 18, 2000

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



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

7011-AO-11915

Committee Members

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Alexander F. Treadwell

January 19, 2000

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.

Dear Mr. Henner:

I have received your letter of December 1 in which you sought advisory opinions relating to a series of questions precipitated by numerous and somewhat repetitive requests directed to the City of Oswego by Mr. Mark J. Langlitz, an attorney for Niagara Mohawk. The requests, in brief, pertain to a project involving the Varick Hydroelectric Plant.

Rather than reiterating your questions in every instance, in the following paragraphs, an attempt will be made to offer opinions and principles based on the language of the Freedom of Information Law and its judicial interpretation.

First, it is emphasized that the Freedom of Information Law pertains to existing records, and that §89(3) of that statute states in part that an agency is not required to create or prepare a new record in response to a request. Similarly, an agency is not generally required by the Freedom of Information Law to explain its actions, the contents of records or to answer questions. Further, I do not believe that an agency is required to agree to a request that is prospective in nature in which an applicant seeks records that have not yet been prepared or received, but which will in the future be prepared or received. In short, an agency's primary responsibility under the Freedom of Information Law involves disclosing existing records to the extent required by law.

Second, you questioned the obligation of an agency to "continue to respond to ...repeated requests for records for which a determination has been rendered, and the time for appeal has expired." From my perspective, a request may be renewed, particularly if there are new records falling within the scope of the request or if circumstances have changed. As you are aware, many of the grounds for withholding records appearing in §87(2) of the Freedom of Information Law are based on potentially harmful effects of disclosure, and in some instances, those harmful effects will diminish or disappear due to changes in circumstances or the passage of time.

For instance, if an agency is soliciting bids and the deadline for their submission is January 25, and a potential bidder seeks the bids that have been submitted so far, those bids, in my view, may be clearly be withheld, for §87(2)(c) permits an agency to withhold records when disclosure would "impair present or imminent contract awards..." Premature disclosure would give the person seeking the bids an unfair advantage, and the government agency may not have the capacity to engage in a contract optimal to the taxpayers. However, when the deadline for the submission of the bids has passed, all of the bidders would be on an equal footing, and the government agency may have no choice but to accept the low appropriate bid.. At that point, disclosure would no longer "impair" the bidding process, and the records that could properly have been withheld through January 25 may become available thereafter. In that and other circumstances, records might properly be withheld for a time, but they may become available in the future. As such, nothing would preclude a person from seeking the same records twice in that kind of situation.

On the other hand, if a second request made that "constitute[s] nothing more than an effort to obtain reconsideration of the prior request without any change in circumstances" [Corbin v. Ward, 554 NYS2d 240, 241, 160 AD2d 596 (1990)], I do not believe that an agency would be required to reconsider the request. As a general matter, when a request is denied, the applicant, pursuant to §89(4)(a) of the Freedom of Information Law, has the right to appeal. If the appeal is denied, the applicant may seek judicial review of the denial by initiating a proceeding under Article 78 of the CPLR.

Third, with respect to whether the requests have "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 City, to extent that the records sought can be located with reasonable effort, I believe that the request would have met the requirement of reasonably describing the records. On the other hand, if the records are not maintained in a manner that permits their retrieval except by reviewing 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. It is possible that records falling within the scope of a request may be maintained in several locations by a variety of units within a municipality, and that those units maintain their records by means of different filing and retrieval methods. If an office maintains all of its records regarding a particular facility, 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.

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

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

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.

Lastly, you asked whether the City "has fully complied with its obligations under FOIL" relative to Mr. Långlitz' requests. While it appears that there has been substantial compliance, I have no way of knowing whether there has been "full" compliance. For instance, as indicated earlier, I am unfamiliar with the means by which the City maintains its records or, therefore, the extent to which the requests might have met the standard of reasonably describing the records.

Additionally, while I am unaware of whether the matter continues to be pertinent, one of the records that was withheld is a "draft Environmental Assessment Form". Although I agree with the City's contention that the record in question constitutes "intra-agency material" that falls within the scope of §87(2)(g), a blanket denial of access to that record may have been inappropriate.

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

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

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

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

One of the contentions offered by a 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 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)].

Mr. Peter Henner
January 19, 2000
Page 5-

In short, that a record is predecisional or "draft" would not represent an end of an analysis of rights of access or an agency's obligation to review the contents of a record.

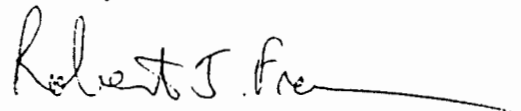
The Court also dealt with the issue of what constitutes "factual data" that must be disclosed under §87(2)(g)(i). In its consideration of the matter, the Court found that:

"...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. Yudelton, 68 AD2d 176, 181-182) id., 276-277).]

In my view, insofar as the record at issue or others falling with the coverage of §87(2)(g) consist of recommendations, advice or opinions, for example, they may be withheld; insofar as they consist of statistical or factual information, I believe that they must be disclosed.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Mark J. Langlitz



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI-NO-11916

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Executive Director

Robert J. Freeman

January 20, 2000

Mr. Joseph Frederick Gazza
Attorney at Law
P.O. Box 969, 5 Ogden Lane
Quogue, NY 11959

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

Dear Mr. Gazza:

I have received your letter of October 19 and apologize for the delay in response to your "appeal" to this office. The matter, as I understand it, relates to your request to the Central Pine Barrens Joint Planning and Policy Commission for a list of those owning "pine barrens credits" who responded to a notice from the Pine Barrens Credit Clearinghouse that an individual expressed interest in purchasing credits.

In this regard, first, it is noted 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 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:

Mr. Joseph Frederick Gazza

January 20, 2000

Page -2-

"(a) The governing body of a public corporation or the head, chief executive or governing body of other agencies shall hear appeals or shall designate a person or body to hear appeals regarding denial of access to records under the Freedom of Information Law.

(b) Denial of access shall be in writing stating the reason therefor and advising the person denied access of his or her right to appeal to the person or body established to hear appeals, and that person or body shall be identified by name, title, business address and business telephone number. The records access officer shall not be the appeals officer" (section 1401.7).

It is also noted that the state's highest court has held that a failure to inform a person denied access to records of the right to appeal enables that person to seek judicial review of a denial. Citing the Committee's regulations and the Freedom of Information Law, the Court of Appeals in Barrett v. Morgenthau held that:

"[i]nasmuch as the District Attorney failed to advise petitioner of the availability of an administrative appeal in the office (see, 21 NYCRR 1401.7[b]) and failed to demonstrate in the proceeding that the procedures for such an appeal had, in fact, even been established (see, Public Officers Law [section] 87[1][b]), he cannot be heard to complain that petitioner failed to exhaust his administrative remedies" [74 NY 2d 907, 909 (1989)].

Based on the correspondence attached to your letter, you were not informed of the right to appeal when your request was denied.

Second, although I have attempted on several occasions to acquire information from the Commission's attorneys in an effort to learn more of the matter, I do not believe that I have information adequate to offer an unequivocal opinion. An attorney for the Commission, James Rigano, indicated that those who responded to the notice indicating that an individual expressed an interest in purchasing credits did so based on an understanding that their privacy would be protected and that their identities would not be further disclosed or disseminated. I am unaware of the specific nature of their understanding or agreement or the basis for distinguishing the disclosure to that potential purchaser as opposed to a disclosure to you.

Third, in terms of rights of access, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. It appears that §87(2)(b) is the only ground for denial pertinent to an analysis of rights of access, for it permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." Additionally, §89(2)(b) provides a series of examples of unwarranted invasions of personal privacy, one of which involves the "sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes."

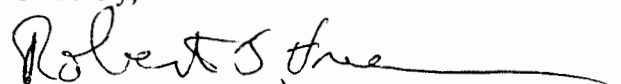
Mr. Joseph Frederick Gazza
January 20, 2000
Page -3-

It would appear that your purpose in seeking the list would be essentially the same as that of the potential purchaser of credits. In either instance, it appears that the list would be used for what might be characterized as a commercial purpose or a solicitation. If those identified on the list consented to provide their names and addresses for a limited use, with an understanding that the information would be used solely for the purpose of responding to a single expression of interest in purchasing credits, a denial of your request would likely have been appropriate. If, however, there was no consent or understanding of that nature, it would appear that you should have the same ability to acquire the list as the potential purchaser.

Again, the foregoing is based on the information that I was able to obtain. If it is inaccurate, please feel free to contact me.

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: Mark H. Rizzo
James Rigano



STATE OF NEW YORK
DEPARTMENT OF STATE
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FOIL-AO-11917

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Alexander F. Treadwell

January 20, 2000

Executive Director

Robert J. Freeman

Dennis J. Morris, J.D.
Assistant County Attorney
Office of County Attorney of Schuyler County
105 Ninth Street, Unit 5
Watkins Glen, NY 14891

The staff of the Committee on Open 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 December 9 in which you requested an opinion concerning responses to certain requests for records.

You wrote that when a special prosecutor is appointed for a particular case, a record indicating the appointment is forwarded to the county clerk and a local court. In many instances, there is no disposition even though many years have passed, and the question involves how a county clerk in receipt of requests for criminal docket searches should be given. Essentially the same question has arisen with regard to requests for records that have been sealed pursuant to §§160.50 and 720.20 of the Criminal Procedure Law.

In this regard, it is noted at the outset 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 mean:

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

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

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

Dennis J. Morris, J.D.
January 20, 2000
Page -2-

Assuming that the records in question are maintained by the County Clerk acting as the clerk of the court or by a justice court, the Freedom of Information Law would not apply, and the provisions of that statute requiring that the reasons for a denial of a request be fully explained in writing would not be pertinent [see Freedom of Information Law, §89(4)(a)].

From my perspective, the purposes of the statutes to which you referred requiring that records be sealed reflect an intent to protect the privacy of individuals who may have been the subjects of criminal investigations or charges but who were not convicted. In those situations in which there was no conviction, I believe that the Legislature intended to prevent the fact of a charge or an arrest from being disclosed to the detriment of an individual.

It has been suggested that in situations in which records that have been sealed are requested, the appropriate response should merely indicate that "any such records, if they exist, would be exempt from disclosure by statute." Again, because the Freedom of Information Law does not apply, I do not believe that a response of greater detail would be required. Further, a response of that nature does not infer that an individual might have been charged.

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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DEPARTMENT OF STATE
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Alexander F. Treadwell

Executive Director

January 20, 2000

Robert J. Freeman

Mr. Robert Gagne

[REDACTED]

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

Dear Mr. Gagne:

I have received your letter of December 9. In brief, you asked whether requests and appeals made under the Freedom of Information Law are themselves available.

In this regard, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, with the exception of portions of certain kinds of requests, the records sought are accessible under the law.

In my view, the only instances in which the records at issue may be withheld in part would involve situations in which, due to the nature of their 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. In instances in which the request or appeal do not include intimate personal information, I believe that those records would ordinarily be accessible in their entirety.

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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FOI 020-11919

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Executive Director

Robert J. Freeman

January 20, 2000

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. Sivecz:

I have received your letter of December 13 in which you asked whether certain records used in filling a vacancy in "a civil service position", such as an "application, resumes, references, licenses, interview notes and any other information that was used in making a determination to offer employment", are available under the Freedom of Information Law.

In this regard, I offer the following comments.

First, §89(7) of the Freedom of Information Law states that an agency is not required to disclose the name of an applicant for appointment to public employment.

Second, notwithstanding the foregoing, I believe that many aspects of the resumes or applications submitted regarding those who were not hired, as well as a variety of details regarding a person who was hired, must be disclosed.

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

In a case in which an individual wanted to compare his qualifications with the qualifications of others, it was determined that resumes of those others must be disclosed, following the deletion of personally identifying details [see Harris v. City of University of New York, Baruch College, 114 AD 2d 805 (1985)].

With respect to the records pertaining to a person hired, the judicial interpretation of the Freedom of Information Law indicates that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that those individuals are required to be more accountable than others. The courts have found that, as a general rule, records that are relevant to the performance of the official duties of a public officer or employee are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980; Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that items relating to public officers or employees are irrelevant to the performance of their official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977, dealing with membership in a union; Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1981, involving the back of a check payable to a municipal attorney that could indicate how that person spends his/her money; Selig v. Sielaff, 200 AD 2d 298 (1994), concerning disclosure of social security numbers].

I note that it has been held that disclosure of a public employee's educational background would not constitute an unwarranted invasion of personal privacy and must be disclosed [see Ruberti, Girvin & Ferlazzo v. NYS Division of State Police, 641 NYS 2d 411, 218 AD 2d 494 (1996)]. Additionally, in a recent judicial decision, Kwasnik v. City of New York (Supreme Court, New York County, September 26, 1997), the court quoted from and relied upon an opinion rendered by this office and held that those portions of resumes, including information detailing one's prior public employment must be disclosed. The Committee's opinion stated that:

"If, for example, an individual must have certain types of experience, educational accomplishments or certifications as a condition precedent to serving in [a] particular position, those aspects of a resume or application would in my view be relevant to the performance of the official duties of not only the individual to whom the record pertains, but also the appointing agency or officers ... to the extent that records sought contain information pertaining to the requirements that must have been met to hold the position, they should be disclosed, for I believe that disclosure of those aspects of documents would result in a permissible rather than an unwarranted invasion [of] personal privacy. Disclosure represents the only means by which the public can be aware of whether the incumbent of the position has met the requisite criteria for serving in that position.

"The Opinion further stated that:

Mr. William Sivecz

January 20, 2000

Page - 3 -

"Although some aspects of one's employment history may be withheld, the fact of a person's public employment is a matter of public record, for records identifying public employees, their titles and salaries must be prepared and made available under the Freedom of Information Law [see §87(3)(b)]."

In short, it is likely that some aspects of the resume of the incumbent must be disclosed, while others could be withheld to protect personal privacy.

Section 89(2)(b)(i) specifies that "references of applicants for employment" would, if disclosed, constitute an unwarranted invasion of privacy and, therefore, may be withheld. In addition, interview notes would consist of "intra-agency materials". Insofar as those materials contain opinions, recommendations, impressions and the like, they may be withheld under §87(2)(g) of the Freedom of Information Law.

I hope that I have been of assistance.

RJF:tt



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OML-AO-3107
FOIL-AO-11920

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Executive Director

Robert J. Freeman

January 20, 2000

E-MAIL

TO: "Michael Clark" [REDACTED]
FROM: Robert J. Freeman, Executive Director *RSF*

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

Dear Mr. Clark:

I have received your letter of December 15 in which you asked whether you "have a right to obtain a report of the discussions of [y]our school board at a recent meeting." As I understand the situation, a coach was approved for hiring by the athletic director of the Hilton Central School District, but the Superintendent "denied hire." Since you want to know a reason for the failure to hire that person, you questioned whether you may "obtain documentation (manuscripts) of the board meetings where this issue has been addressed."

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, such as a school district, is not required to create a record in response to a request. Therefore, if there is no "manuscript" or "documentation" reflective of discussions at Board meetings, or if there are no records indicating the reason for not hiring the coach, the District would not be required to prepare records containing the information sought on your behalf.

Second, if the matter was discussed during one or more open meetings, minutes of those meetings would be available. I note, however, that minutes need not consist of a verbatim account of a discussion. Section 106 of the Open Meetings Law provides minimum requirement concerning the contents of minutes, and subdivision (1) pertaining to minutes of open meetings 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.”

I note that if the District maintains a tape recording of a meeting open to the public, any person would have the right to listen to the tape or obtain a copy [see Zaleski v. Hicksville Union Free School District, Supreme Court, Nassau County, NYLJ, December 27, 1978).

Third, I would conjecture that the matter would not have been discussed in public, but rather during one or more executive sessions. An “executive session”, according to §102(3) of the Open Meetings Law, is a portion of an open meeting during which the public may be excluded. Section 105 specifies the subjects that may be discussed during an executive session. Pertinent to your inquiry is paragraph (f) of subdivision (1) of that provision, for it permits a public body, such as a board of education, to enter into executive session to discuss:

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

When an issue is discussed in executive session, there is no requirement that a detailed record of that closed session be prepared.

Fourth, pertinent to the matter may be §87(2)(g) of the Freedom of Information Law, which deals with written communications between or among officers or employees of government agencies and permits an agency to withhold records that:

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

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

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

Mr. Michael Clark
January 20, 2000
Page 3-

advice, for example, regarding whether to hire the individual in question, those kinds of records may be withheld.

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

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

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

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

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

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

RJF:tt

cc: Board of Education



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11921

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Alexander F. Treadwell

January 21, 2000

Executive Director

Robert J. Freeman

Mr. Paul Priore



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

Dear Mr. Priore:

I have received your letter of December 13. You have sought advice concerning rights of access to various "categories" of records that you requested from the New York City Department of Parks and Recreation.

Before focusing on the records that you requested, I point out that a potential issue with respect to some aspects of your request involves the extent to which your request "reasonably describes" the records sought as required by §89(3) of the Freedom of Information Law. I point out that it has been held by the Court of Appeals, 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

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. It is possible that records falling within the scope of the request may be maintained in several locations by a variety of units within the Department, and that those units maintain their records by means of different filing and retrieval methods. If an office maintains all of its records regarding Flushing Meadows Corona Park in a single file or perhaps in a series of files that can be readily located, it may be a simple task to retrieve the records. If, however, records are not maintained in that manner, locating the records might involve a search, in essence, for the needle in the haystack. Based on the holding by the State's highest court, an agency is not required to engage in that kind of effort.

Insofar as the request met the standard of reasonably describing 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.

With respect to bids, the provision of primary significance would be §87(2)(c) which permits an agency to withhold records to the extent that disclosure would "impair present or imminent contract awards or collective bargaining negotiations." As it relates to the impairment of "contract awards", §87(2)(c) is, in my opinion, generally cited and applicable in two types of circumstances.

One involves a situation in which an agency is involved in the process of seeking bids or proposals concerning the purchase of goods and services. If, for example, an agency seeking bids or proposals has received a number of bids, but the deadline for their submission has not been reached, premature disclosure for the bids to another possible submitter might provide that person or firm with an unfair advantage vis a vis those who already submitted bids. Further, disclosure of the identities of bidders or the number of bidders might enable another potential bidder to tailor his bid in a manner that provides him with an unfair advantage in the bidding process. In such a situation, harm or "impairment" would likely be the result, and the records could justifiably be denied. However, after the deadline for submission of bids or proposals are available after a contract has been awarded, and that, in view of the requirements of the Freedom of Information Law, "the successful bidder had no

reasonable expectation of not having its bid open to the public" [Contracting Plumbers Cooperative Restoration Corp. v. Ameruso, 105 Misc. 2d 951, 430 NYS 2d 196, 198 (1980)].

The other situation in which §87(2)(c) has successfully been asserted to withhold records pertains to real property transactions where appraisals in possession of an agency were requested prior to the consummation of a transaction. Again, when premature disclosure would have enabled the public to know the prices the agency sought, thereby potentially precluding the agency from receiving an optimal price, an agency's denial was upheld [see Murray v. Troy Urban Renewal Agency, 56 NY 2d 888 (1982)].

In both of the kinds of the situations described above, there is an inequality of knowledge. More specifically, in the bid situation, the person who seeks bids prior to the deadline for their submission is presumably unaware of the content of the bids that have already been submitted; in the appraisal situation, the person seeking that record is unfamiliar with its contents. As suggested above, premature disclosure of bids would enable a potential bidder to gain knowledge in a manner unfair to other bidders and possibly to the detriment of an agency and, therefore, the public. Disclosure of an appraisal would provide knowledge to the recipient that might effectively prevent an agency from engaging in an agreement that is most beneficial to taxpayers.

When there is no inequality of knowledge between or among the parties to negotiations, or if records have been shared or exchanged by the parties, it is questionable and difficult to envision how disclosure would "impair present or imminent contract awards", (see Community Board 7 of Borough of Manhattan v. Schaffer, Supreme Court, New York County, NYLJ, March 20, 1991). Further, if an agreement has been reached or a lease or contract has been signed, presumably negotiations have ended, and any impairment that might have existed prior to the consummation of an agreement would essentially have disappeared.

The identities and business addresses of successful bidders would, in my view, be accessible. Although §87(2)(b) states that an agency may withhold records when disclosure would result in "an unwarranted invasion of personal privacy", there are several judicial decisions, both New York State and federal, that pertain to records about individuals in their business or professional capacities 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).

With regard to "all memoranda, letters and reports relating to past and ongoing construction projects at Flushing Meadows Corona", for reasons mentioned earlier, a request of that nature likely would not "reasonably describe" the records. I note, too, that internal memoranda, reports and the like communicated between or among government officials may be withheld to the extent that they consist of advice, recommendations, suggestions, ideas and the like [see Freedom of Information Law, §87(2)(g)].

Personnel records would be available and deniable in part, and 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.

Section 87(2)(g), which was cited above, 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.

Also pertinent is §87(2)(b), which permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." Although the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public employees. It is clear that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. With regard to records pertaining to public employees, the courts have found that, as a general rule, records that are relevant to the performance of a public employee's official duties are available, for disclosure in such instances would

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

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

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

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

"Each agency shall maintain...

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

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

In analyzing rights of access, of primary relevance is §87(2)(b) concerning unwarranted invasions 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, *supra*. In addition, 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)].

Mr. Paul Priore
January 21, 2000
Page -7-

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

If there is a separate list of those responsible for overseeing and evaluating certain construction projects, I believe that it would be available. If no such list exists, an agency would not be required to create such a record on your behalf [see Freedom of Information Law, §89(3)].

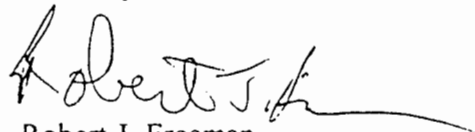
Another record required to be maintained pursuant to §87(3) involves a "subject matter list." Subdivision (c) of that provision states that each agency shall maintain:

"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 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.

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

7076 AD-11922

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Executive Director

Robert J. Freeman

January 24, 2000

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 facts presented in your correspondence.

Dear Mr. Grubbs:

I have received your letter of December 14 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, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

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

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

Mr. Jarvis Grubbs
January 24, 2000
Page - 2 -

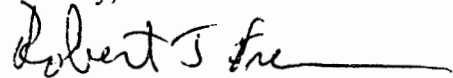
governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

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

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

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Susan Petito
Sgt. Richard Evangelista, Records Access Officer



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DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

7076-190-11923

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Alexander F. Treadwell

Executive Director

January 24, 2000

Robert J. Freeman

Mr. Ronald Logan

[REDACTED]

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

Dear Mr. Logan:

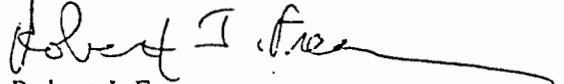
I have received your letter of December 14 in which you asked that I review a request to the Department of Correctional Services and its response. You requested "committee discussions, promulgations, on who's [sic] authority it [a certain directive] was enacted and the date it was originally enacted, drafting identities of the parties and/or entities responsible for its enactment and the like." The Department made six pages of material available, but it is your belief that other records fall within the scope of your request.

In this regard, the Freedom of Information Law pertains to existing records, and §89 (3) states in part that an agency is not required to create a record in response to a request for information. Similarly, an agency is not required to provide "information" in response to a question; 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 "discussions" but there are no records of any such discussions, the Department would not be required to prepare records on your behalf in an effort to provide the information in which you are interested. In short, an agency's obligation under the Freedom of Information Law involves providing access to existing records insofar as the law requires disclosure; it is not an agency's obligation to reconstruct events and create new records in an effort to accommodate an applicant for information.

Mr. Ronald Logan
January 24, 2000
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:tt
cc: Anthony J. Annucci
Mark E. Shepard



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL - AO - 11924

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January 25, 2000

Executive Director

Robert J. Freeman

Mr. Martin I. Berman
CEO
Gramercy Radiology Group, P.C.
201 East 19th Street
New York, NY 10003

Dear Mr. Berman:

I have received your letter of January 21 in which you requested records relating to bids submitted to the New York City Department of Sanitation.

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, and it is not empowered to compel an agency to grant or deny access to records. Nevertheless, in an effort to assist you, I offer the following comments.

First, a request for records should be made to the agency that you believe would possess the records of your interest. In this instance, it appears that the Department of Sanitation would maintain the records. Further, 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 the agency's response to requests, and the request should ordinarily be directed to that person.

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

I believe that most relevant with respect to access to bids and related records is §87(2)(c). That provision permits an agency to withhold records or portions thereof that:

"if disclosed would impair present or imminent contract awards or collective bargaining negotiations..."

Mr. Martin I. Berman
January 25, 2000
Page 2-

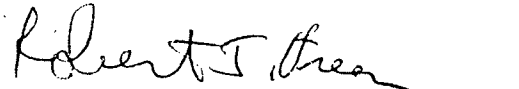
In my view, the key word in §87(2)(c) is "impair", and the potential for harm or impairment as a result of disclosure is the determining factor regarding the propriety of a denial under that provision.

In the context of your letter, if, for example, an agency seeking bids receives a number of bids and related records, but the deadline for their submission has not been reached, premature disclosure of the records to another possible submitter might provide that person or firm with an unfair advantage vis a vis those who already submitted bids. Further, disclosure of the identities of bidders or the number of bidders might enable another potential bidder to tailor his bid in a manner that provides him with an unfair advantage in the bidding process. In such a situation, harm or "impairment" would likely be the result, and the records could justifiably be denied. However, after the deadline for submission of bids or other records has been reached, often the passage of that event results in the elimination of harm. Further, it has been held that bids or proposals are available after a contract has been awarded, and that, in view of the requirements of the Freedom of Information Law, "the successful bidder had no reasonable expectation of not having its bid open to the public" [Contracting Plumbers Cooperative Restoration Corp. v. Ameruso, 105 Misc. 2d 951, 430 NYS 2d 196, 198 (1980)]. From my perspective, the same principles would apply to letters or other documentation submitted by bidders.

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

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

Enc.



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI L-AU - 11925

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January 25, 2000

Executive Director

Robert J. Freeman

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 December 15 in which you sought an advisory opinion concerning your right to obtain from the Division of Parole "very specific and detailed statistical information broken down into specified categories."

In this regard, it is emphasized at the outset that the Freedom of Information Law pertains to existing records. Section 89(3) of that statute provides in part that an agency is not required to create a record in response to a request. I point out, however, that §86(4) of the Freedom of Information Law defines the term "record" expansively to include:

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

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

Mr. Christopher Lue-Shing

January 25, 2000

Page 2-

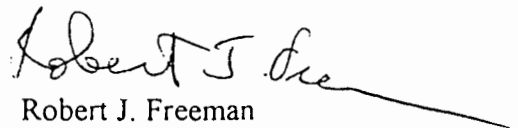
When information is maintained electronically, it has been advised that if the information sought is available under the Freedom of Information Law and may be retrieved by means of existing computer programs, an agency is required to disclose the information. In that kind of situation, the agency in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

If the information that you seek does not now exist or cannot be retrieved or extracted without reprogramming, an agency would not, in my opinion, be obliged to develop new programs or modify its existing programs in an effort to generate the data of your interest.

Assuming that the statistics that you seek do exist or can be generated, it appears that they would be available, for §87(2)(g)(i) of the Freedom of Information Law requires that "intra-agency materials" consisting of "statistical or factual tabulations or data" must be disclosed.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Ann Crowell



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-A-11926

Committee Members

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Alexander F. Treadwell

January 25, 2000

Executive Director

Robert J. Freeman

Mr. Clifford Conyers
Columbia County Jail
85 Industrial Tract
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. Conyers:

I have received your letter of December 6. Please note the change in the address of this office.

You have sought guidance concerning requests relating to your arrest made to a court and to the Office of the Rensselaer County District Attorney. In this regard, I offer the following comments.

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."

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. Clifford Conyers

January 25, 2000

Page -2-

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

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

In view of the response by the Office of the District Attorney, I point out that in a decision concerning a request for records maintained by the office of a district attorney that would ordinarily be exempted from disclosure under the Freedom of Information Law, it was held that "once the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member 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).

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.

With respect to the remainder of the documentation that you are seeking, 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, aff'd 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;

Mr. Clifford Conyers
January 25, 2000
Page -6-

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

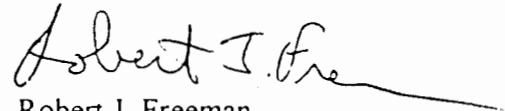
iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in sub- paragraphs (i) through (iv) of §87(2)(e).

Another possible ground for denial is §87(2)(f), which permits withholding to the extent that disclosure "would endanger the life or safety of any person". The capacity to withhold on that basis is dependent upon the facts and circumstances concerning an event.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. H. Bauer
Alexander B. Perry



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11927

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Alexander F. Treadwell

January 25, 2000

Executive Director

Robert J. Freeman

Mr. Michael Rodriguez
71-A-0316
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. Rodriguez:

I have received your letter of December 13 in which you sought guidance that might be useful in asserting your rights under the Freedom of Information Law in relation to a situation in which the Department of Correctional Services has lost records pertaining to you.

In this regard, it is emphasized at the outset that the Freedom of Information Law pertains to existing records. Section 89(3) of that statute provides in relevant part that an agency is not required to create or prepare a record that it does not maintain. In short, insofar as the Department does not maintain the records in which you are interested, the Freedom of Information Law does not apply.

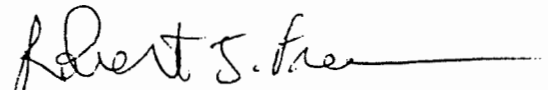
As you may be aware, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that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

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

Mr. Michael Rodriguez
January 25, 2000
Page 2-

I regret that I cannot be of greater assistance. Enclosed for your review is an explanatory brochure that may be useful to you.

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

Enc.

cc: Anthony J. Annucci



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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Alexander F. Treadwell

January 26, 2000

Executive Director

Robert J. Freeman

Mr. Henry G. McComb
The Target Exchange Inc.
203 Champlain Drive
Plattsburgh, NY 12901-4203

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

Dear Mr. McComb:

I have received your letter of December 15 in which you raised issues concerning rights of access to the payroll record required to be maintained pursuant to §87(3)(b) of the Freedom of Information Law. You wrote that some agencies have suggested that the record in question is not available if it is sought for a commercial purpose.

In this regard, I offer the following comments.

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

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

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

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

"Each agency shall maintain...

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

As such, a payroll record that identifies all officers or employees by name, public office address, title and salary must be prepared to comply with the Freedom of Information Law. Moreover, I believe that the payroll record described above must be disclosed for the following reasons.

Pertinent to the matter is §87(2)(b) of the Freedom of Information Law, which permits an agency to withhold record or portions of records when disclosure would result in "an unwarranted invasion of personal privacy." However, payroll information has been found by the courts to be available [see e.g., Miller v. Village of Freeport, 379 NYS 2d 517, 51 AD 2d 765, (1976); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NYS 2d 954 (1978)]. Miller dealt specifically with a request by a newspaper for the names and salaries of public employees, and in Gannett, the Court of Appeals held that the identities of former employees laid off due to budget cuts, as well as current employees, should be made available. In addition, this Committee has advised and the courts have upheld the notion that records that are relevant to the performance of the official duties of public employees are generally available, for disclosure in such instances would result in a permissible as opposed to an unwarranted invasion of personal privacy [Gannett, supra; Capital Newspapers v. Burns, 109 AD 2d 292, aff'd 67 NY 2d 562 (1986); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980; Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); and Montes v. State, 406 NYS 664 (Court of Claims 1978)]. As stated prior to the enactment of the Freedom of Information Law, payroll records:

"...represent important fiscal as well as operation information. The identity of the employees and their salaries are vital statistics kept in the proper recordation of departmental functioning and are the primary sources of protection against employment 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.

Second, in general, the reasons for which a request is made or an applicant's potential use of records are irrelevant, and it has been held that if records are accessible, they should be made equally available to any person, without regard to status or interest [see e.g., M. Farbman & Sons v. New York City, 642 NY 2d 75 (1984) and Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. However, §89(2)(iii) of the Freedom of Information Law permits an agency to withhold "lists of names and addresses if such lists would be used for commercial or fund-raising purposes" on the ground that disclosure would constitute an unwarranted invasion of personal privacy. Due to the language of that provision, the intended use of a list of names and addresses is relevant, and case law indicates that an agency can ask why a list of names and addresses has been

Mr. Henry G. McComb
January 26, 2000
Page 3-

requested [see Goldbert v. Suffolk County Department of Consumer Affairs, Sup. Ct., Suffolk Cty., (September 5, 1980)].

Nevertheless, §89(6) of the Freedom of Information Law states that:

"Nothing in this article shall be construed to limit or abridge any otherwise available right of access at law or in equity to any party to records."

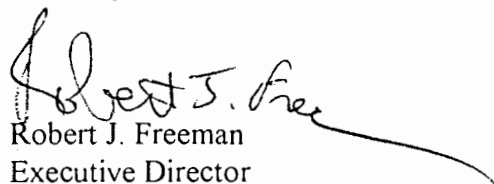
As such, if records are available as of right under a different provision of law or by means of judicial determination, nothing in the Freedom of Information Law can serve to diminish rights of access. In this instance, since the payroll information in question was found to be available prior to the enactment of the Freedom of Information Law, I believe that it must be disclosed, regardless of the intended use of the records. Consequently, in my view, the payroll record required to be maintained should be disclosed to any person, irrespective of its intended use.

Third, from my perspective, the provision dealing with lists of names and addresses is intended to enable agencies to withhold lists that would be used to solicit individuals at their residences. In the case of the payroll record, however, the residence address is not included; rather the record includes the "public office address", the location where public employees carry out their governmental duties. In my view, there is nothing "personal" or intimate about the work location of a public employee, and that kind of information should be made available on request.

Lastly, the Freedom of Information Law does not require that records be posted or that an agency disseminate records on its own initiative. The agency's obligation, in my opinion, involves disclosing records, on request, in accordance with applicable 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

FOIA No - 11929

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Alexander F. Treadwell

Executive Director

Robert J. Freeman

January 27, 2000

Mr. Bobby Smith
97-A-0301
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 facts presented in your correspondence.

Dear Mr. Smith:

I have received your letter of December 15 in which you sought assistance in obtaining a list of the jobs that you had between 1980 and 1995. From my perspective, it is likely that you may be the best source of that information. In this regard, I offer the following comments.

First, it is noted at the outset that the statute within the advisory jurisdiction of the Committee on Open Government, the Freedom of Information Law, is applicable to records maintained by state and local government in New York. As such, it does not apply to private companies or organizations.

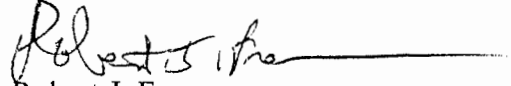
Second, I do not believe that there is any state agency that would maintain information concerning every position or job held by an individual during that person's working lifetime. While the Department of Taxation and Finance maintains records concerning an individual's earnings, those records are not kept forever, and I believe that most of those covering the period of your interest would have been destroyed.

The only likely governmental source of the information sought in my view would be the Social Security Administration. That agency would have a record of your contributions to social security based on deductions from payments made to you and may have records indicating where you worked. The Social Security Administration is a federal agency subject to the federal Freedom of Information and Privacy Acts. To seek records from that agency, a request may be directed to the FOIA Office, Room 3-A-6 Operations, 6401 Security Blvd., Baltimore, MD 21235-6401.

Mr. Bobby Smith
January 27, 2000
Page - 2 -

I hope that I have been of assistance.

Sincerely,

A handwritten signature in black ink, 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-40-11930

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

Executive Director

Robert J. Freeman

January 27, 2000

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 facts presented in your correspondence.

Dear Mr. McAllister:

I have received your letter of December 17 in which you sought guidance concerning a delay in response to your request for records at your facility.

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

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

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

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

Mr. Charles McAllister
January 27, 2000
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 hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:tt

cc: Kim Wood



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

7021.10 - 11931

Committee Members

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January 27, 2000

Executive Director

Robert J. Freeman

Mr. George Rand

[REDACTED]

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

Dear Mr. Rand:

I have received your letter of December 14 in which you sought my views concerning a response to a request for "salary data" by the Lynbrook School District. In short, you were informed that the District had "begun to assemble the appropriate data" and that it "anticipate[d] being able to respond within sixty working days" of the date of the acknowledgment of your request.

From my perspective, the District is required to maintain a record containing the information of your interest on an ongoing basis. Consequently, a delay in disclosure of sixty days would in my opinion be unreasonable and inconsistent with the thrust of the law. In this regard, I offer the following comments.

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

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

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

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

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

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

If a request is voluminous and a significant amount of time is needed to locate records and review them to determine rights of access, a delay, in view of those and perhaps the other kinds of factors mentioned earlier, might be reasonable. On the other hand, if a record or report is clearly public and can be found easily, there would appear to be no rational basis for delaying disclosure. 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, 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..."

Mr. Henry G. McComb
January 26, 2000
Page 3-

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

"Each agency shall maintain...

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

As such, a payroll record that identifies all officers or employees by name, public office address, title and salary must be prepared and "maintained", presumably on a continual basis, to comply with the Freedom of Information Law. Moreover, I believe that the payroll record described above must be disclosed for the following reasons.

Pertinent to the matter is §87(2)(b) of the Freedom of Information Law, which permits an agency to withhold record or portions of records when disclosure would result in "an unwarranted invasion of personal privacy." However, payroll information has been found by the courts to be available [see e.g., Miller v. Village of Freeport, 379 NYS 2d 517, 51 AD 2d 765, (1976); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NYS 2d 954 (1978)]. Miller dealt specifically with a request by a newspaper for the names and salaries of public employees, and in Gannett, the Court of Appeals held that the identities of former employees laid off due to budget cuts, as well as current employees, should be made available. In addition, this Committee has advised and the courts have upheld the notion that records that are relevant to the performance of the official duties of public employees are generally available, for disclosure in such instances would result in a permissible as opposed to an unwarranted invasion of personal privacy [Gannett, supra; Capital Newspapers v. Burns, 109 AD 2d 292, aff'd 67 NY 2d 562 (1986) ; Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980; Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975) ; and Montes v. State, 406 NYS 664 (Court of Claims 1978)]. As stated prior to the enactment of the Freedom of Information Law, payroll records:

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

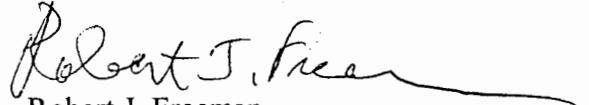
In short, a record identifying agency employees by name, public office address, title and salary must in my view be maintained and made available.

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

Mr. Henry G. McComb
January 26, 2000
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 across the width of the typed name below it.

Robert J. Freeman
Executive Director

RJF:jm

cc: Clara Goldberg, Assistant Superintendent



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11932

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January 27, 2000

Executive Director

Robert J. Freeman

Hon. Judith Weintraub
Village Clerk
Village of Pleasantville
80 Wheeler Avenue
Pleasantville, NY 10570

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

Dear Ms. Weintraub:

I have received your letter of December 20, as well as the materials attached to it. The correspondence indicates that a woman requested certain records on November 15 pertaining to herself and her spouse, both whom live at the same address, and that the Village disclosed the records sought to extent required by law on November 19. A request for the same records was made by the spouse on December 3. In addition, he requested "notes and transcripts of telephone calls, recordings, digitally stored materials, and photographs and pictorial matter" relating to himself and his wife.

You have asked whether you are required "duplicate the same information for Mr. Falkoff that [you] just gave to Mrs. Falkoff", whether the Police Department is "required to go through hours & hours of recordings to duplicate the calls" that have been requested, and whether the "telephone recordings" are available.

First, having reviewed both requests, it appears that the spouses are acting on behalf of one another and that their interests are the same. If that is so, I do not believe that the Village would be required to make the same records available twice. Based on the decision rendered in Moore v. Santucci [151 AD2d 677 (1989)], if a record was made available to an individual or his or her representative, there must be a demonstration that neither that person nor the representative 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).

Second, with respect to searching through hours of recordings to locate the passages falling within the scope of the request, significant may be the extent to which the applicant has "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.

I am unaware of the number, frequency or dates of calls that might have been made relating to the individuals in question. If they occurred over a lengthy period of time and there is no way of locating the portions of the recordings pertaining to those individuals without listening to hours of tape, it is likely that the request would not meet the standard of "reasonably describing" the records.

On the other hand, if calls pertaining to the individuals were made during specific or identifiable times, the ability to locate portions of the records may not be burdensome. In that event, I believe that the Village would be required to locate those portions of the recordings.

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

Insofar as calls may have been made by the two individuals, I believe that they would be available. In short, they could not invade their own privacy and would be familiar with the calls that they made themselves. On the other hand, if calls about either of the two individuals were made by others, i.e., in the nature of complaints, it has consistently been advised that information identifying those persons 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.

In the context of records maintained by police departments, §87(2)(e) may be pertinent, for it 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."

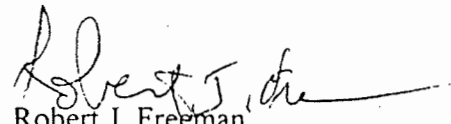
Since the request refers to notes that may have been prepared, those kinds of records would constitute "intra-agency" materials that fall within the scope of §87(2)(g). Insofar as those kinds of materials consist of impressions, recommendations, opinions and the like, they may be withheld.

Lastly, the Freedom of Information Law pertains to existing records. Section 89(3) provides in part that an agency is not required to create a record in response to a request. Therefore, if, for example, there are no notes or written transcripts of recordings, the Village would not be required to prepare new records or transcripts on behalf of an applicant.

Hon. Judith Weintraub
January 27, 2000
Page 4-

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

Sincerely,


Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11933

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Executive Director

Robert J. Freeman

January 31, 2000

Mr. Daniel Case

[REDACTED]

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

Dear Mr. Case:

I have received your undated letter, which reached this office on December 20, as well as the materials attached to it. You have raised issues concerning a denial of access to records by the Empire State Development Corporation (ESDC).

Attached to your letter is a copy of a news release indicating that the Governor had signed a lease agreement with a particular company to operate Stewart Airport. Notwithstanding the foregoing, ESDC denied access to the lease on the basis of §87(2)(c) of the Freedom of Information Law. That provision, 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." You stated in your letter that you found it "remarkable" that the agency did not rely upon §163(9)(c) of the State Finance Law, which, in your words, "has long been that agency's justification for withholding the requested information." That provision pertains to "Purchasing services and commodities" by state agencies and typically is applicable in a request for proposal (RFP) process. It states in relevant part that: "Disclosure of the content of competing offers other than statistical tabulations of bids received in response to an invitation for bids, or of any clarifications of or any revisions thereto shall be prohibited prior to award."

When §163(9)(c) applies, it removes records from rights of access otherwise conferred by the Freedom of Information Law. That latter statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. The first ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." Therefore, prior to an award, §163(9)(c) serves to exempt the kind of record at issue from disclosure.

As you may be aware, the execution of an agreement may involve several steps, one of which involves choosing the winning submitter in response to an RFP; another, as in this instance, may involve the signing of a lease. However, after the lease is signed, there may be negotiations on the part of the signatories, as well as approvals required by the State Comptroller and the Attorney General.

Since I am not an expert in the area of procurement or purchasing by state agencies, I have discussed with an expert the issue of what constitutes an "award" as that term is used in the State Finance Law, and a "contract award" as that phrase appears in the Freedom of Information Law. It was advised that an "award" involves the situation in which an agency selects a vendor, or as in this instance, a lessee, in the bid or RFP process, and the parties sign an initial agreement. Once there is an award, the prohibition against disclosure imposed by the State Finance Law no longer applies. That may be reason for the absence of reliance on §163(9)(c) by ESDC. A "contract award", according to the expert, may not be made until the requisite approvals have been obtained and the contract is executed. As such, an "award" pertains to an initial agreement, i.e., the of the signing of the lease, and a "contract award" would occur later in the process when the agreement is final in all respects.

The distinction between the two appears to be especially relevant in the RFP process and the application of §87(2)(c). It is my understanding the process of awarding contracts following the submission of bids is different from that involving RFP's. With respect to bids, in general, so long as the bids meet the requisite specifications, an agency must accept the low bid and enter into a contract with the submitter of the low bid. When an agency seeks proposals by means of RFP's, there is no obligation to accept the proposal reflective of the lowest cost; rather, to obtain the best value, the agency may engage in negotiations with the submitters regarding cost as well as the nature or design of goods or services, or the nature of the project in accordance with the goal sought to be accomplished. As such, the process of evaluating RFP's is generally more flexible 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.

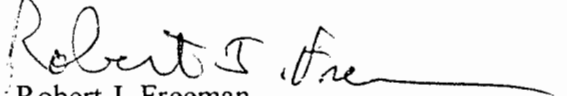
In the case of RFP's, even though the deadline for submission of proposals might have passed, an agency may engage in negotiations or evaluations with the submitters resulting in alterations in proposals or costs. Even after a submitter has been named and an "award" is made, the parties may and often will engage in a series of negotiations. As such, despite having made an award, the process may not be final, and the initial agreement may be altered or even rejected by the Comptroller or the Attorney General. Consequently, insofar as disclosure prior to the execution or consummation of the

Mr. Daniel Case
January 31, 2000
Page - 3 -

contract would impair the contracting process or the ability of an agency to reach an optimal agreement on behalf of the public, I believe that an agency may deny access.

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: Lawrence Gerson
Anita W. Laremont



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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February 2, 2000

Executive Director

Robert J. Freeman

Ms. Gina Edwards
Reporter
Naples Daily News
1075 Central Avenue
Naples, FL 34102

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

Dear Ms. Edwards:

As you are aware, I have received your letter of December 29 and the materials pertaining to it. You have sought assistance concerning requests made on behalf of the Naples, Florida *Daily News* for "discovery material presented to defense attorneys" by the Office of the New York County District Attorney relating to certain pending criminal cases. One of the requests was denied, and it is assumed that the other would be denied for the same reasons. Specifically, the District Attorney's records access officer wrote that:

"...disclosure of these records would interfere with law enforcement investigations and judicial proceedings. See Matter of Pittari v. Pirro, ___ A.D.2d ___, (2d Dept. 1999), N.Y.L.J., August 20, 1999, at 21, col.3). In addition, this investigation is an ongoing investigation that is being conducted by the New York County District Attorney's Office. Disclosure of records would interfere with a law enforcement investigation, would identify a confidential source and disclose confidential information relating to a criminal investigation, and reveal criminal investigative techniques and procedures. See Public Officers Law §87(2)(e)(i)(iii) and (iv)."

From my perspective, although some elements of the records sought might justifiably be withheld, the remainder must be disclosed. In this regard, I offer the following comments.

First, I believe that there is a distinction between rights of access conferred upon the public under the Freedom of Information Law and rights conferred upon a defendant via the use of

discovery, and 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 discovery 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].

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 NY2d 267 (1996)].

In sum, I believe that the Freedom of Information Law imposes a duty to disclose records, as well as the capacity to withhold them, irrespective of the status or interest of the person requesting them. To be distinguished are other provisions of law that may require disclosure based upon one's status, e.g., as a defendant, and the nature of the records or their materiality to a proceeding.

Consequently, the materials made available in discovery to a defendant through discovery may not be available in their entirety to the public under the Freedom of Information Law. Conversely, there may be instances in which records are beyond the scope of discovery, but which may be available under the Freedom of Information Law.

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.

The Court of Appeals reiterated its general view of the intent of the Freedom of Information Law in Gould, stating that:

"To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see*, Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" (*id.*, 275).

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

"...to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents (*Matter of Fink 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 Office of the District Attorney has engaged in a blanket denial of access in a manner which, in my view, is equally inappropriate. Again, 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 that 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).

In short, I believe that the basis for the denial of your appeal was incomplete and inadequate, and that the blanket denial of the request was inconsistent with law.

I am mindful of the decision cited by the records access officer, *Pittari v. Pirro*, *supra*, 696 NYS2d 167. Notwithstanding my disagreement with some aspects of the holding in that case, the facts presented there are different from those present in relation to your request. In *Pittari*, a request was made by a defendant under the Freedom of Information Law for "records compiled for law enforcement purposes 'pertaining to [his] arrest and prosecution'" (*id.*, 168). As you may be aware, §87(2)(e) of the Freedom of Information Law 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."

Based on the foregoing, only to the extent that the harmful effects of disclosure described in subparagraphs (i) through (iv) would arise could §87(2)(e) permit an agency to deny access.

The court in Pittaro emphasized that:

“[t]he question is whether the nature of the records sought and the timing of the FOIL request rendered those records exempt from disclosure under FOIL. The Court of Appeals, in *Matter of Fink v. Lefkowitz*, 47 N.Y.2d 567, 572, 419 N.Y.S.2d 467, 393 N.E.2d 463 noted:

‘[T]he 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’” (id., 169).

The “timing” in this instance is apparently different from that in Pittari. As I understand the matter, the defendant in that case sought records under the Freedom of Information Law *prior* to discovery, for the court found that “[i]f a criminal proceeding is pending, mandating FOIL disclosure would interfere with the orderly process of disclosure in the criminal proceeding set forth in CPL article 240” (id., 171). In contrast, you have requested records *after* discovery. Consequently, the harm sought to be avoided by the court in Pittari would no longer be a consideration.

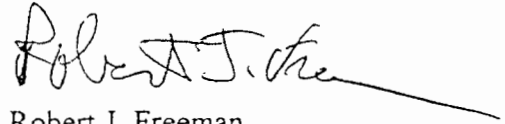
By disclosing records via discovery to defendants under Article 240 of the CPL, I believe that an agency effectively loses its ability to cite certain grounds for denial under the Freedom of Information Law, such as §87(2)(e). In short, by disclosing to a defendant, I believe that an agency has effectively negated any contention that disclosure to the public under the Freedom of Information Law would, for example, interfere with an investigation or judicial proceeding or identify a confidential source. As suggested earlier, however, there may be other grounds for denial that might be cited. For instance, while names of witnesses might have been made available via discovery to a defendant, disclosure to the public might constitute “an unwarranted invasion of personal privacy” pursuant to §87(2)(b) of the Freedom of Information Law and, therefore, be withheld. Similarly, although a defendant might obtain criminal history records regarding witnesses, it has been held that those records are exempt from disclosure to the public under the Freedom of Information Law (see Woods v. New York City Police Department, Sup. Ct., New York County, NYLJ, February 2, 1995 and Capital Newspapers v. Poklemba, Sup. Ct., Albany County, April 6, 1989)

For the reasons expressed above, the blanket denial of your request by the Office of the District Attorney was, in my view, inconsistent with law, and that agency is required to disclose the records sought, except to the extent that one or more of the grounds for denial, other than §87(2)(e), could justifiably be cited.

Ms. Gina Edwards
February 2, 2000
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:jm

cc: Gary J. Galperin
Nina Keller



STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11935

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Alexander F. Treadwell

February 2, 2000

Executive Director

Robert J. Freeman

Dr. Ellenmorris Tiegerman
School for Language and Communication
Development
100 Glen Cove Avenue
Glen Cove, NY 11542

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

Dear Ms. Tiegerman:

I have received your memorandum of December 28 in which you offered several points representing your understanding of our conversation in late December. In this regard, for purposes of clarification, 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..."

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

The provision dealing with the right to appeal a denial of access to records is found in §89(4)(a) of the Freedom of Information Law, which states in relevant part that:

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

Further, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), which govern the procedural aspects of the Law, state that:

"(a) The governing body of a public corporation or the head, chief executive or governing body of other agencies shall hear appeals or shall designate a person or body to hear appeals regarding denial of access to records under the Freedom of Information Law.

(b) Denial of access shall be in writing stating the reason therefor and advising the person denied access of his or her right to appeal to the person or body established to hear appeals, and that person or body shall be identified by name, title, business address and business telephone number. The records access officer shall not be the appeals officer" (section 1401.7).

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.

You referred to the distinction in rights of access between advice or opinions, for example, and factual information. It is emphasized that that consideration arises only in context of communications within an agency or between or among agencies of state and local government. Those kinds of communications are characterized in §87(2)(g) of the Freedom of Information Law as "inter-agency or intra-agency materials." That provision permits an agency withhold records that:

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

Dr. Ellenmorris Tiegerman
February 2, 2000
Page 3--

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

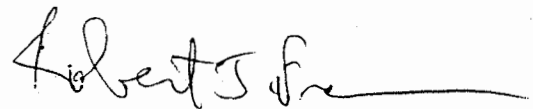
It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those 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 emphasize that some factual information contained within inter-agency or intra-agency materials might justifiably be withheld. For instance, insofar as internal government documents include medical information, social security numbers or other items of a personal or intimate nature, they may be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see §87(2)(b)], even though they may be "factual." Similarly, there may be other instances in which records apparently available under subparagraphs (i) through (iv) of §87(2)(g) may be withheld in whole or in part based on the assertion of other exceptions.

Lastly, unless a statute prohibits disclosure, an agency may choose to disclose records, even if there is a basis for denial in accordance with the grounds for denial appearing in §87(2). Therefore, while an agency may withhold advice or opinions falling within the scope of §87(2)(g), it may, in its discretion, opt to disclose.

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



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AU-11936

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February 2, 2000

Executive Director

Robert J. Freeman

Ms. Rochelle J. Auslander
Donoghue, Thomas, Auslander & Drohan
Summit Corporate Park
2 Summit Court - Suite 104D
Fishkill, NY 12524

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

Dear Ms. Auslander:

I have received your letter of December 28 in which you sought an advisory opinion in your capacity as attorney for the Ellenville Central School District concerning a request made under the Freedom of Information Law. Your question is: "Are the ratings of 'satisfactory' or 'unsatisfactory' given to teachers for classroom evaluations to be considered 'final ratings', which have to be made available under FOIL, or are they opinions or perhaps 'interim ratings' which do not have to be made available under FOIL." You added that the evaluations and ratings at issue are not "annual reviews".

In this regard, from my perspective, the question may be answered based on the function of the ratings. The "annual reviews" to which you referred are not fully described. However, it appears that the outcome of those reviews would represent the District's final determination concerning an employee's performance. If that is so, and if the ratings prepared based on classroom evaluations represent a preliminary element used later in reaching a final determination concerning performance, I do not believe that there would be an obligation to disclose.

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.

Pertinent 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.

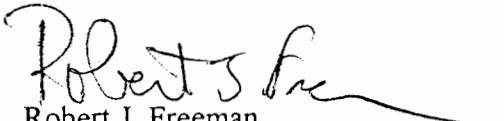
I point out that the Appellate Division, Second Department, has determined that records apparently analogous to those requested may be withheld, stating that:

"The lesson observation reports consist solely of advice, criticisms, evaluations, and recommendations prepared by the school assistant principal regarding lesson preparation and classroom performance. As such, these reports fall squarely within the protection of Public Officers Law § 87(2)(g)" [Elentuck v. Green, 202 AD2d 425, 608 NYS2d 701, 702 (1994)].

If the contents, nature or function of the records at issue are different or distinguishable from the records considered in Elentuck, the result, in terms of the ability to deny access, may also be different. If, however, they are indeed analogous to those found to be deniable, I believe that the records may be withheld.

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-11937

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February 4, 2000

Executive Director

Robert J. Freeman

Mr. Sam Pratt



The staff of the Committee on Open 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 December 29, as well as the materials attached to it. You have sought an opinion concerning a request for records made to the Hudson Community Development and Planning Agency ("the Agency"), which is part of the government of the City of Hudson.

Based upon a review of the correspondence, 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. From my perspective, the kinds of records in which you are interested would clearly be available, for none of the grounds for denial would be applicable.

Second, however, pertinent may be 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 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. It is possible that records falling within the scope of the request may be maintained in several locations by a variety of units within Agency or the City, and that those units maintain their records by means of different filing and retrieval methods. If an office maintains all of its records regarding grants, since the beginning of its existence, in a single file, it may be a simple task to locate the records. If, however, records are not maintained by subject, but rather are kept chronologically, locating the records might involve a search, in essence, for the needle in the haystack. Based on the holding by the State's highest court, an agency is not required to engage in that kind of effort.

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

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

Lastly, since you made reference to the subject matter list, I point out that §87(3) of the Freedom of Information Law states in relevant part that:

Mr. Sam Pratt
February 4, 2000
Page 3-

"Each agency shall maintain...

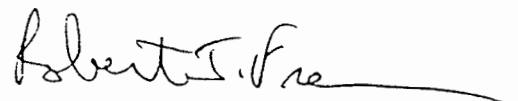
c. a reasonably detailed current list by subject matter, of all records in the possession of the agency, whether or not available under this article."

The "subject matter list" required to be maintained under §87(3)(c) is not, in my opinion, required to identify each and every record of an agency; rather I believe that it must refer, by category and in reasonable detail, to the kinds of records maintained by an agency. Further, the regulations promulgated by the Committee on Open Government state that such a list should be sufficiently detailed to enable an individual to identify a file category of the record or records in which that person may be interested [21 NYCRR 1401.6(b)]. I emphasize that §87(3)(c) does not require that an agency ascertain which among its records must be made available or may be withheld. Again, the Law states that the subject matter list must refer, in reasonable detail, to the kinds of records maintained by an agency, whether or not they are available.

It has been suggested that the records retention and disposal schedules developed by the State Archives and Records Administration at the State Education Department may be used as a substitute for the subject matter list. I would conjecture that there may be no separate subject matter list regarding records of the Agency and that the City's subject matter list may include records maintained by all units of City government.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Michael Vertetis
James J. Dolan, Jr.



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February 4, 2000

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 December 22 in which you sought an opinion concerning a request made under the Freedom of Information Law to the Division of State Police. Based on the Division's response, you sought "any database, statistics, or documents pertaining to unsolved murders and other suspicious unwitnessed deaths in Dutchess, Orange, Sullivan and Ulster Counties from 1980 to the present..." The Division indicated that its records "are not kept in the manner you have described, therefore your request does not reasonably a record maintained by this agency."

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

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

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

Mr. Bill VanAllen
February 4, 2000
Page 2-

requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency"])" (id. at 250).

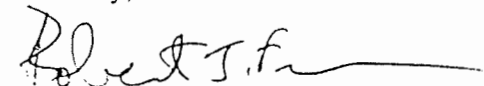
In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping system. In Konigsberg, it appears that the agency was able to locate the records on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

While I am unfamiliar with the recordkeeping systems of the Division, to extent that the records sought can be located with reasonable effort, I believe that the request would have met the requirement of reasonably describing the records. On the other hand, if the records are not maintained in a manner that permits their retrieval except by reviewing perhaps hundreds or even thousands of records individually in an effort to locate those falling within the scope of the request, to that extent, the request would not in my opinion meet the standard of reasonably describing the records. It is possible that records falling within the scope of the request may be maintained in several locations by a variety of units within the Division, and that those units maintain their records by means of different filing and retrieval methods. If an office maintains all of its records regarding unsolved murders in a single file, it may be a simple task to locate the records. If, however, records are maintained elsewhere or 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.

In short, insofar as the request fails to meet the standard of reasonably describing the records, I believe that it may be rejected by the Division.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Lt. Col. Raymond G. Dutcher



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AJ - 11939

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David A. Schulz
Joseph J. Seymour
Carole E. Stone
Alexander F. Treadwell

February 4, 2000

Executive Director

Robert J. Freeman

Mr. Jayson Thompson
95-A-3305
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 December 20 in which you sought guidance concerning the ability to gain access to photographs of injuries incurred at a facility in which you are no longer housed.

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, photographs of yourself would be available, for none of the grounds for denial would apply.

Second, it is unclear where the records in question are kept. It is my understanding that they are transferred with an inmate to a new facility. However, if you believe that they are kept in two locations, it is suggested that requests be made to both. As you may be aware, the regulations promulgated by the Department of Correctional Services indicate that requests may be made to the Superintendent or his designee.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
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February 4, 2000

Executive Director

Robert J. Freeman

Mr. Frank Rodriguez
93-A-9555
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. Rodriguez:

I have received your letter of December 23 concerning your requests for various items sought under the Freedom of Information Law.

In this regard, having reviewed your request, it is emphasized that the Freedom of Information Law pertains to agency records; it does not apply to physical evidence, such as items of clothing, cartridges, holsters and the like [see Allen v. Strojnowski, 129 AD2d 700 (1989)].

Insofar as a request made under that statute involves 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.

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. Frank Rodriguez

February 4, 2000

Page 2-

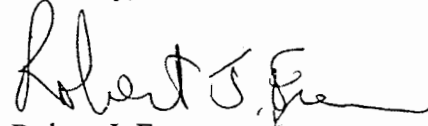
If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively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



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11941

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Carole E. Stone
Alexander F. Treadwell

February 4, 2000

Executive Director

Robert J. Freeman

E-Mail

TO: Janon Fisher <janon.fisher@apbnews.com>

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. Fisher:

I have received your recent communication concerning delays in responding to requests on the part of the New York City Police Department.

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

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

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

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

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

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

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

Mr. Janon Fisher
February 4, 2000
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.

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FODL-AO-11942

Committee Members

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Joseph J. Seymour
Carole E. Stone
Alexander F. Treadwell

February 4, 2000

Executive Director

Robert J. Freeman

Mr. Michael R. McCarthy
98-B-1992
Bare Hill Correctional Facility
Caller Box 20
Cady Road
Malone, NY 12953

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

Dear Mr. McCarthy:

I have received your letter of December 21 in which you described difficulty in obtaining medical records from the Department of Correctional Services.

In this regard, first, I believe that medical records are generally available to the subject of those records under the Public Health Law, §18, and if they are maintained by an agency, under the Freedom of Information Law as well [see Mantica v. NYS Department of Health, 94 NY2d 1 (1999)].

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. Michael R. McCarthy
February 4, 2000
Page -2-

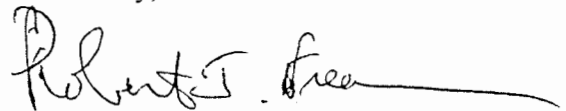
that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...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 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:jm

cc: Anthony J. Annucci
William McCann



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 11943

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Alexander F. Treadwell

February 4, 2000

Executive Director

Robert J. Freeman

Mr. Douglas T. Miller
95-B-1433
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. Miller:

I have received your letter of December 23 in which you sought assistance in relation to a request for "an investigation report" that was prepared prior to a facility grievance hearing.

In this regard, as a general matter the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Since I am unaware of the contents of the record in which you are interested, or the effects of its disclosure, I cannot offer specific guidance. Nevertheless, the following paragraphs will review the provisions that may be significant in determining rights of access to the record in question.

Of potential significance is §87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". That provision might be applicable relative to the deletion of identifying details in a variety of situations, i.e., where a record identifies a confidential source or a witness, for example.

Perhaps the most relevant provision concerning access to records maintained by law enforcement agencies is §87(2)(e), which permits an agency to withhold records that:

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

Mr. Douglas T. Miller

February 4, 2000

Page 2-

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

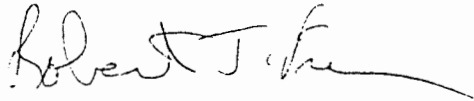
It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations 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. Douglas T. Miller
February 4, 2000
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: FOIL Officer



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11944

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Alexander F. Treadwell

February 7, 2000

Executive Director

Robert J. Freeman

Mr. Mitchell Agront
86-B-1183
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. Agront:

I have received your letter of December 28 in which you sought assistance in obtaining photographs of yourself relating to an incident that occurred at a correctional facility in 1989.

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to agency record, 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, photographs maintained by an agency would constitute "records" subject to rights conferred by the Freedom of Information Law.

Second, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, since the photographs are of you, none of the grounds for denial would apply.

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

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

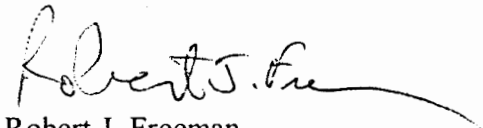
If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively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

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

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

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11945

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Alexander F. Treadwell

February 7, 2000

Executive Director

Robert J. Freeman

Mr. James Holmes
93-A-2031 D1-36
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. Holmes:

I have received your letter of December 28 concerning your requests for records directed to the Office of the Rensselaer County District Attorney and the City of Troy Police Department .

With respect to the former, in response to a request, you were informed that the records sought, "if they exist...would have been turned over to [your] defense attorney at the time of trial." It is your belief that the Office of the District Attorney did not search for or review the records. With respect to the latter, it has refused to disclose "police activity logs" on the ground that they are the officers' personal property and, therefore, are not subject to the Freedom of Information Law. You added that you "feel [I] know what's going on" and asked whether I have "been to any of the meetings with the D.A. in [your] cases about the FOIL."

In this regard, first, I know none of the details relating to your arrest or conviction and have no special knowledge of "what's going on." Further, I have never met with the Rensselaer County District Attorney or any person in his office with respect to your case or any other.

Second, based on the decision rendered in Moore v. Santucci [151 AD2d 677 (1989)], if a record was made available to you or your attorney, there must be a demonstration that neither you nor your attorney possesses the record in order to successfully obtain a second copy. Specifically, the decision states that:

"...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial

of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

In view of the foregoing, it is suggested that you contact your attorney to determine whether he or she continues to possess the record. If the attorney no longer maintains the record, he or she should prepare an affidavit so stating that can be submitted to the office of the district attorney.

Third, I believe that an agency must search for and review the contents of records that could be located to determine the extent to which the records may be withheld. Further, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

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

Lastly, the police activity logs are, in my opinion, agency records that fall within the coverage of the Freedom of Information Law. That statute pertains to agency records, and §86(4) defines the term "record" broadly to 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 decision rendered by the state's highest court to which you referred in your letter, the Court of Appeals held that police officers' memo books, also known as "police activity logs", are no

Mr. James Holmes

February 7, 2000

Page -3-

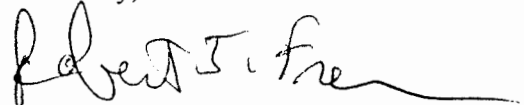
"records" that fell within the coverage of the Freedom of Information Law, despite a contention by the New York City Police Department that they were the personal property of police officers. In rejecting the Department's position, the Court found that:

"Activity logs are the leather-bound books in which officers record all their work-related activities, including assignments received, tasks performed, and information relating to suspected violations of law. Significantly, the Police Department issues activity logs to all its officers, who are required to maintain these memo books in the course of their regular duties and to store the completed books in their lockers; the officers are obligated to surrender the activity logs to superiors for inspection upon request; and the contents of the logs are meticulously prescribed by departmental regulation (*accord, Matter of Washington Post Co. v. New York State Ins. Dept.*, 61 N.Y.2d 557, 564-565, 475 N.Y.S.2d 263, 463 N.E.2d 604 [minutes of meetings of private insurance companies, required by regulation to be turned over to Insurance Department for inspection, are 'records' under FOIL]). Thus, although the officers generally maintain physical possession of the activity logs, they are nevertheless 'kept [or] held' by the officers for the Police Department, which places these documents squarely within the statutory definition of 'records' (*see, Matter of Encore Coll. Bookstores v. Auxiliary Serv. Corp.*, 87 N.Y.2d 410, 417, 639, N.Y.S.2d 990, 663 N.E.2d 302). Subject to any applicable exemption and upon payment of the appropriate fee (*see, Public Officers Law*, § 87[1][b][iii]), the activity logs are agency records available under provisions of FOIL" [*Gould v. New York City Police Department*, 89 NY2d 267, 278-279 (1996)].

In short, I believe that the police activity logs constitute agency records subject to rights conferred by the Freedom of Information Law. As you are aware, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer, Office of the Rensselaer County District Attorney
Records Access Officer, City of Troy Police Department



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 11940

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Alexander F. Treadwell

February 4, 2000

Executive Director

Robert J. Freeman

Mr. Frank Rodriguez
93-A-9555
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. Rodriguez:

I have received your letter of December 23 concerning your requests for various items sought under the Freedom of Information Law.

In this regard, having reviewed your request, it is emphasized that the Freedom of Information Law pertains to agency records; it does not apply to physical evidence, such as items of clothing, cartridges, holsters and the like [see Allen v. Strojnowski, 129 AD2d 700 (1989)].

Insofar as a request made under that statute involves 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.

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. Frank Rodriguez

February 4, 2000

Page 2-

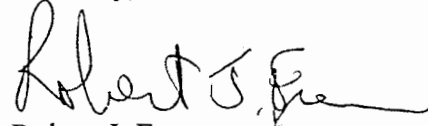
If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively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



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11941

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

February 4, 2000

Executive Director

Robert J. Freeman

E-Mail

TO: Janon Fisher <janon.fisher@apbnews.com>

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. Fisher:

I have received your recent communication concerning delays in responding to requests on the part of the New York City Police Department.

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

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

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

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

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

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

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

Mr. Janon Fisher
February 4, 2000
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.

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FODL-AO-11942

Committee Members

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Alexander F. Treadwell

February 4, 2000

Executive Director

Robert J. Freeman

Mr. Michael R. McCarthy
98-B-1992
Bare Hill Correctional Facility
Caller Box 20
Cady Road
Malone, NY 12953

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

Dear Mr. McCarthy:

I have received your letter of December 21 in which you described difficulty in obtaining medical records from the Department of Correctional Services.

In this regard, first, I believe that medical records are generally available to the subject of those records under the Public Health Law, §18, and if they are maintained by an agency, under the Freedom of Information Law as well [see Mantica v. NYS Department of Health, 94 NY2d 1 (1999)].

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. Michael R. McCarthy
February 4, 2000
Page -2-

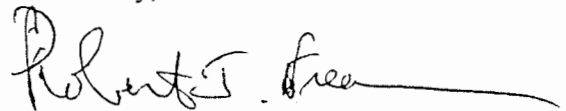
that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...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 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: Anthony J. Annucci
William McCann



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 11943

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Alexander F. Treadwell

February 4, 2000

Executive Director

Robert J. Freeman

Mr. Douglas T. Miller
95-B-1433
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. Miller:

I have received your letter of December 23 in which you sought assistance in relation to a request for "an investigation report" that was prepared prior to a facility grievance hearing.

In this regard, as a general matter the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Since I am unaware of the contents of the record in which you are interested, or the effects of its disclosure, I cannot offer specific guidance. Nevertheless, the following paragraphs will review the provisions that may be significant in determining rights of access to the record in question.

Of potential significance is §87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". That provision might be applicable relative to the deletion of identifying details in a variety of situations, i.e., where a record identifies a confidential source or a witness, for example.

Perhaps the most relevant provision concerning access to records maintained by law enforcement agencies is §87(2)(e), which permits an agency to withhold records that:

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

Mr. Douglas T. Miller

February 4, 2000

Page 2-

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

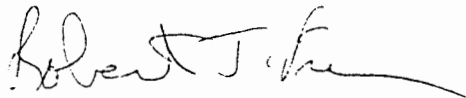
It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations 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. Douglas T. Miller
February 4, 2000
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: FOIL Officer



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11944

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Alexander F. Treadwell

February 7, 2000

Executive Director

Robert J. Freeman

Mr. Mitchell Agront
86-B-1183
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. Agront:

I have received your letter of December 28 in which you sought assistance in obtaining photographs of yourself relating to an incident that occurred at a correctional facility in 1989.

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to agency record, 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, photographs maintained by an agency would constitute "records" subject to rights conferred by the Freedom of Information Law.

Second, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, since the photographs are of you, none of the grounds for denial would apply.

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

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

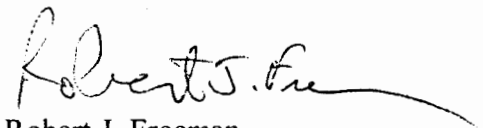
If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively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

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

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

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11945

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February 7, 2000

Executive Director

Robert J. Freeman

Mr. James Holmes
93-A-2031 D1-36
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. Holmes:

I have received your letter of December 28 concerning your requests for records directed to the Office of the Rensselaer County District Attorney and the City of Troy Police Department .

With respect to the former, in response to a request, you were informed that the records sought, "if they exist...would have been turned over to [your] defense attorney at the time of trial." It is your belief that the Office of the District Attorney did not search for or review the records. With respect to the latter, it has refused to disclose "police activity logs" on the ground that they are the officers' personal property and, therefore, are not subject to the Freedom of Information Law. You added that you "feel [I] know what's going on" and asked whether I have "been to any of the meetings with the D.A. in [your] cases about the FOIL."

In this regard, first, I know none of the details relating to your arrest or conviction and have no special knowledge of "what's going on." Further, I have never met with the Rensselaer County District Attorney or any person in his office with respect to your case or any other.

Second, based on the decision rendered in Moore v. Santucci [151 AD2d 677 (1989)], if a record was made available to you or your attorney, there must be a demonstration that neither you nor your attorney possesses the record in order to successfully obtain a second copy. Specifically, the decision states that:

"...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial

of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

In view of the foregoing, it is suggested that you contact your attorney to determine whether he or she continues to possess the record. If the attorney no longer maintains the record, he or she should prepare an affidavit so stating that can be submitted to the office of the district attorney.

Third, I believe that an agency must search for and review the contents of records that could be located to determine the extent to which the records may be withheld. Further, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

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

Lastly, the police activity logs are, in my opinion, agency records that fall within the coverage of the Freedom of Information Law. That statute pertains to agency records, and §86(4) defines the term "record" broadly to 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 decision rendered by the state's highest court to which you referred in your letter, the Court of Appeals held that police officers' memo books, also known as "police activity logs", are no

Mr. James Holmes

February 7, 2000

Page -3-

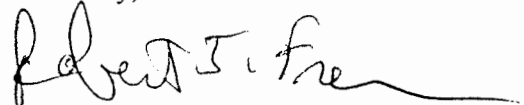
"records" that fell within the coverage of the Freedom of Information Law, despite a contention by the New York City Police Department that they were the personal property of police officers. In rejecting the Department's position, the Court found that:

"Activity logs are the leather-bound books in which officers record all their work-related activities, including assignments received, tasks performed, and information relating to suspected violations of law. Significantly, the Police Department issues activity logs to all its officers, who are required to maintain these memo books in the course of their regular duties and to store the completed books in their lockers; the officers are obligated to surrender the activity logs to superiors for inspection upon request; and the contents of the logs are meticulously prescribed by departmental regulation (*accord, Matter of Washington Post Co. v. New York State Ins. Dept.*, 61 N.Y.2d 557, 564-565, 475 N.Y.S.2d 263, 463 N.E.2d 604 [minutes of meetings of private insurance companies, required by regulation to be turned over to Insurance Department for inspection, are 'records' under FOIL]). Thus, although the officers generally maintain physical possession of the activity logs, they are nevertheless 'kept [or] held' by the officers for the Police Department, which places these documents squarely within the statutory definition of 'records' (*see, Matter of Encore Coll. Bookstores v. Auxiliary Serv. Corp.*, 87 N.Y.2d 410, 417, 639, N.Y.S.2d 990, 663 N.E.2d 302). Subject to any applicable exemption and upon payment of the appropriate fee (*see, Public Officers Law, § 87[1][b][iii]*), the activity logs are agency records available under provisions of FOIL" [*Gould v. New York City Police Department*, 89 NY2d 267, 278-279 (1996)].

In short, I believe that the police activity logs constitute agency records subject to rights conferred by the Freedom of Information Law. As you are aware, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer, Office of the Rensselaer County District Attorney
Records Access Officer, City of Troy Police Department



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 11946

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Alexander F. Treadwell

February 8, 2000

Executive Director

Robert J. Freeman

Hon. Thomas G. Clingan
Albany County Clerk
Albany County Court House - Rm. 128
16 Eagle Street
Albany, NY 12207-1019

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

Dear Mr. Clingan:

I have received your letter of January 3 in which you sought guidance concerning a request for "microfilms...of all mortgages and deeds recorded in the Albany County Clerk's office."

You indicated that your practice in responding to requests for microfilmed documents "not belonging to the County Clerk's office" involves charging on the basis of the actual cost of reproduction in a manner consistent with §87(1)(b)(iii) of the Freedom of Information Law. That provision authorizes agency to establish "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 issue is whether the fee for microfilmed records that are the records of the County Clerk should be based on the actual cost of reproduction in accordance with the language of the Freedom of Information Law quoted above, or §8019 of the Civil Practice Law and Rules (CPLR).

In this regard, I know of no judicial determination that has considered the issue that you raised, and from my perspective, the Freedom of Information Law is not the governing statute.

As you are aware, §§8018 through 8021 of the CPLR require that county clerks charge certain fees in their capacities as clerks of court and other than as clerks of court. Since those fees are assessed pursuant to statutes other than the Freedom of Information Law, I believe that they may exceed those permitted under the Freedom of Information Law. As stated in §8019, "The fees of a county clerk specified in this article shall supersede the fees allowed by any other statute for the same services...".

Subdivision (f) of §8019, entitled "Copies of records", states in relevant part that:

"The following fees, up to a maximum of thirty dollars per record shall be payable to a county clerk or register for copies of the records of the office except records filed under the uniform commercial code:

1. to prepare a copy of any paper or record on file in his office, except as otherwise provided, fifty cents per page with a minimum fee of one dollar."

If a record subject to subdivision (f) is reproduced on paper, i.e., by means of a photocopy machine, it would be clear in my opinion that the Freedom of Information Law would not be applicable and that a county clerk could charge "fifty cents per page with a minimum fee of one dollar..." If an equivalent record is no longer maintained on paper and is not reproduced onto a "page", that factor would not in my view transfer the basis for charging a fee to the Freedom of Information Law; rather, I believe that §8019(f) would continue to govern.

While I am unfamiliar with the legislative history of §8019, I would conjecture that your view is appropriate, that the Legislature in enacting that and other sections within Article 80 of the CPLR, intended that county clerks, in their capacities as clerks of court and otherwise, carry out certain duties and assess certain fees for performing particular services. When those provisions were initially enacted in 1963, the advances in information technology that have become commonplace could not have been envisioned. Nevertheless, if your contention concerning legislative intent is accurate, I believe that you could charge "fifty cents per page" for reproducing records in media other than paper equivalent to the charge that would be assessed for a "page" reproduced on paper.

It is reemphasized that the governing statute, in my view, is not the Freedom of Information Law, but rather §8019 of the CPLR, and it is suggested that you might seek the views of others, or that the County Attorney seek an opinion from the Attorney General.

I regret that I cannot be of greater assistance.

Sincerely,



Robert J. Freeman
Executive Director



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11947

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Joseph J. Seymour
Carole E. Stone
Alexander F. Treadwell

February 8, 2000

Executive Director

Robert J. Freeman

Mr. Thomas Cross
91-A-7183
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. Cross:

I have received your letter of December 28 concerning your unsuccessful efforts to obtain a "bluebook" from a court and the office of a district attorney. The latter has denied the request.

In this regard, I am unaware of the nature or content of the record of your interest. Without additional information, I cannot offer guidance concerning the denial of access by the district attorney. I point out, however, that the Freedom of Information Law 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."

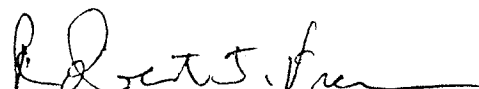
Based on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law (see e.g., Judiciary Law, §255) may grant broad public

Mr. Thomas Cross
February 8, 2000
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, appearing to read "Robert J. Freeman", written in black ink.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3111
FOIL-AO-11948

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

February 9, 2000

Executive Director

Robert J. Freeman

Mr. Michael J. Patane
Director
Great Swamp Conservancy, Inc.
8375 North Main Street
Canastota, NY 13032

The staff of the Committee 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. Patane:

As you are aware, I have received your letter of December 29. In your capacity as a director of the Great Swamp Conservancy, Inc., you indicated that you have encountered difficulty since 1997 in obtaining information relating to the Cowaselon Creek Watershed District (CCWD) Board. Your initial request directed to the Board appears to have been ignored, and you wrote that the Madison County Treasurer responded to your request for bills associated with the District by stating that: "We will supply them to you when we can." You added that the CCWD Board "does not advertise its meetings nor do they hold them in a public place."

In this regard, I offer the following comments.

First, when I raised questions concerning the means by which the Board was created, you referred to Article 5-D of the County Law. Within Article 5-D are §§299-o and 299-p. The former pertains to the establishment of a county watershed protection district and states in part that:

"After a watershed district has been created and a project has been approved for construction it shall be the responsibility of the county to require the watershed district to construct, operate, repair and maintain the project works and facilities in accordance with the plans and specifications and to accomplish and maintain the project and purpose for which the watershed district was created."

The latter states that the County Board of Supervisors is required to appoint or designate an administrative head or body to enable the district to carry out its powers and duties, which are equivalent to those of other districts created by a county in accordance with §§261 to 264 of the County Law.

In this instance, a board was established, and assuming that the CCWD Board consists of two or more members, I believe that it would be subject to the requirements of the Open Meetings Law. That statute pertains to meetings of public bodies, and §102(2) defines the phrase "public body" to include:

"...any entity for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

Because the CCWD Board was created by the County and, pursuant to Article 5-d, carries out certain powers and duties, I believe that it conducts public business and performs a governmental function for a public corporation, in this instance, Madison County. If that is so, the Board constitutes a "public body" required to comply with the Open Meetings Law.

Rights of access to meetings conferred by that statute have been construed expansively, and 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.*).

Further, the Open Meetings Law requires that notice be posted and given to the news media prior to every meeting of a public body, such as a board of education. Specifically, §104 of that statute provides that:

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

2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.

3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

Stated differently, if a meeting is scheduled at least a week in advance, notice of the time and place must be given to the news media and to the public by means of posting in one or more designated public locations, not less than seventy-two hours prior to the meeting. If a meeting is scheduled less than a week 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.

There is nothing in the Open Meetings Law that specifies where meetings may be held. The only provision that deals somewhat directly with the issue is §103(b), which states that public bodies must make or cause to be made reasonable efforts to hold meetings in locations that offer barrier-free access to physically handicapped persons. Perhaps equally pertinent is §100 of the Open Meetings Law, the Legislative Declaration, which states that:

"It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the

performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonwealth will prosper and enable the governmental process to operate for the benefit of those who created it."

As such, the Open Meetings Law confers a right upon the public to attend and listen to the deliberations of public bodies and to observe the performance of public officials who serve on such bodies.

From my perspective, every provision of law, including the Open Meetings Law, should be implemented in a manner that gives reasonable effect to its intent. Whether a meeting is held on public or private property, to give reasonable effect to the law, I believe that meetings should be held in locations in which those likely interested in attending have a reasonable opportunity to do so.

Second, with respect to access to records, the Freedom of Information Law 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 language quoted above, the County, as well as any municipal board, would constitute an agency falling 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. In my view, bills and similar records involving the receipt or expenditure of public monies would be available, for none of the grounds for denial would apply.

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)].

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, a suggested earlier, 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. As the Court of Appeals has asserted:

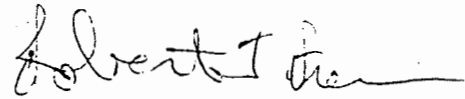
"...the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objectives cannot hope to be attained unless 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. Michael J. Patane
February 9, 2000
Page 6-

As you requested, copies of this opinion will be forwarded to the officials that you designated.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Rocco DiVeronica
John Gladney
Dave Taber
Chairman, Madison County Board of Supervisors



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11949

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February 10, 2000

Executive Director

Robert J. Freeman

Ms. Ray Miller

[REDACTED]

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

Dear Ms. Miller:

I have received your letter of January 3 in which you referred to difficulties in obtaining records, particularly the entirety of a complaint, from the New York City Department of Health.

In this regard, I offer the following comments.

First, identifying details apparently pertaining to the person who made a complaint were deleted from the record made available to you. From my perspective, it is likely that the deletions were proper.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. When a complaint is made to an agency, §87(2)(b) of the Freedom of Information Law is often relevant. That provision permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy."

With respect to such complaints, it has generally been advised that the substance of a complaint is available, but that those portions of the complaint which identify complainants may be deleted on the ground that disclosure would result in an unwarranted invasion of personal privacy. I point out that §89(2)(b) states that an "agency may delete identifying details when it makes records available." Further, the same provision contains five examples of unwarranted invasions of personal privacy, the last two of which include:

"iv. disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and

such information is not relevant to the work of the agency requesting or maintaining it; or

v. disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency."

In my view, what is relevant to the work of the agency is the substance of the complaint, i.e., whether or not the complaint has merit. The identity of the person who made the complaint is often irrelevant to the work of the agency, and in such circumstances, I believe that identifying details may be deleted. However, again, I believe that the remainder of the records must be disclosed.

Second, as I understand the matter, you have encountered delays in the Department's responses to your requests. Here I point out that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests 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:

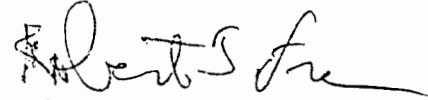
"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial,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

Ms. Ray Miller
February 10, 2000
Page 3-

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". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Wilfredo Lopez



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11950

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February 14, 2000

Executive Director

Robert J. Freeman

Mr. Leslie Latimer
87-A-8124
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. Latimer:

I have received your letter of December 29 in which you sought assistance in relation to requests for a variety of statistical and factual information directed to the State Commission of Correction. You also questioned whether there may be a way of avoiding the fee of twenty-five cents per photocopy when records are copied.

Based on a review of your correspondence, I offer the following comments.

First, it is emphasized that the Freedom of Information Law pertains to existing records. Section 89(3) of that statute provides in part that an agency 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. Leslie Latimer
February 14, 2000
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, Szikszay v. Buelow, 436 NYS 2d 558 (1981)].

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

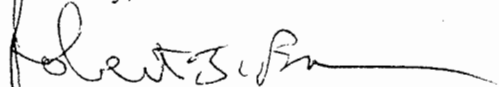
If the information that you seek does not now exist or cannot be retrieved or extracted without significant reprogramming, an agency would not, in my opinion, be obliged to develop new programs or modify its existing programs in an effort to generate the data of your interest.

Assuming that the statistical or factual data that you seek do exist or can be generated, I believe that they would be available, with one exception, for §87(2)(g)(i) of the Freedom of Information Law requires that "intra-agency materials" consisting of "statistical or factual tabulations or data" must be disclosed. The exception would involve one aspect of a request in which you sought, among other items, the names and race of certain inmates. In my view, the disclosure of names or other personally identifying details with their race would, if disclosed, constitute an unwarranted invasion of personal privacy [see Freedom of Information Law, §87(2)(b)]. Therefore, the Commission could, in my view, withhold portions of existing records to protect against such invasions of privacy.

Second, with respect to your objection to the fee of twenty-five cents per photocopy, I note that 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
cc: Mark Bonacquist



STATE OF NEW YORK
DEPARTMENT OF STATE
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FOIL-AO-11951

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Alexander F. Treadwell

February 14, 2000

Executive Director

Robert J. Freeman

Mr. Stephen Allen
86-A-4977
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. Allen:

I have received your letter of December 29 in which you complained that Thomas Antenen, Records Access Officer for the New York City Department of Correction, has not responded to your requests for records and asked that this office "direct" him to respond or to release the records sought.

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 "direct" an agency official to take certain action, enforce the law, 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. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding 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. Stephen Allen
February 14, 2000
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:

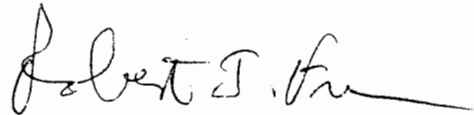
"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial,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

I believe that the person designated at the Department of Correction to determine appeals under the Freedom of Information Law is its General Counsel.

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
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Alexander F. Treadwell

February 14, 2000

Executive Director

Robert J. Freeman

Mr. Philip Earl 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 January 1 in which you asked whether the New York Freedom of Information Law requires "something comparable" to what is known as a "Vaughn index."

In this regard, I am unaware of any provision of the Freedom of Information Law or judicial decision that would require that a denial at the agency level identify every record withheld or a description of the reason for withholding each document be given. Such a requirement has been imposed under the federal Freedom of Information Act, which may involve the preparation of a so-called "Vaughn index" [see *Vaughn v. Rosen*, 484 F.2D 820 (1973)]. Such an index provides an analysis of documents withheld by an agency as a means of justifying a denial and insuring that the burden of proof remains on the agency. Again, I 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:

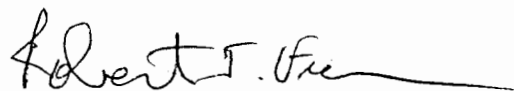
"All of these documents were inter-agency or intra-agency materials exempted under Public Officers Law section 87(2)(g) and some were materials the disclosure of which could endanger the lives or safety of certain individuals, and thus were exempted under Public Officers Law section 87(2)(f). The failure of the respondents and the Supreme Court, Westchester County, to disclose the underlying facts contained

Mr. Philip Earl King
February 14, 2000
Page -2-

within the ambit of [the] statutory exemptions' (Matter of Farbman & Sons v. New York City Health and Hosps. Corp., 62 NY 2d 75, 83; Matter of Fink v. Lefkowitz, 47 NY 2d 567, 571), did not constitute error. To make such disclosure would effectively subvert the purpose of these statutory exemptions which is to preserve the confidentiality of this information" [Nalo v. Sullivan, 125 AD 2d 311, 312 (1987)].

I hope that I have been of assistance.

Sincerely,

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
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Joseph J. Seymour
Carole E. Stone
Alexander F. Treadwell

February 14, 2000

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 December 31 and the materials attached to it. You have sought guidance concerning repeated efforts to obtain records from the Office of the Kings County District Attorney.

Based on a response by Mr. Paul Sacks, the records access officer, of apparent relevance is the decision rendered in Moore v. Santucci [151 AD2d 677 (1989)]. According to the holding in that case, 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).

Mr. Rafael Robles
February 14, 2000
Page 2-

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.

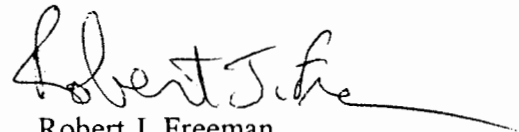
With respect to criminal history records, the general repository of those records is the Division of Criminal Justice Services. While the subject of a criminal history record may obtain such record from the Division, it has been held that criminal history records maintained by that agency are exempted 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 AD2d 554 (1996)]. In Woods, the Court upheld a denial of a request for the rap sheets "of numerous individuals who were not witnesses at [the petitioner's] trial." However, it distinguished its determination from the holding in Thompson, supra, in which it was found that a rap sheet must be disclosed when the request is "limited to the criminal convictions and any pending criminal actions against an individual called by the People as a witness in the petitioner's criminal trial." Therefore, insofar as your request involves records analogous to those found to be available in Thompson, I believe that the District Attorney would be required to disclose.

Finally, while records relating to convictions may be available from the courts or other sources, when charges are dismissed in favor of an accused, records relating to arrests that did not result in convictions are generally sealed pursuant to §160.50 of the Criminal Procedure Law.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Jodi L. Mandel
Paul Sacks



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11954

Committee Members

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Gary Lewi
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Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Carole E. Stone
Alexander F. Treadwell

February 15, 2000

Executive Director

Robert J. Freeman

Mr. Michael R. Kindred
97-A-6458
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. Kindred:

I have received your letter of January 3 in which you complained that requests for records made to the City of Albany Police Department and the Office of the Albany 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. Michael R. Kindred

February 15, 2000

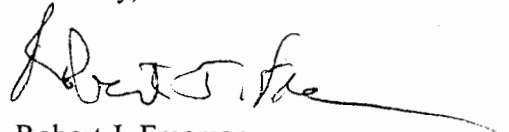
Page 2-

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 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: City Clerk
Hon. Sol Greenberg



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL AO -

FOIL AO - 11955

Committee Members

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

February 15, 2000

Executive Director

Robert J. Freeman

Mr. Stephen R. Grant
94-R-7072
Gowanda Correctional Facility
P.O. Box 311
Gowanda, NY 14070-0311

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

Dear Mr. Grant:

I have received your letter of December 28. As I understand the matter, you requested records from the City of Buffalo Police Department and were told that copies would be made available upon payment of a fee of \$2.75, which would indicate that eleven photocopies would be made. Most recently, however, you were informed that there would be eight pages, and you inferred from that response that three pages were being withheld. Further, you wrote that you made payment to the Department in 1995 and 1997.

In this regard, it is unclear in my opinion that records are being withheld. If, however, access to any of the records falling within the scope of your request are being denied, I believe that you should have been informed in writing of the denial, as well as the right to appeal. Since you informed Corporation Counsel that payment had already been tendered, it is assumed that the issue will have been resolved.

I note that you referred in your correspondence to the Personal Privacy Protection Law, §§91 to 99 of the Public Officers Law. That statute is inapplicable in the context of your request, for it pertains only to state agencies and specifically excludes units of local government from its coverage [see definition of "agency", §92(1)].

Lastly, for future reference, 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:

Mr. Stephen Grant

February 15, 2000

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..."

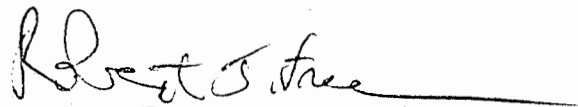
If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: K. Plesac

FOI Appeals Officer, Office of Corporation Counsel



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

KOEL-AD-11956

Committee Members

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David A. Schulz
Joseph J. Seymour
Carole E. Stone
Alexander F. Treadwell

February 16, 2000

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 3 in which you questioned the propriety of seeking records under the Freedom of Information Law from a court.

In this regard, 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."

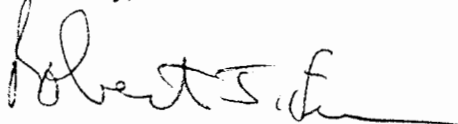
Based on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law (see e.g., Judiciary Law, §255; Uniform Justice Court Act, §2019-a) may 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. James McCoy
February 16, 2000
Page 2-

It is suggested that a request for court records 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 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-11957

Committee Members

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

February 16, 2000

Executive Director

Robert J. Freeman

Mr. Paul Priore



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

Dear Mr. Priore:

I have received your letter of January 3 in which you sought my views concerning rights of access to records that you requested from the New York City Department of Parks and Recreation. The request involves the "personnel file" of an assistant commissioner, that person's "office files", and the payroll record and subject matter list required to maintained pursuant to 87(3) of the Freedom of Information Law.

In this regard, I offer the following comments.

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

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

Often significant 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. 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].

Also pertinent is §87(2)(g), which authorizes an agency to withhold records that:

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

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

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

In short, some aspects of personnel records are likely available under the law, while others could be withheld.

Third, from my perspective, your request for office files would not likely meet the standard of "reasonably describing" the records as required by §89(3) of the Freedom of Information Law. There are hundreds, if not thousands of files in an my office, and I would conjecture that in the office of an assistant commissioner of a large agency, the finding would be the same. I note that it has been

held that in order to reasonably describe the records, an applicant must provide sufficient detail to enable agency staff to locate and identify the records sought [see Konigsberg v. Coughlin, 68 NY2d 245 (1986)]. In the context of your request, there is no indication of the nature or subject matter of the records of your interest.

Lastly, it is clear in my view that the payroll record and subject matter list must be maintained on an ongoing basis and made available by the Department. By way of background, with certain exceptions, the Freedom of Information Law is does not require an agency to create records. Section 89(3) of the Law states in relevant part that:

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

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

"Each agency shall maintain...

(b) a record setting forth the name, public office address, title and salary of every officer or employee of the agency; and

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

Based on the foregoing, a payroll record that identifies all officers or employees by name, public office address, title and salary must be prepared to comply with the Freedom of Information Law. Moreover, I believe that a payroll list identifying employees, must be disclosed.

In analyzing rights of access, of primary relevance is §87(2)(b), of the Freedom of Information Law, which, again, 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)]. 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)].

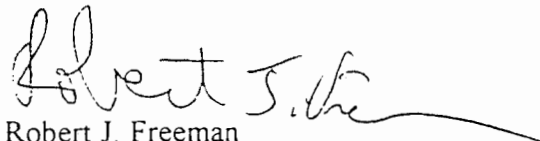
Mr. Paul Priore
February 16, 2000
Page 4-

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

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.

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: Laura LaVelle
Estelle Cooper



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11958

Committee Members

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

February 17, 2000

Executive Director

Robert J. Freeman

E-Mail

TO: Janusz Muszak [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. Muszak:

I have received your letter of January 8. Since the Committee on Open Government does not enforce the Freedom of Information Law, you asked "who does."

In this regard, as you are likely aware, if an initial requests for records is denied, the applicant has the right to appeal. If an appeal is denied, the applicant has the right to seek judicial review of the denial in accordance with §89(4)(b) of the Freedom of Information Law. That provision states in relevant part that:

"...a person denied access to a record in an appeal determination under the provisions of paragraph (a) of this subdivision may bring a proceeding for review of such denial pursuant to article seventy-eight of the civil practice law and rules. In the event that access to any record is denied pursuant to the provisions of subdivision two of section eighty-seven of this article, the agency involved shall have the burden of proving that such record falls within the provisions of such subdivision two."

It is noted that a court may award attorney's fees to the person challenging an agency's denial of access to records if certain conditions are met. Specifically, §89(4)(c) provides that:

"The court in such a proceeding may assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions

Mr. Janusz Muszak
February 17, 2000
Page 2-

of this section in which such person has substantially prevailed, provided, that such attorney's fees and litigation costs may be recovered only where the court finds that:

- i. the record involved was, in fact, of clearly significant interest to the general public: and
- ii. the agency lacked a reasonable basis in law for withholding the record."

I hope that I have been of assistance.

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AU-11959

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David A. Schulz
Joseph J. Seymour
Carole E. Stone
Alexander F. Treadwell

February 17, 2000

Executive Director

Robert J. Freeman

Ms. Anna Marie Mascolo
Associate Vice President
Nassau Community College
One Education Drive
Garden City, NY 11530-6793

The staff of the Committee on 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. Mascolo:

I have received your letter of January 5, as well as a copy of Nassau Community College's Rules and Regulations applicable to its Board of Trustees.

You referred to a portion of the Rules and Regulations indicating that a calendar must be published a week in advance of a meeting that includes proposed resolutions. Specifically, §4 states in relevant part that:

"The Secretary of the Board shall cause to publish a calendar on Tuesday of that week, 7 days prior to the proposed meeting of the Board, and said calendar shall include all duly presented calendar items complete in form and received by the Secretary pursuant to these Rules."

You indicated that the majority of the resolutions "involve expenditures for items costing more than \$15,000", and since the Board meets once a month, an attempt is made to place as many of those items on the calendar as possible. Nevertheless, you wrote that "from time to time an expenditure greater than \$15,000 will arise during the seven-day period prior to the Board meeting", and in those instances, they have been added to the calendar "with the Board's concurrence."

A member of the Board of Trustees has questioned whether the Board may add those items to the calendar in light of your Rules, and he has asked for "an official ruling from [me] on this matter."

Ms Anna Marie Mascolo

February 17, 2000

Page 2-

In this regard, it is emphasized that neither myself nor the Committee on Open Government is authorized to issue "rulings" that may be characterized as binding. This office is authorized to prepare advisory opinions, and the following comments should be considered advisory only.

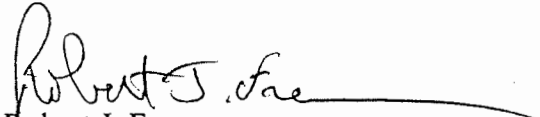
First, there is nothing in the Open Meetings Law or any other statute of which I am aware that requires that an agenda or calendar be prepared prior to a meeting. If a public body wants to adopt a policy or rule concerning its proceedings or impose requirements relating to agendas or calendars, certainly it may do so, so long as the policy or rule is reasonable and not inconsistent with law. Similarly, the Open Meetings Law does not require that if a calendar or agenda has been prepared, a public body must abide by it. Even in other jurisdictions in which there is a requirement that an agenda be prepared and disclosed prior to meetings, public bodies have the ability and flexibility to consider additional items under the heading of "new business", "other business" or "old business", for example.

Second, because the Open Meetings Law is silent with respect to the issue in question, I do not believe that this office clearly has advisory jurisdiction. Nevertheless, as I interpret the Board's Rules, §7 authorizes the Board to consider items that do not appear on the calendar. Specifically, that provision states in relevant part that: "No items shall be considered for action at any meeting of the Board which do not appear on the calendar *except by majority consent of all voting members of the Board*" (emphasis added). Based on the foregoing, I believe, as you indicated, that "with the board's concurrence", new items may be added to the calendar and the Board may consider those items, notwithstanding the absence of publication of those items in the calendar seven days prior to the meeting.

Lastly, I point out that §104 of the Open Meetings Law requires that every meeting be preceded by notice of the time and place, and that such notice be given to the news media and by means of posting. There is no requirement that an agenda, a calendar or the subject matter of items to be considered at a meeting be included in the notice.

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

Sincerely,


Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11960

Committee Members

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

February 17, 2000

Executive Director

Robert J. Freeman

Mr. James H. Eckl
Associate Attorney
NYS Department of Environmental Conservation
Division of Environmental Enforcement
Bureau of State Superfund & Voluntary Cleanup
Room 410A
50 Wolf Road
Albany, NY 12233-5550

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

Dear Mr. Eckl:

I have received your letter of January 7 and the materials attached to it. You have sought my views concerning the propriety of a request purportedly made under the Freedom of Information Law.

Among the enclosures is a request for "all records" involving some twenty-six areas. In most, the applicant sought all records "tending to support" a particular statement, or "utilized", "used" or "relating to" various activities of the Department of Environmental Conservation. You have contended that the kinds of requests described would "amount to an interrogatory" and would, if honored, reveal an agency's "thought-processes" and, potentially, its strategy in an administrative or judicial proceeding.

From my perspective, a request for records "tending to support" a statement is not a request for records as envisioned by the Freedom of Information Law, for a response would involve making a series of judgments based on opinions, some of which would be subjective, mental impressions, the strength of one's memory, and perhaps legal research. For instance, in a situation in which an individual sought provisions of law that might have been "applicable" in governing certain activity, it was advised that the request was inappropriate. Specifically, the request involved "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 added). In response, it was suggested that:

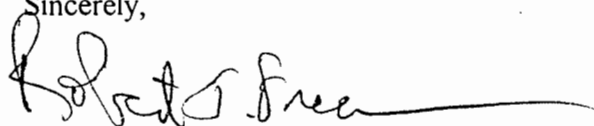
"...the foregoing is not a request for records. In essence, it is a request for an interpretation of law requiring a judgment. Any number of provisions of law might be "applicable", and a disclosure of some of them, based on one's knowledge, may be incomplete due to an absence of expertise regarding 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."

In like manner, ascertaining which records might "tend to support" a statement would involve an attempt to render a judgment regarding the use, utility, accuracy or value of records. As in the case of locating "applicable law", equally reasonable people, even those within the same agency, may reach different conclusions regarding which records tend to support a statement.

Further, there may be a variety of records from an array of sources used in and outside the scope of one's governmental duties that "tend to support" a statement, including curricular materials used in undergraduate, graduate or post graduate studies, library materials, magazine articles, documentaries, films (i.e., for training), professional journals and similar documentation read or seen over the course of years. Those kinds of materials may contribute to one's breadth of knowledge and may, consciously or otherwise, tend to support a position on a given subject. However, identifying or recalling those kinds of materials that may have resulted in the acquisition of knowledge and which even may tend to support a statement or position would, in my opinion, frequently involve an impossibility. Moreover, for purposes of the Freedom of Information Law, a request for such materials would not meet the standard of "reasonably describing" the records sought, for such a request would not enable the Department to locate and identify the records in the manner envisioned by that statute [see Konigsberg v. Coughlin, 68 NY2d 245 (1986)].

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-AU-11961

Committee Members

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

February 18, 2000

Executive Director

Robert J. Freeman

Mr. Charles Roda

Dear Mr. Roda:

I have received your letter of January 6, as well as the materials attached to it. You have complained with respect to requests for records made to the Division of Alcoholic Beverage and Control and the Office of the Inspector General. Having reviewed the correspondence, the basis for your complaint is, in my view, unclear, for both agencies responded to your requests. Nevertheless, for purposes of clarification, I offer the following comments.

First, it appears that you were frustrated due to the inability to locate an administrative proceeding in a court docket or similar record. An administrative proceeding is not conducted in a court; rather, in most instances it is conducted by a hearing officer or administrative law judge at an agency's premises. In general, like judicial proceedings, administrative proceedings are presumptively open to the public.

Second, it appears that you are dissatisfied due to the brevity of report supplied to you by the Office of the Inspector General. In this regard, I believe that various details relating to the report could justifiably have been withheld. 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. Several of the grounds for denial might be applicable with respect to records prepared in conjunction with an investigation.

Section 87(2)(b) permits an agency to withhold records to the extent that disclosure would result in "an unwarranted invasion of personal privacy." That provision might be asserted to protect the privacy of witnesses or persons questioned or interviewed, for example. Further, if a public employee is the subject of a charge, an allegation or a complaint, and it is determined that he or she did not engage in misconduct (which was the finding in this instance), it has been held that an agency may protect that person's privacy under the cited provision [see e.g., Herald Company v. City of Syracuse, 430 NYS2d 460 (1980)].

Also pertinent may be §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."

Various aspects of internal governmental communications may be withheld under §87(2)(g). That provision enables an agency to withhold records that:

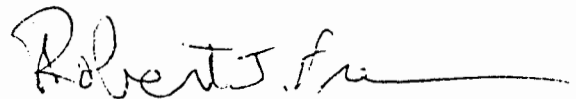
"are inter-agency or intra-agency materials which are not:

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

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

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: Maris C. Hart
Stephen Del Giacco



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 11962

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

February 22, 2000

Executive Director

Robert J. Freeman

Hon. Douglas Malone
Oswego County Legislator District 20
169 DeMass Road
Oswego, NY 13126

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

Dear Legislator Malone:

I have received your letter of January 11. You have sought an opinion concerning whether the Clerk of the Oswego County Legislature may require that you seek records by means of the Freedom of Information Law, even in situations in which you seek minutes of meetings of committees of the County Legislature, and you serve as a member of those committees.

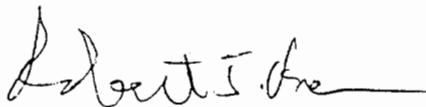
In this regard, in general, the Freedom of Information Law is intended to enable the public to request and obtain accessible records. Further, it has been held that accessible records should be made equally available to any person, without regard to status or interest [see e.g., Burke v. Yudelson, 368 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, or if the records are unquestionably public and readily accessible, the request might not be viewed as having been made under the Freedom of Information Law. In such a situation, if a request is reasonable, and in the absence of a rule or policy to the contrary, I believe that a member of the Legislature should not generally be required to resort to the Freedom of Information Law in order to seek or obtain records.

However, viewing the matter from a more technical perspective, one of the functions of a public body involves acting collectively, as an entity. A town board, as the governing body of a public corporation, generally acts by means of motions carried by an affirmative vote of a majority of its total membership (see General Construction Law, §41). In my view, in most instances, a board, including a supervisor, member acting unilaterally, without the consent or approval of a majority of the total membership of the board, has the same rights as those accorded to a member of the public, unless there is some right conferred upon a board member by means of law or rule. In such a case, a member seeking records could presumably be treated in the same manner as the public generally.

Hon. Douglas Malone
February 22, 2000
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: Clerk, Oswego County Legislature



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11963

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

February 23, 2000

Executive Director

Robert J. Freeman

Mr. Randolph Drakes

[REDACTED]

The staff of the Committee 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. Drakes:

As you are aware, I have received your letters of January 7 and 18, as well as a variety of related correspondence concerning your requests for information directed to the Banking Department.

In an effort to learn more of the matter and to offer guidance, I have contacted the Department on your behalf. Based on your correspondence and the information acquired from the Department, I offer the following comments.

First, it is emphasized that the Freedom of Information Law pertains to existing records. Section 89(3) of that statute provides in part that an agency need not create a record in response to a request. In this regard, several aspects of your request of October 12 involved information that did not exist in the form of a record. For instance, there apparently was no "list of senior field examiners in order and by time in the field" on a certain date; similarly there were no lists of "budgeted examiners' positions, including trainees, by division, unit and grade" relating to the months to which you referred. In those instances, the Department would not have been required to prepare lists in order to satisfy your request. I note, however, that I was told that it can be made known where any examiner may be stationed on any given day, and that such information is readily available. The Department does not, however, maintain the kind of lists that you requested.

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.

You indicated in a conversation on January 14 that portions of certain records were read aloud to you. To the extent that Department officials purposefully read and, therefore, disclosed the contents of records to you, I believe that they would have waived the ability to deny access pursuant to the grounds for denial.

Mr. Randolph Drakes
February 23, 2000
Page 2-

Third, you suggested that the Department was "hiding" behind §87(2)(g) of the Freedom of Information Law. While I have not seen the records to which you are referring, I was informed that they include evaluations of the strengths and weaknesses of examiners, as well as recommendations relating to and based on their performance. If that is so, I believe that §87(2)(g) would have been properly asserted. That provision permits an agency to withhold records that:

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

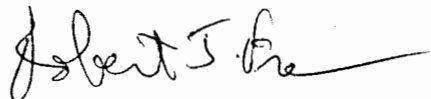
- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations; or
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

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.

From my perspective, the records at issue would clearly constitute "intra-agency materials". Further, evaluations concerning performance would, in my view, represent opinions that could justifiably be withheld. In like manner, insofar as they consist of recommendations or advice, for example, I believe that §87(2)(g) would serve as a basis for a denial of 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: Christine Cardi
Sara A. Kelsey
Ted McElroy



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11964

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

February 23, 2000

Executive Director

Robert J. Freeman

Mr. Jerry Mastan, Sr.

[REDACTED]

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

Dear Mr. Mastan:

As you are aware, I have received from you copies of the "Application for Public Access to Records" prepared by the Enlarged City School District of Watervliet, and the District's "Records Regulation." As a member of the Board of Education, you have asked that I review those documents and comment with respect to their adequacy.

In this regard, I offer the following comments.

First, by way of background, §87(1) of the Freedom of Information Law requires that the Committee on Open Government promulgate general rules and regulations concerning the procedural implementation of that statute, and the Committee has done so (see attached, 21 NYCRR Part 1401). In turn, the governing body of a public corporation, such as the board of education in a school district, is required to adopt its own regulations consistent with those promulgated by the Committee and with the Freedom of Information Law.

Having reviewed the District's regulations, I believe that are in conformity with the Committee's regulations and the Freedom of Information Law.

Second, I note that many agencies have developed forms or applications used by the public to seek records under the Freedom of Information Law, but that there is nothing in either the Law or the Committee's regulations concerning any particular form that must be used. Consequently, it has been advised that a member of the public cannot be required to use an agency's prescribed form, and that any request made in writing that "reasonably describes" the records sought [see Freedom of Information Law, §89(3)] should be sufficient.

Mr. Jerry Mastan, Sr.
February 23, 2000
Page 2-

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 extends to the right with a long horizontal flourish.

Robert J. Freeman
Executive Director

RJF:jm

cc: Superintendent of Schools



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-Ad-11965

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

February 23, 2000

Executive Director

Robert J. Freeman

Mr. Glenn Stewart
81-A-5821
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. Stewart:

I have received your letter of January 10 in which you sought guidance concerning unanswered requests for records. In this regard, I offer the following comments.

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

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

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

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

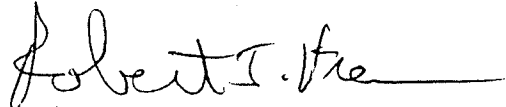
Mr. Glenn Stewart
February 23, 2000
Page 2-

"...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: Records Access Officer, Office of the Chemung County District Attorney
Records Access Officer, City of Elmira Police Department



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11966

Committee Members

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

February 23, 2000

Executive Director

Robert J. Freeman

Mr. C. Fitts
99-A-3133
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. Fitts:

I have received your letter of January 7 in which you sought guidance in obtaining copies of records at no cost.

In this regard, §87(1)(b)(iii) of the Freedom of Information Law authorizes agencies to charge up to twenty-five cents per photocopy when making duplicates of paper records up to nine by fourteen inches. I note that there is nothing in that statute that pertains to the waiver of fees and that 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)]. In short, despite your inability to pay, the Freedom of Information Law does not require agencies to reduce or waive fees.

It is suggested that you might borrow the amount needed or ask a friend or relation to seek a copy of the record 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 - 11967

Committee Members

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

February 23, 2000

Executive Director

Robert J. Freeman

Mr. Ricky Tejada
98-A-3357
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. Tejada:

I have received your letter of January 7 in which you sought assistance concerning a request for photographs taken at a facility that had been operated by the Division for Youth, whose functions are now carried out by the Office of Children and Family Services. The records were apparently withheld on the basis of §501-c of the Executive Law.

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

Relevant to the matter is the first ground for denial, §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is the provision to which you referred, §501-c of the Executive Law, which states that files pertaining to youths maintained by the Division for Youth (or its successor) are confidential and may be disclosed only in specified circumstances. That provision states in relevant part that:

"Records or files of youths kept by the division for youth shall be deemed confidential and shall be safeguarded from coming to the knowledge of and from inspection or examination by any person other than one authorized to receive such knowledge or to make such inspection or examination: (i) by the division pursuant to its regulations; (ii) or by a judge of the court of claims when such records are required for the trial of a claim or other proceeding in such court; or (iii) by a federal court judge or magistrate, a justice of the supreme

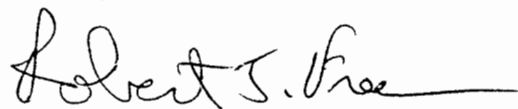
Mr. Ricky Tejada
February 23, 2000
Page 2-

court, a judge of the county court or family court, or a grand jury. No person shall divulge the information thus obtained without authorization to do so by the division, or by such justice, judge or grand jury."

Based on the foregoing, assuming that §501-c is applicable, it is likely that the records in question would be disclosed only pursuant to a court order.

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 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-11968

Committee Members

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David A. Schulz
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Carole E. Stone
Alexander F. Treadwell

February 23, 2000

Executive Director

Robert J. Freeman

Mr. Thomas Dallio
88-T-2364
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. Dallio:

I have received your letter of January 6 in which you referred to a request for "names of all staff employed at Southport Correctional Facility [that] has not been honored." You asked that this office take "authoritative action...to make sure that this agency...complies with the law..."

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

Second, §87(3)(b) of the Freedom of Information Law requires that each agency maintain a record that includes the name, public office address, title and salary of every officer or employee of the agency. As such, I believe that a list must be maintained that identifies all staff employed at the facility.

Third, if a request has been denied the applicant has the right to appeal the denial pursuant to §89(4)(a) of the Freedom of Information Law, which states in relevant part that:

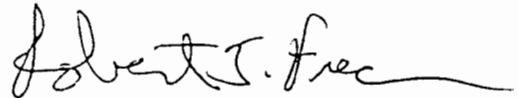
"any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal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

Mr. Thomas Dallio
February 23, 2000
Page -2-

For your information, the person designated at 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 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

cc: Superintendent, Southport Correctional Facility
Anthony J. Annucci



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL - A0 - 11967

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

February 23, 2000

Executive Director

Robert J. Freeman

Mr. Ricky Tejada
98-A-3357
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. Tejada:

I have received your letter of January 7 in which you sought assistance concerning a request for photographs taken at a facility that had been operated by the Division for Youth, whose functions are now carried out by the Office of Children and Family Services. The records were apparently withheld on the basis of §501-c of the Executive Law.

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

Relevant to the matter is the first ground for denial, §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is the provision to which you referred, §501-c of the Executive Law, which states that files pertaining to youths maintained by the Division for Youth (or its successor) are confidential and may be disclosed only in specified circumstances. That provision states in relevant part that:

"Records or files of youths kept by the division for youth shall be deemed confidential and shall be safeguarded from coming to the knowledge of and from inspection or examination by any person other than one authorized to receive such knowledge or to make such inspection or examination: (i) by the division pursuant to its regulations; (ii) or by a judge of the court of claims when such records are required for the trial of a claim or other proceeding in such court; or (iii) by a federal court judge or magistrate, a justice of the supreme

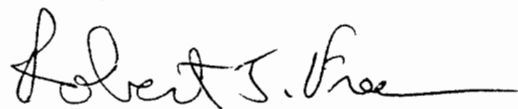
Mr. Ricky Tejada
February 23, 2000
Page 2-

court, a judge of the county court or family court, or a grand jury. No person shall divulge the information thus obtained without authorization to do so by the division, or by such justice, judge or grand jury."

Based on the foregoing, assuming that §501-c is applicable, it is likely that the records in question would be disclosed only pursuant to a court order.

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 to the right with a long horizontal stroke.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11968

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Joseph J. Seymour
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Alexander F. Treadwell

February 23, 2000

Executive Director

Robert J. Freeman

Mr. Thomas Dallio
88-T-2364
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. Dallio:

I have received your letter of January 6 in which you referred to a request for "names of all staff employed at Southport Correctional Facility [that] has not been honored." You asked that this office take "authoritative action...to make sure that this agency...complies with the law..."

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

Second, §87(3)(b) of the Freedom of Information Law requires that each agency maintain a record that includes the name, public office address, title and salary of every officer or employee of the agency. As such, I believe that a list must be maintained that identifies all staff employed at the facility.

Third, if a request has been denied the applicant has the right to appeal the denial pursuant to §89(4)(a) of the Freedom of Information Law, which states in relevant part that:

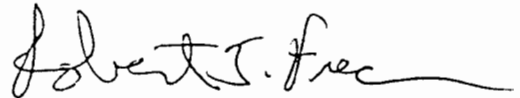
"any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal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

Mr. Thomas Dallio
February 23, 2000
Page -2-

For your information, the person designated at 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.

Robert J. Freeman
Executive Director

RJF:jm

cc: Superintendent, Southport Correctional Facility
Anthony J. Annucci



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February 23, 2000

Executive Director

Robert J. Freeman

Mr. Mike Kilian
Managing Editor
Observer-Dispatch
221 Oriskany Plaza
Utica, NY 13501

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

Dear Mr. Kilian:

I have received your letter of January 18, as well as the correspondence relating to it. You have sought an advisory opinion concerning "police and fire call records" that have been requested from the City of Utica. The records sought appear to be the equivalent of a "police blotter" and had been made available routinely by the City. However, you were informed that the information that had been disclosed was released "as a special courtesy requiring extra work by the Utica Police Department", that it was created by a computerized form that has since been discontinued", and that the "form you are accustomed to is no longer in existence, neither [sic] through computerization or manually." You were also told that the information sought must be "created", and that the City is not required to do so.

In this regard, as you are aware, the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that an agency need not create a record in response to a request. It is also important to note, however, that §86(4) of the Law defines the term "record" to include:

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

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

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

Often information stored electronically can be extracted by means of a few keystrokes on a keyboard. While some have contended that those kinds of minimal steps involve programming or reprogramming, and, therefore, creating a new record, so narrow a construction would tend to defeat the purposes of the Freedom of Information Law, particularly as information is increasingly being stored electronically. If electronic information can be extracted or generated with reasonable effort, if that effort involves less time and cost to the agency than engaging in manual deletions, it would seem that an agency should follow the more reasonable and less costly and labor intensive course of action.

While the City may have discontinued a computer application that had been used to generate the information of your interest, I would conjecture that, in order to carry out its duties effectively and guarantee the safety of its citizens, the City likely uses a different application or information system. If, under that system, the City has the ability to generate the data of your interest, I believe that it would be obliged to do so. It is suggested that you seek records reflective of the file layout or layouts used in the City's current electronic information systems.

Lastly, as suggested earlier, I believe that there is clearly a distinction between extracting information and creating it. If an applicant knows that an agency's database consists of 10 items or "fields", asks for items 1, 3 and 5, but the agency has never produced that combination of data, would it be "creating" a new record? The answer is dependent on the nature of the agency's existing computer programs; if the agency has the ability to retrieve or extract those items by means of its existing programs, it would not be creating a new record; it would merely be retrieving what it has the ability to retrieve in conjunction with its electronic filing system. An apt analogy may be to a filing cabinet in which files are stored alphabetically and an applicant seeks items "A", "L" and "X". Although the agency may never have retrieved that

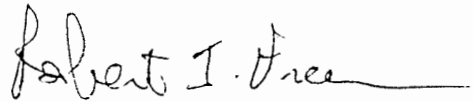
Mr. Mike Kilian
February 23, 2000
Page -3-

combination of files in the past, it has the ability to do so, because the request was made in a manner applicable to the agency's filing system.

In the context of your request, even though the electronic information system used to generate the data of your interest in the past is no longer used, if the City has the ability to generate equivalent data through a new or different system, for the reasons described above, I believe that it is required to do so.

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: Charles N. Brown
Benny D. Rotundo



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COMMITTEE ON OPEN GOVERNMENT

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Carole E. Stone
Alexander F. Treadwell

February 23, 2000

Executive Director

Robert J. Freeman

Mr. Anthony Carty
92-A-9491
Upstate Correctional Facility
P.O. Box 2000
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. Carty:

I have received your letter of January 10 in which you raised a series of questions.

You asked first how you may proceed with an appeal in a Tier III hearing. In this regard, the Committee on Open Government is authorized to provide opinions concerning the Freedom of Information Law. This office has neither the jurisdiction nor the expertise to respond to that question.

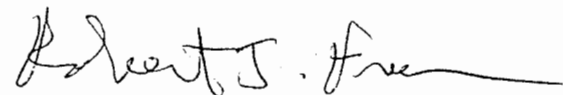
Second, if "confidential information is used at the hearing, but not disclosed", you asked whether the Freedom of Information Law is the "proper vehicle to seek access." I am not fully familiar with the kind of hearing to which you referred. However, it is my understanding that records used at such a hearing or submitted as evidence are available to the subject of the hearing based on principles of due process. If the records in question are not made available on request to you as a party to the hearing, it is suggested that you seek them by submitting a request pursuant to the Freedom of Information Law.

Lastly, you asked "at what stage is exhaustion considered allowing [you] to move on to an Article 78 motion." In the context of the Freedom of Information Law, if an initial request for records is denied, the person denied access has the right to appeal the denial pursuant to §89(4)(a) to the head of the agency or the person designated by the head of the agency to determine appeals. In this instance, the person so designate to determine appeals under the Freedom of Information Law is Anthony J. Annucci, Counsel to the Department. If the appeal is denied, the applicant would have exhausted his or her administrative remedies and may seek judicial review of the denial by initiating a proceeding under Article 78 of the Civil Practice Law and Rules.

Mr. Anthony Carty
February 23, 2000
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, 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
Carole E. Stone
Alexander F. Treadwell

February 23, 2000

Executive Director

Robert J. Freeman

Ms. Lee Lama



Mr. Wm. Scott Copp
Director of Building
Town of Perinton
1350 Turk Hill Road
Fairport, NY 14450-8796

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

Dear Ms. Lama and Mr. Copp:

As you are aware, I have received a variety of correspondence from both of you concerning Ms. Lama's efforts to gain access to copies of records maintained by the Town of Perinton.

The initial issue, one that has been considered and discussed exhaustively, related to the fees sought to be imposed by the Town for the reproduction of large sized building plans, which can be copied as single documents only by a commercial copying service. While it appears that the copying service, Kinko's, would have provided adequate assurances that it could maintain the security and integrity of original documents, that matter appears to have been resolved. In short, Ms. Lama indicated that Mr. Copp said that he can provide 8 1/2" by 11" copies of the house plans "that can be pieced together", and Ms. Lama wrote that she would be "willing to accept that as a compromise."

A second issue relates to the time in which an agency must respond to a request for records. In a letter addressed to Ms. Lama on January 14 by the Town Clerk, Susan C. Roberts, Ms. Roberts referred to a conversation she had with me and wrote that I advised that:

"1.) Records Access officers may take vacations. When the officer is out of the office requests addressed to him would not be received by him until his return. The five business days for a response would begin at that time. Therefore, a letter sent to me on November 29,

Mr. Lee Lama
Mr. Wm. Scott Copp
February 23, 2000
Page 2-

1999, would not have reached me until my return from vacation on December 6, 1999. Faxes are a much less reliable form of delivery. The fax, which you said was sent to me on November 29, 1999, was never received. 2.) When other employees are on vacation records which are easily accessible in their offices should be made available. Records which are not easily accessible to anyone but the employee would not be available until their return. A letter to the FOIL applicant, within the five business days allowed, stating that the employee is on vacation and giving a date when the record would be available is sufficient."

While I do not recall the details of the conversation between the Town Clerk and myself, I offer the following clarifications. Certainly records access officers and others may take vacations. However, absence due to vacation does not necessarily enable the agency to delay the disclosure of records. As stated in the Town's resolution implementing the Freedom of Information Law, as well as the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), the records access officer has the duty of coordinating an agency's response to requests. In my view, part of the function of "coordinating" involves ensuring that Town personnel respond to requests to the extent that they can do so in the absence of the records access officer. Further, the Town's resolution appears to anticipate the absence of officers or employees, for in addition to the Town Clerk, two deputy town clerks, or their successors, are designated as records access officer.

I note, too, that the meaning of the phrase "a letter sent to me" is unclear. Does that mean letters marked "personal" only, letters addressed to "Susan C. Roberts", those addressed to the "Town Clerk", or those addressed to "Susan C. Roberts, Town Clerk"? From my perspective, each of the preceding sent to the Clerk's place of business could be assumed to have been sent to her in conjunction with the performance of her official duties. The only category in my view that might not be immediately opened upon receipt by the Town would be those marked "personal." With respect to all others, insofar as they constitute requests made under the Freedom of Information Law, I believe that the Town would be obliged to respond in some manner within five business days of its receipt of such requests.

Even in the absence of the Clerk, I believe that the intent of the Freedom of Information Law should be given effect. In the statement of intent that appears at the beginning of the Law, §84, the Legislature declared that the state and its localities are required to make records available "wherever and whenever feasible." In my view, if a record that has been requested is clearly available under the law and can be readily located, there would likely be no valid basis for delaying disclosure as much as or beyond five business days following the receipt of a request, irrespective of the absence of the records access officer.

I point out in passing that two elements of the Town's resolution appear to be out of date. While the Freedom of Information Law as originally enacted in 1974 made reference to a "fiscal officer" (see Section 4 of the Resolution), there has been no reference in the law to a fiscal officer since 1978. Similarly, while the original §88(1) of the Freedom of Information Law referred to

Mr. Lee Lama
Mr. Wm. Scott Copp
February 23, 2000
Page 3--

disclosure of a payroll record by the fiscal officer to bona fide members of the news media, the provision dealing with the payroll record since 1978 has been §87(3)(b). That provision does not distinguish between the news media and others.

Also, Section 7 of the Resolution refers to the Town Board determining an appeal within seven business days of the receipt of an appeal. Although the Town Board could continue to determine appeals within seven business days, §89(4)(a) provides that the person or body designated to determine appeals has ten business days from the receipt of an appeal to do so.

Third, much of the dispute appears to involve the issue of copyright. A close reading of the opinions previously rendered and the only decision of which I am aware dealing with a request for a record under the Freedom of Information Law that might merit copyright protection does not suggest that the Town has the right to forbid the public from viewing or copying building or architectural plans.

Since Mr. Copp is willing to reproduce the plans by "piecing them together", there appears to be no issue concerning endangering one's life or safety [see Freedom of Information Law, §87(2)(f)]; on the contrary, it appears that the plans would clearly be available for inspection. The only exception to rights of access pertinent to the matter would be §87(2)(d), which permits an agency to withhold records that "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise." Under the Copyright Act, copyrighted work may be reproduced "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research" without infringement of the copyright. Further, the provision describes the factors to be considered in determining whether a work may be reproduced for a fair use, including "the effect of the use upon the potential market for or value of the copyrighted work" [17 U.S.C. §107(4)].

According to the U.S. Department of Justice, the most common basis for the assertion of the federal Freedom of Information Act's "trade secret" exception involves "a showing of competitive harm," and in the context of a request for a copyrighted work, the exception may be invoked "whenever it is determined that the copyright holder's market for his work would be adversely affected by FOIA disclosure" (FOIA Update, supra). As such, it was concluded that the trade secret exception:

"stands as a viable means of protecting commercially valuable copyrighted works where FOIA disclosure would have a substantial adverse effect on the copyright holder's potential market. Such use of Exemption 4 is fully consonant with its broad purpose of protecting the commercial interests of those who submit information to government... Moreover, as has been suggested, where FOIA disclosure would have an adverse impact on 'the potential market for or value of [a] copyrighted work,' 17 U.S.C. §107(4), Exemption 4 and the Copyright Act actually embody virtually congruent protection,

because such an adverse economic effect will almost always preclude a 'fair use' copyright defense... Thus, Exemption 4 should protect such materials in the same instances in which copyright infringement would be found" (id.).

Conversely, it was suggested that when disclosure of a copyrighted work would not have a substantial adverse effect on the potential market of the copyright holder, the trade secret exemption could not appropriately be asserted. Further, "[g]iven that the FOIA is designed to serve the public interest in access to information maintained by government," it was contended that "disclosure of nonexempt copyrighted documents under the Freedom of Information act should be considered a 'fair use'" (id.).

In my opinion, due to the similarities between the federal Freedom of Information Act and the New York Freedom of Information Law, the analysis by the Justice Department could properly be applied when making determinations regarding the reproduction of copyrighted materials maintained by entities of government in New York. In sum, if reproduction of copyrighted architectural plans and similar records would "cause substantial injury to the competitive position of the subject enterprise," i.e., the holder of the copyright, in conjunction with §87(2)(d) of the Freedom of Information Law, it would appear that an agency could preclude reproduction of the work. On the other hand, if reproduction of the work would not result in substantial injury to the competitive position of the copyright holder, it appears that the work would be available for copying under the Freedom of Information Law.

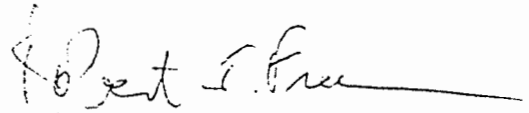
In the only decision that has dealt with copyright in relation to the Freedom of Information Law, Sagaponack Homeowners Association v. Town of Southampton (Supreme Court, Suffolk County, NYLJ, September 29, 1998), the court emphasized that to withhold copyrighted material, it must be proven that disclosure would in fact "cause substantial injury to the competitive position" of the holder of the copyright. There is nothing in the correspondence from the Town that refers to the harm that could arise by reproducing the records at issue.

Perhaps most importantly, it is my understanding that Ms. Lama has not sought the records for the purpose of using them in any commercial context; rather, I believe that her intent involves using them in an effort to have influence over the course or nature of development in the Town. According to the holding in Sagaponack, her intent would appear to constitute a "fair use." At the end of that decision, reference was made to the fact that the records would be used for a purpose related to litigation, not for any commercial endeavor, and the court found that disclosure in that context would not constitute "a general publication" and would not "interfere with the copyright." If my assumptions concerning Ms. Lama's intent are accurate, I believe that the same conclusion would be reached, that reproduction of the records, perhaps with conditions concerning their redisclosure or reproduction, would, under the circumstances, constitute a permissible fair use.

Mr. Lee Lama
Mr. Wm. Scott Copp
February 23, 2000
Page 5-

I hope that the foregoing serves to clarify the issues and that I have been of assistance. Should questions arise concerning the foregoing, 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 extends across the right side of the page.

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Susan C. Roberts



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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David A. Schulz
Joseph J. Seymour
Carole E. Stone
Alexander F. Treadwell

February 24, 2000

Executive Director

Robert J. Freeman

Ms. Rebecca Jo Rosen

[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. Rosen:

I have received your letter of January 16 in which you sought an advisory opinion concerning your right to gain access to "audio tapes of a public school board meeting."

Having sought an audio tape of a meeting of the City of Jamestown Board of Education, the Superintendent denied the request, stating that:

"This recording was maintained by the district to assist the secretary of the Board in the preparation of the minutes of the meeting. As such, it is the internal, intra-agency record under the Freedom of Information Law. I have asked our attorney to review the law and determine if this particular record falls within the definition contained in section 87(2)(g) of FOIL, which exempts many intra-agency materials from disclosure."

The Board's attorney confirmed the denial on the same basis as the Superintendent.

From my perspective, the denial of your request is not only inconsistent with law, it is illogical. In this regard, I offer the following comments.

First, as you are aware, the Freedom of Information Law pertains to agency records, and §86(4) of 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 school board maintains a tape recording of a meeting, the tape would constitute a "record" that falls within the coverage of the Freedom of Information Law, irrespective of the reason for which the recording was prepared.

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

The fact that any person could have heard the content the record, in my view, constitutes a waiver of the capacity to withhold what has become part of the public domain. As stated in a decision in which the ability to prohibit the use of audio tape recorders at open meetings was rejected, the Appellate Division determined that:

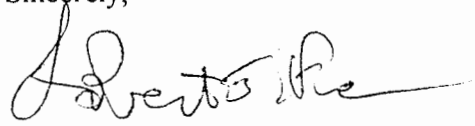
"[t]hose who attend such meetings, who decide to freely speak out and voice their opinions, fully realize that their comments and remarks are being made in a public forum. The argument that members of the public should be protected from the use of their words, and that they have some sort of privacy interest in their own comments, is therefore wholly specious" [Mitchell v. Board of Education of Garden City School District, 113 AD 2d 924, 925 (1985)].

In like manner, when members of a board of education and the staff of a school district exchange ideas, opinions, and engage in a deliberative process during open meetings, they have, by statute, effectively waived their ability to preclude the public from using their words or capturing their words on audio tape. To suggest that a record maintained by a school district that captures words knowingly expressed in public pursuant to board members' statutory duties is, in my opinion, unsupportable and clearly inconsistent with law.

Ms Rebecca Jo Rosen
February 24, 2000
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: Raymond Fashano
Michael Foley



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AU-11973

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February 24, 2000

Executive Director

Robert J. Freeman

Mr. Jones R. Woods
93-B-0437
Auburn Correctional Facility
P.O. Box 618
Auburn, NY 13024

Dear Mr. Woods:

I have received your petition demanding that I hold a hearing pursuant to §75 of the Civil Service Law based on your allegation that Mark Shepard of the Department of Correctional Services failed to comply with the Freedom of Information Law.

In this regard, such a demand cannot be honored. This office, the Committee on Open Government, is authorized to provide advice and opinions concerning the Freedom of Information Law. Neither the Committee nor myself is empowered to conduct hearings or discipline employees of other agencies, enforce the law or compel an agency to grant or deny access to records. Further, §75(2) of the Civil Service Law states in part that "The hearing on such charges shall be held by the officer or body having the power to remove the person against whom such charges are preferred, or by a deputy or other person designated by such officer or body in writing for that purpose." Again, this office has no such power.

Moreover, based on the correspondence attached to your petition, it appears that Mr. Shepard was being helpful by forwarding your request to the proper person. For future reference, I note that the regulations promulgated by the Department of Correctional Services indicate that requests for records kept at a facility should be directed to the facility superintendent or his designee.

Even if Mr. Shepard had possession of the records of your interest and had denied access to them, your remedy would not have involved the initiation of a disciplinary proceeding, but rather an appeal under the Freedom of Information Law, §89(4)(a). 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

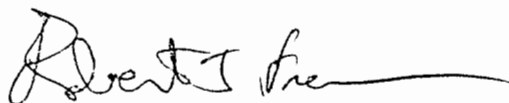
Mr. Jones R. Woods
February 24, 2000
Page 2-

executive, or governing body, who shall within ten business days of the receipt of 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 to determine appeals is its Counsel, Anthony J. Annucci.

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

cc: Mark Shepard

From: Robert Freeman
To: [REDACTED]
Date: 3/1/00 8:33AM
Subject: Dear Godfather:

Dear Godfather:

I have received your letter in which you sought guidance in attempting to locate an individual whose last known address was in New York approximately twenty years ago.

In this regard, the primary function of this office involves providing advice concerning public access to government records in New York, particularly under the state's Freedom of Information Law. Without additional information relating to the individual in question, it may be difficult to use government records to locate that person.

To seek records from a government agency, an applicant must have an idea of which agency maintains the records; there is no central database that tracks the lives of residents. If you believe that an agency maintains records of your interest, a request should be made to the agency's "records access officer". He or she has the duty of coordinating an agency's response to requests.

I emphasize that §89(3) of the Freedom of Information Law requires that an applicant for a record must "reasonably describe" the record sought. Therefore, a request must contain sufficient detail to enable the staff at an agency to locate and identify the record of your interest. Simply writing to an agency and seeking records relating to a named individual, without additional detail, would not likely meet the standard of reasonably describing the records.

Two major sources of names and addresses are voter registration lists and real property tax assessment rolls. However, there is no central source of those records. Each county, for example, has a board of elections that maintains a separate voter registration list. An additional issue may be that many people on such a list may have the same name.

In short, without additional personally identifiable information, it may be difficult if not impossible to locate a person after twenty years through government records accessible to the public if the only information that you have is a name and the fact that he or she lived in New York.

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-11975

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

March 1, 2000

Executive Director

Robert J. Freeman

Mr. John Parker
Counsel
Office of Assemblyman Richard L. Brodsky
5 West Main St., Suite 205
Elmsford, NY 10523

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

Dear Mr. Parker:

I have received your letter of February 1, as well as a variety of materials relating to it. You have sought an advisory opinion concerning the implementation of the Freedom of Information Law by Westchester County.

By way of brief background, in a letter of September 7 addressed to the County Executive, your office, under your signature, requested "all materials written or electronic, in possession of Westchester County" relating to a proposed "land swap" involving parcels located in the Town of Greenburgh and the City of New Rochelle, and a separate request was made on September 9. Another letter was sent to the County Executive on September 21 indicating that there had been no reply and seeking a prompt reply. The initial written response to the requests was made by the County Executive's records access officer, Ms. Susan Tolchin, on November 23. She wrote that she was disclosing all of the materials falling within the scope of the requests "in the possession of the Office of the County Executive."

Because you believed that the response was both late and incomplete in that it dealt only with records kept in the Office of the County Executive, Ms. Maritza F. Bolanos, appealed on December 28. The County Attorney, Mr. Alan D. Scheinkman, responded to the appeal on January 13 and dismissed it, stating that:

"While both of Mr. Parker's letters were issued on the official letterhead of Assemblyman Brodsky, neither identified Mr. Parker's position within Assemblyman Brodsky's office. Neither letter represented that the requests were being made on behalf of

Assemblyman Brodsky. Ms. Tolchin's letter, dated November 23, 1999, treated Mr. Parker as the person who was requesting the records and made no reference to Mr. Brodsky in her response. This treatment was appropriate given the lack of any express representation by Mr. Parker that the request was being made on behalf of Mr. Brodsky or any other third person.

"Section 89 of the Public Officers Law (subdivision 4[a]) and Section 437.81 of the Laws of Westchester County authorize an appeal to the undersigned by 'a person denied access to a record'. The record indicates that it was Mr. Parker who requested the access to records, that it was Mr. Parker to whom Ms. Tolchin sent 'all the material in the possession of the Office of the County Executive on the subject as of this date', and that the only person who could claim that records had been denied him was Mr. Parker."

Mr. Scheinkman also wrote that the appeal was time barred and that "[t]ime to appeal was triggered" when the County Executive's office did not respond within five days of Mr. Parker's requests. He added that even if that contention was not offered, the appeal was untimely, for the response by Ms. Tolchin was rendered on November 23, but the appeal was not made until December 28, a time beyond the thirty day time to appeal prescribed by §89(4)(a) of the Freedom of Information Law.

From my perspective, the County has responded in a manner inconsistent with the spirit if not the letter of the Freedom of Information Law. In this regard, I offer the following comments.

First, although the correspondence sent to the County might have been prepared by different persons, and although it may not have been explicitly stated that they wrote on behalf of Assemblyman Brodsky, it was, in my view, clearly implicit. Each item of correspondence appeared on the letterhead of the Assemblyman, and the language of each indicates that each was made as his representative. In the initial letter of September 7, Mr. Parker closed by stating that "[w]e would appreciate a response..."; the beginning of the letter of September 9 states that "[T]his letter supplements our September 7, 1999 request"; and in the letter of September 21, he wrote that "[o]n September 7 and September 9, 1999 this office requested all materials..." (emphasis mine). The words underlined in my opinion clearly indicate that the requests were made on behalf of the office of Assemblyman Brodsky. I believe that the rejection of an appeal because it was signed not by you, but rather by the Assemblyman's Deputy Counsel, is artificial and reflects a refusal to recognize the reality of the situation, that each item of correspondence should reasonably have been deemed to have been prepared by representatives of a single office acting on behalf of Assemblyman Brodsky.

Second, as you aware, it has been advised by this office and confirmed judicially that an agency's failure to respond to a request within five business days of its receipt of the request constitutes a constructive denial of the request. Pursuant to §89(4)(a) of the Freedom of Information Law, when a request is denied, the applicant may appeal within thirty days. While it has been held that an agency's failure to respond to a request within five business days provides an applicant with

Mr. John Parker

March 1, 2000

Page 3-

the right to appeal [see De Corse v. City of Buffalo, 239 AD2d 949 (1997)], there is no case suggesting that the time to appeal begins on the sixth business day and expires thirty days thereafter. Moreover, the ability to appeal a constructive denial of a request is based on an agency's failure to comply with law, but the language of the Freedom of Information Law concerning an agency's obligation to respond to requests and an applicant's right to appeal a denial of a request is predicated on procedural compliance by the agency.

Pursuant to §89(3) of the Freedom of Information Law, in response to a written request for a records, an agency has five business days to "...make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgment of the receipt of such request..." Section 89(4)(a) states that person denied access to a record "may within thirty days appeal in writing such denial..." "Such denial" in my view refers to the denial in writing required by §89(3), and I believe that the thirty day time to appeal is triggered upon receipt of a written denial, or, as indicated earlier, when an agency has failed to carry out its duty to respond within five business days.

Third, with respect to the appeal of December 28 following Ms. Tolchin's response of November 23, you wrote that you did not receive her letter until December 3. If that is so, even in consideration of the contention offered by the County Attorney, the appeal would have been made well within thirty days.

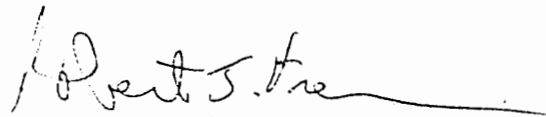
Lastly, notwithstanding the rules and regulations adopted by Westchester County to implement the Freedom of Information Law, in view of the language of the request, i.e. "all materials...in possession of Westchester County" concerning a certain subject, I believe that the County Executive's records access officer should have informed you, certainly well in advance of November 23, more than two months after receipt of your requests, that her response would be limited to the disclosure of records in the possession of the County Executive, and that requests for records kept by other County agencies should be made to their records access officers. Alternatively, to assist you in a manner consistent with the Freedom of Information Law, she could have acknowledged the receipt of your request within five business days and forwarded copies of your request to the agencies in County government that would likely possess the records of your interest.

As you may be aware, §87(1) of the Freedom of Information Law requires that the governing body of a public corporation, such as a county, promulgate procedural rules and regulations designed to implement that statute. Those rules and regulations must be consistent with the statute and the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401). One aspect of the Committee's regulations involves the requirement that each agency designate one or more persons as "records access officer." In many units of local government, including several counties, one person is so designated, and he or she has the duty of coordinating an agency's response to requests. In Westchester County, it is my understanding that each County department has its own records access officer. That likely accounts for Ms. Tolchin's response that she would deal only with records in possession of the County Executive. Nevertheless, to give effect to the spirit of the law, I believe that she should have engaged in the kinds of steps suggested in the preceding paragraph.

Mr. John Parker
March 1, 2000
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 line extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Andrew Spano
Alan D. Scheinkman
Susan Tolchin



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11976

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Carole E. Stone
Alexander F. Treadwell

March 2, 2000

Executive Director

Robert J. Freeman

Mr. Seth A. Miller
Collins, Dobkin & Miller LLP
Five Beekman Street - Suite 210
New York, NY 10038-2206

Dear Mr. Miller:

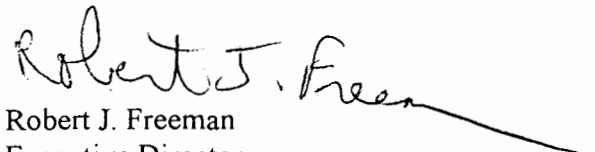
I have received your letter of January 21, which you characterized as "a complaint about stonewalling by the New York State Division of Housing and Community Renewal to [y]our repeated requests for information concerning the manner by which they have responded to the mandates of the Courts to change their way of processing high income deregulation cases involving rent stabilized apartments." You indicated that you are especially interested in records reflective of DHCR's policy in effect at certain times.

In this regard, in an effort to learn more of the matter, I contacted DHCR on your behalf and was informed that the agency provided you with 32 pages of documentation. However, it was specified that no records reflective of "policy" as of the date to which you referred or developed since the issuance of a certain decision rendered by the Court of Appeals have been prepared. I was told that DHCR is applying the law in a manner consistent with judicial decisions as those decisions are rendered, but that no statements of policy exist. Additionally, an "operational bulletin" has been posted on its website, but it was indicated that the bulletin has not been revised since the decision was rendered by the Court of Appeals.

As you may be 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. Therefore, if no "policy" exists, DHCR is not obliged to prepare such a record on your behalf.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm
cc: Sidney Weir
David Cabrera

FOIL-AO-11977

From: Robert Freeman
To: [REDACTED]
Date: 3/2/00 8:08AM
Subject: Re: FOI requests by e-mail

There are no precedents in NY involving the use of email to request records under the FOIL. However, this office has advised that any request made in writing, including a request by email, that reasonably describes the record sought should suffice.

There may be situations, however, in which email may not be adequate. For instance, if a person requests records pertaining to himself or herself that could be withheld from others as an unwarranted invasion of personal privacy, the agency could require the applicant to provide proof of his or her identity. Until digital signatures become prevalent, the email request for records accessible only to the subject of the records may not be adequate.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
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STATE OF NEW YORK
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FOIL-AO-11978

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Wade S. Norwood
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Joseph J. Seymour
Carole E. Stone
Alexander F. Treadwell

March 6, 2000

Executive Director

Robert J. Freeman

Mr. Rick Karlin
Times Union
P.O. Box 15000
News Plaza
Albany, NY 12212

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

Dear Mr. Karlin:

I have received your letter of February 10 in which you sought an advisory opinion concerning a request for records of the Department of Motor Vehicles. You wrote that you are attempting to obtain "a list of school bus drivers in the Capital Region, their names, ages and driving records as they relate to moving violations and accidents" and that you are focusing on drivers "who work with school bus companies licensed by the Department" and operating in Albany, Schenectady, Saratoga and Rensselaer Counties. You added that you would prefer to obtain the data "on an Excel spreadsheet or computer disc", but that the Department indicated that it could not release the data due to the federal Driver's Privacy Protection Act.

In this regard, I offer the following comments.

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

Second, with respect to the Department's claim, pertinent is §87(2)(a), which relates to records that "are specifically exempted from disclosure by state or federal statute." In many instances, the Driver's Privacy Protection Act, 18 USC §2721 *et seq.* prohibits the disclosure of personal information maintained by the Department that is derived from license records. However, in the context of your request, I do not believe that it would apply. For purposes of that Act, §2725(3) defines the phrase "personal information" to mean:

Mr. Rick Karlin

March 6, 2000

Page 2--

"Information that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information, *but does not include information on vehicular accidents, driving violations, and driver's status*" (emphasis mine).

Since your request involves data relating to "moving violations and accidents", again, I do not believe that the Driver's Privacy Protection Act would exempt the data from disclosure.

Third, while I know of no case law on the subject, it has been advised that portions of records identifiable to individuals that include their ages may be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" pursuant to §§87(2)(b), 89(2)(b), and 89(2-a) of the Freedom of Information Law. If, however, one's age appears on an accident report, which is available from the Department under the Freedom of Information Law and §66-a of the Public Officers Law, I believe that the same item would be available from a different record maintained by the Department containing equivalent information.

If indeed ages of bus drivers may properly be withheld, but ages are of primary interest to you, names of the drivers could be withheld from the records prior to disclosure; conversely, if you are interested more in the names than the ages, portions of the data indicating age might be withheld prior to the disclosure of the remainder.

Lastly, as you may be aware, the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that an agency need not create a record in response to a request. It is also important to note, however, that §86(4) of the Law defines the term "record" to include:

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

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

When information is maintained electronically, it has been advised that if the information sought is available under the Freedom of Information Law and may be retrieved by means of existing computer programs, an agency is required to disclose the information. In that kind of situation, the agency would merely be retrieving data that it has the capacity to retrieve. Disclosure

Mr. Rick Karlin
March 6, 2000
Page 3-

may be accomplished either by printing out the data on paper or perhaps by duplicating the data on another storage mechanism, such as a computer tape or disk. On the other hand, if information sought can be retrieved from a computer or other storage medium only by means of new programming or the alteration of existing programs, those steps would be the equivalent of creating a new record. As stated earlier, since §89(3) does not require an agency to create a record, an agency is not required to reprogram or develop new programs to retrieve information that would otherwise be available [see Guerrier v. Hernandez-Cuebas, 165 AD 2d 218 (1991)].

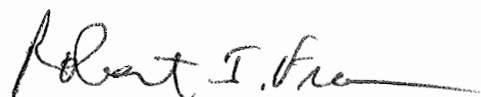
Often information stored electronically can be extracted by means of a few keystrokes on a keyboard. While some have contended that those kinds of minimal steps involve programming or reprogramming, and, therefore, creating a new record, so narrow a construction would tend to defeat the purposes of the Freedom of Information Law, particularly as information is increasingly being stored electronically. If electronic information can be extracted or generated with reasonable effort, if that effort involves less time and cost to the agency than engaging in manual deletions, it would seem that an agency should follow the more reasonable and less costly and labor intensive course of action.

In my view, there is clearly a distinction between extracting information and creating it. If an applicant knows that an agency's database consists of 10 items or "fields", asks for items 1, 3 and 5, but the agency has never produced that combination of data, would it be "creating" a new record? The answer is dependent on the nature of the agency's existing computer programs; if the agency has the ability to retrieve or extract those items by means of its existing programs, it would not be creating a new record; it would merely be retrieving what it has the ability to retrieve in conjunction with its electronic filing system. An apt analogy may be to a filing cabinet in which files are stored alphabetically and an applicant seeks items "A", "L" and "X". Although the agency may never have retrieved that combination of files in the past, it has the ability to do so, because the request was made in a manner applicable to the agency's filing system.

In the context of your request, if the Department has the ability to generate the data of your interest, subject to the qualifications discussed earlier regarding name and age, and if you are willing to pay the actual cost of reproduction as envisioned by §87(1)(b)(iii) of the Freedom of Information Law, I believe that the Department would be obliged to do so.

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: Alexandra Sussman



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11979

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Alexander F. Treadwell

March 6, 2000

Executive Director

Robert J. Freeman

Mr. Ronald J. Hall
96-A-5913
Upstate Correctional Facility
P.O. 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. Hall:

I have received a series of letters from you relating to your efforts in gaining access to records. Some of the issues raised have been considered in previous correspondence, but I offer the following additional remarks.

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

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

Second, based on the language of §89(3), a certification made under the Freedom of Information Law does not pertain to the accuracy of the contents of a record, but rather would involve an assertion that a copy is a true copy. In other words, a certification prepared pursuant to §89(3) would not indicate that the contents of a record are complete, accurate or "legal"; it would merely indicate that the copy of the record is a true copy.

Mr. Ronald J. Hall
March 6, 2000
Page 2-

Further, it has been consistently advised, particularly when certification is requested with respect to a voluminous number of records, that a single certification, given by means of a written assertion, statement or affidavit, for example, describing or identifying the records that were copied, would be sufficient. I do not believe that each copy of records made available under the Freedom of Information Law must be stamped or "certified" separately.

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

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

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AU-11980

Committee Members

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

March 7, 2000

Executive Director

Robert J. Freeman

Mr. Stephen M. Winding

[REDACTED]
[REDACTED]

Dear Mr. Winding:

I have received your letter of January 26, as well as a variety of related correspondence concerning your efforts in gaining access to records. At this juncture, particularly in view of a response by Derrick Robinson of the Office of the Suffolk County Attorney, it appears that the records that you requested have been disclosed.

For future reference and as you may be aware, although the Freedom of Information Law generally governs rights of access to records of state and local government, different provisions of law were applicable in the context of your requests. In brief, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Pertinent in the circumstances that you presented is §87(2)(a), which provides that an agency may deny access to records or portions thereof that:

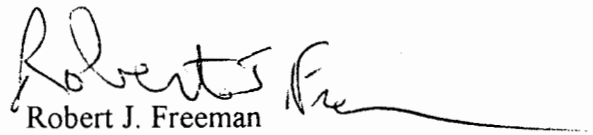
"are specifically exempted from disclosure by state or federal statute..."

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. In short, your right to obtain the records of your interest would not have been conferred by the Freedom of Information Law, but rather by provisions of the Social Services Law.

Mr. Stephen Winding
March 7, 2000
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 long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Derrick Robinson



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AJ-11981

Committee Members

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David A. Schulz
Joseph J. Seymour
Carole E. Stone
Alexander F. Treadwell

March 7, 2000

Executive Director

Robert J. Freeman

E-Mail

TO: Jack Bathrick [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. Bathrick:

I have received your recent letter in which you questioned the course of action that you might take in relation to delays by the State Insurance Department 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..."

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

Mr. Jack Bathrick

March 7, 2000

Page 2-

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

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

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

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

I hope that I have been of assistance.

RJF:jm

cc: Lester Grimmell



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AJ-11982

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Alexander F. Treadwell

March 7, 2000

Executive Director

Robert J. Freeman

Hon. Dennis W. Hardy
Mayor
Village of Piermont
478 Piermont Avenue
Piermont, 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 Mayor Hardy:

I have received your letter of January 26 in which you sought my views concerning a series of events occurring in the Village of Piermont.

According to your letter, on January 21, an employee of the Village "was arraigned in open court and charges were read to him", and a copy of the charges were placed in the records of the Piermont Police Department. In your capacity as chief executive officer of the Village, you requested a copy of the charges, but the Chief of Police denied your request, "stating that the District Attorney had instructed him not to give [you] a copy." You asked whether, under the circumstances that you described, the Chief of Police "could legitimately refuse a request for documents from the Mayor..."

From my perspective, the denial of your request was inconsistent with law. In this regard, I offer the following comments.

First, although the courts are not subject to the Freedom of Information Law, other statutes confer rights of access to court records. In this instance, pursuant to §2019-a of the Uniform Justice Court Act, which applies to village and town justice courts, the record of the arraignment and charges would in my view have been available to any person.

Second, in a related vein, even when records may ordinarily be withheld under the Freedom of Information Law, once they have been introduced in a public judicial proceeding, an agency no longer has the authority to deny access [see Moore v. Santucci, 151 AD2d 677 (1989)]. In this instance, because the arraignment occurred in a public proceeding during which any member of the

Hon. Dennis W. Hardy

March 7, 2000

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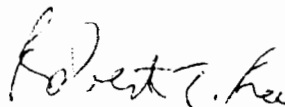
public could have been present, and since the court's record of that proceeding would be public, a duplicate of the same record would, in my opinion, be available from the Village under the Freedom of Information Law.

Third, as you are aware, provisions of the Village Law detail the powers and duties of various village officials. Pertinent in this instance is §4-400(1)(e), which states that "[i]t shall be the responsibility of the mayor...to exercise supervision over the conduct of the police and other subordinate officers of the village." Additionally, §4-402(a) provides that the village clerk is the custodian of village records. Based on those provisions, while the Police Chief may have had physical custody of the record in question, I do not believe that he had legal custody or control over the record.

Lastly, since the person arraigned was a Village employee, it would appear that you were seeking the record not as a member of the public under the Freedom of Information Law, but rather in the performance of your official duties as chief executive officer of the Village. In my view, since there was no statute barring disclosure, the Chief should have honored your request.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-A0-11983

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Joseph J. Seymour
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Alexander F. Treadwell

March 7, 2000

Executive Director

Robert J. Freeman

Mr. Ronald Logan
87-A-9529
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. Logan:

I have received your letter of January 6 concerning your attempts to obtain a Department of Correctional Services policy or directive in effect at a certain time. You were informed by the Department that the record of your interest does not exist.

In this regard, it is noted that the Freedom of Information Law does not deal with the retention and disposal of records. Further, that statute pertains to existing records, and §89(3) provides in relevant part that an agency is not required to create or prepare a record in response to a request. In short, if the record of your interest no longer exists, the Freedom of Information Law, in my view, would not be applicable.

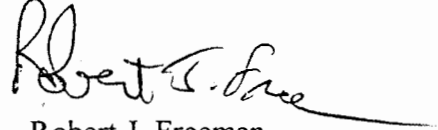
I point out that when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it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

Mr. Ronald Logan
March 7, 2000
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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



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11984

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David A. Schulz
Joseph J. Seymour
Carole E. Stone
Alexander F. Treadwell

March 9, 2000

Executive Director

Robert J. Freeman

Mr. Andre Dolberry
99-A-4612
Wyoming Correctional Facility
P.O. Box 501
Attica, NY 14011

Dear Mr. Dolberry:

I have received a variety of correspondence from you involving your efforts in obtaining records, including appeals directed to this office relating to denials of access to records.

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee is not empowered to determine appeals or compel an agency to grant or deny access to records. The provision dealing with the right to appeal, §898(4)(a) of the Freedom of Information Law, states in relevant part that:

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

It is also noted that the Committee does not obtain records on behalf of individuals. It is not, therefore, the duty of this office to ascertain whether an attorney appeared in court on a certain date.

Lastly, I point out that the Freedom of Information Law is applicable to agency records. Section 86(3) of that statute defines the term "agency" to 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. Andre Dolberry
March 9, 2000
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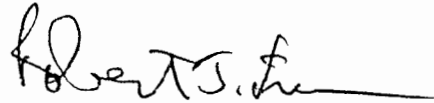
Further, §86(1) defines the term "judiciary" to mean:

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

Based on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. Similarly, a private attorney would not constitute an agency subject to the Freedom of Information Law.

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

Sincerely,

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-11985

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Carole E. Stone
Alexander F. Treadwell

March 9, 2000

Executive Director

Robert J. Freeman

Mr. Michael S. Elder
Counsel
Northeast/Midwest Region
General Electric Company
320 Great Oaks Office Park, Ste. 323
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. Elder:

I have received your letter of February 4 in which you sought an advisory opinion concerning a partial denial of a request directed to the Department of Environmental Conservation (DEC).

By way of background, in February of last year, you submitted a request to DEC for "the entire agency file with respect to General Electric Company's Ft. Edward facility" in order to assist General Electric in preparing comments "on DEC's Proposed Remedial Action Plan ('PRAP') for that facility. You wrote that DEC responded approximately three months later by disclosing certain documents but withholding "approximately 430" others. Following an appeal, certain of the records initially withheld were disclosed in whole or in redacted form, and others were withheld in their entirety. You referred specifically to a denial of access to communications between DEC and the United States Environmental Protection Agency (EPA) on the ground that they fall within exceptions concerning inter-agency or intra-agency materials.

In conjunction with the foregoing, you raised the following questions:

1. Whether a memo regarding EPA's review of a DEC draft of a proposed remedial action plan for GE's Ft. Edward plant site is exempt from disclosures as an intra-agency document;
2. Whether a letter from DEC to EPA commenting on an EPA document regarding the Hudson River PCB Remnant Site is exempt from disclosure because it is specifically exempt from disclosure by a

Mr. Michael S. Elder

March 9, 2000

Page 2-

federal statute, namely, the federal Freedom of Information Act, 5 U.S.C. §552(b)(5) (1999), as part of EPA's pre-decisional and deliberative process; and

3. Whether the ALJ's letter deciding GE's appeal 'fully explain[s]' the basis for the denial of the documents specified in that letter, as required by §89.4(a) of the Public Officers Law. See N.Y. PUB. OFF. LAW §89.4 (McKinney 1999)."

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. 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.

Second, the provision to which DEC alluded, §87(2)(g), pertains to the ability to withhold "inter-agency or intra-agency materials" depending on their contents. For purposes of the Freedom of Information Law, §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."

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 or from 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, Supreme Court, Queens Cty., NYLJ, July 27, 1992; aff'd 613 NYS 2d 46, 205 AD2d 540 (1994)].

DEC also cited decisions involving records prepared by consultants for agencies in which it was held that those records should be treated, in essence, as if they were prepared by agency staff, and that they constitute "intra-agency materials" [see Xerox Corp. v. Town of Webster, 65 NY2d 131 (1985); SeaCrest v. Stubing, 82 AD2d 546 (1981)]. It is emphasized, however, that the Court of Appeals referred to "outside consultants *retained* by agencies" (Xerox, *supra*, 133). I do not believe that either DEC or EPA would have been "retained" by the other or that either could be characterized as a consultant as that term has been used in the context of judicial decisions.

Again, while the EPA is an agency for purposes of the federal Freedom of Information Act (5 USC §552) and its exceptions, it falls beyond the definition of "agency" as that term is defined by the state statute. The reverse would also be so: while DEC is an agency under the state statute, it is not an agency for purposes of the federal Act (see 5 USC §551).

The second question, in essence, involves a situation in which a federal agency may withhold a record under the federal Freedom of Information Act, and whether a state agency in possession of that record may claim that the records is "specifically exempted from disclosure by...statute" pursuant to §87(2)(a) of the New York Freedom of Information Law. In my opinion a claim of that nature cannot be validly be made.

DEC has contended that certain records prepared by EPA that could be withheld by that agency pursuant to §552(b)(5), the exemption in the federal Act analogous to §87(2)(g) of the state statute, the so-called "deliberative process" exemption, may be withheld by DEC on the ground that they are specifically exempted from disclosure by statute. However, several decisions indicate that only federal agencies subject to the federal Act may assert an exemption appearing in the federal Act [see Grand Central Partnership, Inc. v. Cuomo, 166 F.2d 473, 484 (1999); also Philip Morris, Inc. v. Harshbarger, 122 F.3d 58, 83 (1st Cir.1997); Day v. Shalala, 23 F.3d 1052, 1064 (9th Cir.1994); Brown v. Kelly, No. 93-5222, 1994 WL 36144, at *1 (D.C.Cir. January 27, 1994); St. Michael's Convalescent Hosp. v. State of California, 643 F.2d 1369, 1373 (9th Cir.1981); Johnson v. Wells, 566 F.2d 1016, 1018 (5th Cir.1978)].

More importantly, based on judicial decisions involving exceptions to rights of access in both the state and federal freedom of information statutes, the records at issue would not be "specifically

Mr. Michael S. Elder

March 9, 2000

Page 4-

exempted from disclosure by...statute pursuant to §87(2)(a) of the New York Freedom of Information Law or pursuant to its counterpart in the federal Act, the "(b)(3)" exception. Both the Court of Appeals and federal courts in construing access statutes have determined that the characterization of records as "confidential" or "exempted from disclosure by statute" must be based on statutory language that specifically confers or requires confidentiality. As stated by the Court of Appeals:

"Although we have never held that a State statute must expressly state it is intended to establish a FOIL exemption, we have required a showing of clear legislative intent to establish and preserve that confidentiality which one resisting disclosure claims as protection" [Capital Newspapers v. Burns, 67 NY2d 562, 567 (1986)].

An example of the proper assertion of a claim that records were "specifically exempted from disclosure by...statute" was offered in an opinion addressed to Frank V. Bifera, then Acting General Counsel to DEC, in 1997 concerning a provision of the Environmental Conservation Law stating that the Commissioner of DEC "shall not provide" certain information. In that situation, there was clear direction in a statute prohibiting the disclosure of certain information, and it was advised that §87(2)(a) could be cited.

Similarly, in construing the equivalent exception to rights of access in the federal Act, it has been found that:

"Exemption 3 excludes from its coverage only matters that are:

specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

"5 U.S.C. § 552(b)(3) (1982) (emphasis added). Records sought to be withheld under authority of another statute thus escape the release requirements of FOIA if – and only if – that statute meets the requirements of Exemption 3, including the threshold requirement that it specifically exempt matters from disclosure. The Supreme Court has equated 'specifically' with 'explicitly.' *Baldrige v. Shapiro*, 455 U.S. 345, 355, 102 S. Ct. 1103, 1109, 71 L.Ed.2d 199 (1982). '[O]nly *explicitly* non-disclosure statutes that evidence a congressional determination that certain materials ought to be kept in confidence will be sufficient to qualify under the exemption.' *Irons & Sears v. Dann*, 606 F.2d 1215, 1220 (D.C.Cir.1979) (emphasis added). In other words, a statute that is claimed to qualify as an Exemption 3

withholding statute must, on its face, exempt matters from disclosure” [Reporters Committee for Freedom of the Press v. U.S. Department of Justice, 816 F.2d 730, 735 (1987); modified on other grounds, 831 F.2d 1184 (1987); reversed on other grounds, 489 U.S. 789 (1989); see also British Airports Authority v. C.A.B., D.C.D.C.1982, 531 F.Supp. 408; Inglesias v. Central Intelligence Agency, D.C.D.C.1981, 525 F.Supp, 547; Hunt v. Commodity Futures Trading Commission, D.C.D.C.1979, 484 F.Supp. 47; Florida Medical Ass’n, Inc. v. Department of Health, Ed. & Welfare, D.C.Fla.1979, 479 F.Supp. 1291].

In short, to be “exempted from disclosure by statute”, both state and federal courts have determined that a statute must leave no discretion to an agency: it must withhold such records.

In contrast, when records are not exempted from disclosure by a separate statute, both the Freedom of Information Law and its federal counterpart are permissive. Although an agency *may* withhold records in accordance with the grounds for denial appearing in §87(2), the Court of Appeals in a decision cited earlier held that the agency is not obliged to do so and may choose to disclose, stating that:

“...while an agency is permitted to restrict access to those records falling within the statutory exemptions, the language of the exemption provision contains permissible rather than mandatory language, and it is within the agency’s discretion to disclose such records...if it so chooses” (Capital Newspapers, *supra*, 567).

The only situations in which an agency cannot disclose would involve those instances in which a statute other than the Freedom of Information Law prohibits disclosure. The same is so under the federal Act. While a federal agency *may* withhold records in accordance with the grounds for denial, it has discretionary authority to disclose.

Even if DEC or EPA had the authority to withhold records under either §87(2)(g) of the state statute or the (b)(5) exception in the federal Act, neither would be required to withhold the records; on the contrary, they would have the discretionary authority to disclose. That being so, I do not believe that the records at issue could be characterized as being exempted from disclosure by statute.

In a somewhat related vein, it has been suggested that “executive privilege” or the common law “governmental privilege” may be asserted to withhold records, notwithstanding the requirements of the Freedom of Information Law. From my perspective, reliance on a claim of privilege would be misplaced. Reference to executive privilege and the Freedom of Information Law was made in a footnote in Cirale v. 80 Pine St. Corp. [35 NY2d 113 (1974)], which was decided after the enactment but before the effective date of the Freedom of Information Law in 1974. In 1977, the original enactment was repealed and replaced with the current version of that statute, which became effective in 1978. Soon after the change in the law, the Court of Appeals appears to have abolished the governmental privilege in the context of requests made under the Freedom of Information Law.

As stated by the Court in 1979: "[T]he common-law interest privilege cannot protect from disclosure materials which that law requires to be disclosed" [Doolan v. BOCES, 48 NY2d 341, 347]. In short, either records or portions thereof fall within the grounds for denial appearing in §87(2) or they do not; if they do not, there would be no basis for denial, notwithstanding a claim based on an assertion of executive or governmental privilege.

The remaining question is whether DEC's determination of your appeal "fully explains" the reasons for further denial as required by §89(4)(a) of the Freedom of Information Law. In this regard, there is no judicial decision of which I am aware that specifies the degree of detail necessary to satisfy the requirements of that provision. In my view, a determination sustaining an initial decision to deny access must include sufficient detail to enable the applicant for the records to ascertain that records or portions thereof were withheld, at least arguably, with justification.

Even though the DEC prepared such records, I am also unaware of any provision of the Freedom of Information Law or judicial decisions 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. While a final administrative determination must "fully explain" the reasons for denial, I note that an agency's burden of justifying a denial in a judicial challenge is clearly more stringent. As stated by the Court of Appeals in a case in which it referred to several decisions it had previously rendered:

"...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)" (Gould, *supra*, 275).

In the context of your request, it appears that several records were withheld in their entirety on the ground that they reflect "Intra-agency deliberative process" or are "Non-final agency documents." It is possible that those blanket denials of access may have been inappropriate.

As you are aware, §87 (2)(g) enables an agency to withhold records that:

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

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

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

One of the contentions offered by the New York City Police Department in Gould 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)]). 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" (id., 276).

In short, that a record is reflective of the "deliberative process" 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,

Mr. Michael S. Elder

March 9, 2000

Page 8-

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 intra-agency materials 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, unless a different ground for denial can be asserted. In short as stated by the Court of Appeals: "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275).

Lastly, many of the records sought were denied on the ground that they are attorney work product, material prepared for litigation or are subject to the attorney-client privilege. Insofar as those claims are accurate, I believe that the records would be exempt from disclosure pursuant, respectively, to subdivisions (c) and (d) of §3101 and §4503 of the CPLR and, therefore, §87(2)(a) of the Freedom of Information Law. However, the ability to withhold records under those provisions is specific and limited.

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 to others. In a decision in which it was determined that records could justifiably be withheld as attorney work product, the "disputed documents" were "clearly work product documents which contain the opinions, reflections and thought process of partners and associates" of a law firm "which have not been communicated or shown to individuals outside of that law firm" [Estate of Johnson, 538 NYS 2d 173 (1989)]. In another decision, the relationship between the attorney-privilege and the ability to withhold the work product of an attorney was discussed, and it was found that:

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

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

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

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

Mr. Michael S. Elder
March 9, 2000
Page 10-

It is also noted that it has been determined judicially that if records are prepared for multiple purposes, one of which includes eventual use in litigation, §3101(d) does not serve as a basis for withholding records; only when records are prepared solely for litigation can §3101(d) be properly asserted to deny access to records [see e.g., Westchester-Rockland Newspapers v. Moszydlowski, 58 AD 2d 234 (1977)].

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 that extends to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Susan J. DuBois
Ruth Earl
Harold Iselin
Liz Grisaru

PPPL-AU -
FODL-AU - 11986

From: Robert Freeman
To: [REDACTED]
Date: Fri, Mar 10, 2000 4:47 PM
Subject: Dear Mr. Xanthos:

Dear Mr. Xanthos:

I have received your letter concerning the Freedom of Information and Personal Privacy Protection Laws. Both are indeed in effect: the former appears in the Public Officers Law, sections 84-90, and the latter in sections 91-99.

The Freedom of Information Law applies to units of state and local government in New York and pertains to all records kept by or for those agencies. In brief, that law is based on a presumption of access, stating that all records are available, with certain exceptions.

The Personal Privacy Protection Law pertains to personal information maintained by state agencies; it does not apply to local government. In general, that statute provides the subject of records with rights of access to those records; it limits the ability of state agencies to collect personal information, and it restricts the ability of those agencies to disclose personal information.

The Freedom of Information Law is described in our publication, "Your Right to Know", which includes a sample letter of request. The Personal Privacy Protection Law is described in "You Should Know", and it also contains a sample request letter. Both statutes and both publications are available in full text via our website.

I hope that I have been of assistance. Should any questions arise, 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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March 13, 2000

Executive Director

Robert J. Freeman

Ms. Suanne Merlino

[REDACTED]

Dear Ms. Merlino:

Your letter addressed to Governor Pataki has been forwarded to the Committee on Open Government, a unit of the Department of State. The Committee is authorized to offer guidance concerning the Freedom of Information Law.

You indicated that you are tracing your family history, and you questioned the fees charged by municipalities for searching for birth and death records.

In this regard, although the Freedom of Information Law pertains generally to access to government records and the fees that may be charged for copies of records, the provisions of the Public Health Law deal with birth and death records and fees for services rendered concerning searches for and copies of those records. Specifically, subdivision (3) of §4174 refers to searches for and the fees for records sought for genealogical or research purposes that may be imposed by "any person authorized" by the State Commissioner of Health, i.e., municipal clerks. That provision states that:

"For any search of the files and records conducted for authorized genealogical or research purposes, the commissioner or any person authorized by him shall be entitled to, and the applicant shall pay, a fee of ten dollars for each hour or fractional part of an hour of time for search, together with a fee of one dollar for each uncertified copy or abstract of such records requested by the applicant or for a certification that a search discloses no record."

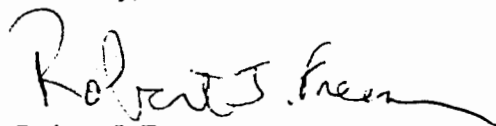
It is noted that the Commissioner of Health has promulgated "Administrative Rules and Regulations" pertaining to genealogical research, and enclosed is a summary of those provisions that have been obtained on your behalf. According to the summary, birth records need not be disclosed unless the subject of the birth record is known to have been deceased prior to 1924; death records need not be disclosed regarding deaths occurring after 1949.

Ms. Suanne Merlino
March 13, 2000
Page -2-

An alternative source of the records is likely the State Department of Health. In general, its Bureau of Vital Records maintains duplicates of records of birth, death and marriage regarding all such events occurring outside of New York City. You may call that office at (518)474-3055 or write for further information to the Bureau of Vital Records, New York State Department of Health, Empire State Plaza, Corning Tower, Albany, NY 12237.

I hope that I have been of assistance.

Sincerely,

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



STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11988

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March 14, 2000

Executive Director

Robert J. Freeman

E-Mail

TO: Jim Parker [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. Parker:

I have received your letter of January 20 in which you raised two issues concerning access to records.

The first pertains to an incident in which a person was taken into custody by a police department but not charged. However, he was allegedly "slammed...against the wall" by a police officer, and a request for the police blotter relating to the incident was denied on the ground that it included "investigative material."

In this regard, 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 ability to withhold "records or portions thereof" that fall within the grounds for denial that follow. In view of the highlighted phrase, even though a portion of a record might justifiably be withheld, it does not mean that the record may be withheld in its entirety; on the contrary, an agency is required to review the record sought in its entirety to determine which portions, if any, may properly be withheld, delete those portions, and disclose the remainder.

Second, the phrase "police blotter" is not specifically defined in any statute. It is my understanding that it is a term that has been used, 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.

Third, there is no general exception in the Freedom of Information Law concerning "investigative materials." The provision that deals most directly with those kinds of materials, §87(2)(e), states that an agency may withhold records that:

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

- i. interfere with law enforcement investigations or judicial proceedings;
- ii. deprive a person of a right to a fair trial or impartial adjudication;
- iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
- iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

Based on the language quoted above, only to the extent that disclosure would result in the harmful effects described in subparagraphs (i) through (iv) of §87(2)(e) would an agency have the authority to withhold information under that provision.

The remaining issue involves an unanswered request made to Herkimer County Court for statistical data involving certain kinds of cases before that court since 1988. Here I point out that the Freedom of Information Law pertains to agency records and that §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

Mr. Jim Parker
March 14, 2000
Page 3-

proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(3) defines the term "judiciary" to mean:

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

Based on those provisions, the courts and court records are not subject to the Freedom of Information Law. That is not to suggest that court records are confidential; on the contrary, most court records are available under other provisions of law (see e.g., Judiciary Law, §255). Nevertheless, neither an agency subject to the Freedom of Information Law nor a court subject to other statutes granting access to records require that a new record be prepared in order to satisfy a request for information. In short, if the statistical data in which you are interested does not exist, an entity would not be required to create a new record containing the data on your behalf.

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

RJF:jm

cc: Clerk, Herkimer County Court



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FOIL-A-11989

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Alexander F. Treadwell

March 14, 2000

Executive Director

Robert J. Freeman

Mr. Ken Dufty
Executive Director
Rensselaer County Environmental
Management Council
Rensselaer County Office Building
Troy, NY 12180

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

Dear Mr. Dufty:

I have received your letter of January 18 in which you sought guidance concerning a request made under the Freedom of Information Law. Please accept my apologies for the delay in response.

You referred to a request for all files and correspondence relating to a particular landfill, and you indicated that "the only way to gather the information...is to peruse computer discs and hard drives...searching and finding documents with the word 'Dewey' as a locator." With respect to the foregoing, you raised the following questions:

- "1) Does a filer of a FOIL request have the right to demand records 'immediately', even when those records are not easily amassed?
- 2) Can a filer of a FOIL request be required to compensate the Responding agency for the employee time that is required to be committed to fulfill their request?"

In this regard, I offer the following comments.

First, the primary 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 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 Council, 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 staff might begin to look for records. If the Council maintains all of its records regarding "Dewey" in a single file or location, it may be a simple task to locate the records. If, however, the records falling within the scope of the request cannot be found except by reviewing the content of thousands items individually, based on the decision rendered by the state's highest court, you would not be required to engage in that kind of effort.

Second, with respect to fees, as a general matter, an agency may charge only for the duplication of records; it cannot charge for searching for records or the personnel time involved in dealing with a request [see Freedom of Information Law, §87(1)(b)(iii); 21 NYCRR Part 1401]. However, if a request does not reasonably describe the records, and an agency consents to exceed its responsibilities imposed by law, the agency may, in my opinion, by prior agreement, charge a fee that reflects its additional effort.

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:

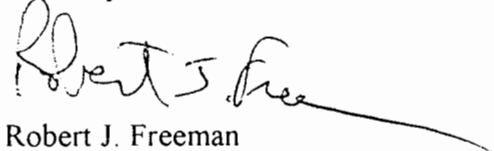
Mr. Ken Dufty
March 14, 2000
Page 3-

"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 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,

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



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11990

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Alexander F. Treadwell

March 14, 2000

Executive Director

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 January 20, as well as the materials relating to it. You have complained that the Department of Environmental Conservation failed to respond to your appeal under the Freedom of Information Law in a timely manner.

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."

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)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Office of Hearings and Mediation Services



STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11991

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Carole E. Stone
Alexander F. Treadwell

March 14, 2000

Executive Director

Robert J. Freeman

Mr. Norman L. Grauerholz

[REDACTED]

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

Dear Mr. Grauerholz:

I have received your letter of January 17 and the materials attached to it. You have sought guidance concerning your right to obtain a copy of a search warrant from the City of Niagara Falls. You indicated that the search resulted in damage to your property, and that a City Court official said that you could obtain a copy with "an order from a higher court."

In this regard, I offer the following comments.

First, the Freedom of Information Law, the statute within the advisory jurisdiction of the Committee on Open Government, 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

Mr. Norman L. Grauerholz
March 14, 2000
Page -2-

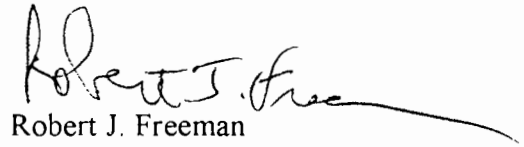
to the public, for other provisions of law (see e.g., Judiciary Law, §255) may grant broad public access to those records. It is recommended that a request for court records be directed to the clerk of the court in possession of the document, citing an applicable statute as the basis for the request.

Second, assuming that copies of the warrant are maintained by the Office of the District Attorney or the Police Department, for example, because they are agencies, the Freedom of Information Law would apply. In brief, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Since the warrant has been executed and the search made, it is unlikely in my view that any of the grounds for denial would be applicable.

Lastly, notwithstanding the foregoing, pursuant to §160.50 of the Criminal Procedure Law, if a person is charged with a crime and the charge is later dismissed, the records relating to event become sealed. If the records have been sealed, neither the court nor an agency in possession of the record would be required to disclose the record in question to you. If the records regarding the event have not been sealed, however, it appears that the record of your interest should be disclosed.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Martha J. Farbo-Lincoln



STATE OF NEW YORK
DEPARTMENT OF STATE
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FOIL-AO-11992

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March 14, 2000

Executive Director

Robert J. Freeman

Ms. Christina T. Fisk
Vice President
JIMAPCO
P.O. Box 1137
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. Fisk:

As you are aware, I have received your letters of October 29 and December 13. Both deal with difficulties that you have encountered in your attempts to obtain government records to enable JIMAPCO to produce map products that are as accurate as possible. You wrote that:

“We have repeatedly experienced refusal of our requests for access to geographic information based upon such reasons as:

- 1) we are a commercial business
- 2) they paid to compile the information and they will not release it.

“The type of documents and files we seek generally are details about street names, political boundaries, fire and ambulance boundaries, and locations of public facilities. We do not expect the materials to be compiled in any special manner for our requests.”

In the first letter, you wrote that a municipality contracted with a private firm to create a “digital GIS system” for the municipality and has contended that only that firm can gain access to the data. The second involves requests directed to the New York State Department of Transportation (DOT) for “digital datasets.” In response, you were informed that you must sign a “copyright agreement” stating that you will not use the materials for commercial purposes. DOT has contended that:

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"...when a commercial enterprise wishes to make commercial profits based on the use and exploitation of property owned by the government, including intellectual property as well as real estate or physical property, it cannot simply take that property from its public owners without compensation, but must instead purchase or license the property and provide the State and its taxpayers with fair compensation for the property that it wishes to use. Requestors will be granted access in compliance with FOIL, but if they wish to sell what they obtain to other people at a profit, they will have to license it first."

In short, DOT is stating that you may acquire a copy of its data, but that you cannot use it in your business activities.

In some respects, the two situations involve common issues of public policy. In the case of the former, I believe that the answer is reasonably clear. The latter, however, raises somewhat novel issues.

With regard to the GIS data prepared by a firm for a municipality, it is emphasized that the Freedom of Information Law pertains to agency records. Section 86(4) of that statute defines the term "record" expansively to include:

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

The Court of Appeals, 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).

More recently, the Court of Appeals found that materials maintained 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 [see Encore College Bookstores, Inc. v. Auxiliary Services Corporation of the State University of New York at Farmingdale, 87NY2d 410, 417 (1995)]. Therefore, if records are produced for an agency, as in the case of GIS data produced by a private entity for a municipality, they constitute agency records, irrespective of their origin.

That JIMAPCO is a private entity seeking records for a profit making purpose is likely irrelevant.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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, when records are accessible under the Freedom of Information Law, it has been held that they should be made equally available to any person, regardless of one's status, interest or the intended use of the records [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Moreover, the Court of Appeals has held that:

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

Farbman pertained to a situation in which a person involved in litigation against an agency requested records from that agency under the Freedom of Information Law. In brief, it was found that one's status as a litigant had no effect upon that person's right as a member of the public when using the Freedom of Information Law, irrespective of the intended use of the records. Similarly, unless there

is a basis for withholding records in accordance with the grounds for denial appearing in §87(2), the use of the records, including the potential for commercial use or the status of the applicant, is in my opinion irrelevant.

The only exception to the principles described above involves the protection of personal privacy. By way of background, §87(2)(b) of the Freedom of Information Law permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." Further, §89(2)(b) of the Law provides a series of examples of unwarranted invasions of personal privacy, one of which pertains to:

"sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes" [§89(2)(b)(iii)].

The provision quoted above represents what might be viewed as an internal conflict in the law. As indicated earlier, the status of an applicant or the purposes for which a request is made are irrelevant to rights of access, and an agency cannot inquire as to the intended use of records. However, due to the language of §89(2)(b)(iii), rights of access to a list of names and addresses, or equivalent records, may be contingent upon the purpose for which a request is made [see Scott, Sardano & Pomeranz v. Records Access Officer of Syracuse, 65 NY 2d 294, 491 NYS 2d 289 (1985); Goodstein v. Shaw, 463 NYS 2d 162 (1983)].

In a case involving a list of names and addresses in which the agency inquired as to the purpose of which the list was requested, it was found that an agency could make such an inquiry. Specifically, in Golbert v. Suffolk County Department of Consumer Affairs (Supreme Court, Suffolk County, September 5, 1980), the Court cited and apparently relied upon an opinion rendered by this office in which it was advised that an agency may appropriately require that an applicant for a list of names and addresses provide an indication of the purpose for which a list is sought. In that decision, it was stated that:

"The Court agrees with petitioner's attorney that nowhere in the record does it appear that petitioner intends to use the information sought for commercial or fund-raising purposes. However, the reason for that deficiency in the record is that all efforts by respondents to receive petitioner's assurance that the information sought would not be so used apparently were unsuccessful. Without that assurance the respondents could reasonably infer that petitioner did want to use the information for commercial or fund-raising purposes."

As such, there is precedent indicating that an agency may inquire with respect to the purpose of a request when the request involves a list of names and addresses. That situation, however, represents the only case under the Freedom of Information Law in which an agency may inquire as to the purpose for which a request is made, or in which the intended use of the record has a bearing upon rights of access.

I would conjecture that the data requested from the municipality does not constitute a list of names and addresses of natural persons. If that is so, I do not believe that there would be any basis for a denial of access.

In sum, assuming that the GIS data has been produced for an agency, it is, in my opinion, an agency record subject to rights of access conferred by the Freedom of Information Law. Further, unless a record sought is a list of names and addresses, the intent of the applicant and the intended use of the record are irrelevant.

The response by DOT to your request poses a more difficult series of issues. I note that every state has enacted a statute dealing with public access to records of state and local government. However, I know of no judicial decision that has focused squarely on the ability of an agency to limit, restrict or condition the use of records acquired as of right pursuant to a statute that requires the agency to disclose and copy its records. Further, federal agencies cannot copyright their works, and there is no precedent dealing with copyright by the federal government. DOT contends that by making copies of records available, it is in no way infringing rights conferred by the Freedom of Information Law. The restriction, which is based on a copyright, merely deals with "a situation involving a separate set of rights to the ownership and possession of property which the State enjoys under a separate set of federal laws."

The stance taken by DOT, in view of the Copyright Act (17 U.S. §101 et seq.), arguably is correct. However, due to the inherent purpose of the Freedom of Information Law and a review of the constitutional and statutory underpinnings of copyright protection, I respectfully disagree.

In enacting the Freedom of Information Law, the State Legislature declared that:

"The more open a government is with its citizenry, the greater the understanding and participation of public in government.

"As state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible."

"Extending" accountability through the Freedom of Information Law "wherever and whenever feasible" in my view evidences an intent that the public good is best served when records available under that statute are disclosed as widely as possible and without impediment. As suggested earlier, in construing the Freedom of Information Law, the courts have held that the status or interest of a person seeking records are irrelevant; the only question (unless the record is a list of names and addresses of natural persons) is whether there is a basis for a denial of access pursuant §87(2). "Interest" in my opinion relates to the intended use of records. That a record may not be used for a purpose relating to the accountability of government is of no moment (see Farbman, supra), and in general, I do not believe that it is the government's business to know or even to inquire as to the intended use of records. Once the records have been found to be available, the applicant should be

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able to do with them as he or she sees fit. As stated by a renowned commentator, Professor Henry H. Perritt, Jr., Professor of Law at the Villanova University School of Law:

“...most state statutes, like the federal FOIA, do not allow for interest balancing or assessing the reason for access. The mere fact that an individual or entity may obtain income from an activity that serves a public purpose does not negate the public nature of the activity. When a commercial publisher disseminates public information, it is serving a public purpose - the very purpose that is central justification for FOIAs” [Should Local Governments Sell Local Spatial Databases Through State Monopolies? 35 *Jurimetrics Journal* 449, 45, Summer, 1995).

Similarly, it has been asserted that “Our democratic American Tradition has historically supported policies and programs which foster the broad-based dissemination of public information, for the benefit of all who properly apply it” (Principles of Government Sourced Data, Commercial Dissemination and Responsible Information Handling, an Industry Whitepaper prepared by the Real Estate Information Providers Association (REIPA), January 11, 1997). From my perspective, the commentary quoted above is consistent with and supports the notion that an access statute, like the Freedom of Information Law, is intended to remove barriers to the dissemination of government records and encourage the widest possible distribution of those records.

In relating the foregoing to copyright, it is important, in my opinion, to review the history and intent of copyright protection.

The basis of copyright is Article I, §8 of the United States Constitution, which indicates the framer’s intent:

“To promote the Progress of Science and Useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”

In construing the “copyright clause”, the United States Supreme Court has stated that its purpose is as follows:

“The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts’” [Mazer v. Stein, 347 U.S. 201, 219 (1954)].

At heart of copyright protection, therefore, is “personal gain”, an economic incentive, and several decisions support that principle. For instance, in National Rifle Ass’n v. Hand Gun Control Federal, 15 F.3d 559, 561 (6th Cir. 1994), it was held that the use of mailing list was fair use and noted that the scope of *prima facie* copyright protection is limited to uses of a work that would

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undermine the incentive for creation [*see also Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984), which discussed the goals and incentives of copyright protection]. In Twentieth Century Music Corp. v. Akin, [422 U.S. 151, 156 (1975)] it was determined that the "ultimate aim is by this incentive [securing a fair return for author's creative labor] to stimulate artistic creativity for the general public good."

Unlike authors and creators, DOT needs no similar incentives. On the contrary, it is that agency's statutory duty to prepare and preserve the kinds of records that you are seeking. In a broad statement of his responsibilities, subdivision (21) of §14 of the Transportation Law provides that:

"The commissioner shall continue to

(a) Keep in his office a map of the state and cause to be delineated thereon all changes in the bounds thereof or of the counties therein.

(b) Collect and preserve all maps, plans, drawings, field notes, levels and surveys of every description made for the use of the state and all engineering instruments belonging to the state."

As stated by Perritt:

"Such incentives are unnecessary for public agencies, since these entities have a statutory duty to collect, organize and disseminate information, such as that represented in spatial databases" (Perritt, supra, 460).

Pertinent to an analysis of the intent of copyright is consideration of the application of access law to records that come into the possession of government from private sources. In considering the issue, the United States Department of Justice referred to the federal Freedom of Information Act (5 U.S.C. §552) and its exemption analogous to §87(2)(d) of the Freedom of Information Law in conjunction with 17 U.S.C. §107, which codifies the doctrine of "fair use". Section 87(2)(d) permits an agency to withhold records that "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise." Under §107, copyrighted work may be reproduced "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research" without infringement of the copyright. Further, the provision describes the factors to be considered in determining whether a work may be reproduced for a fair use, including "the effect of the use upon the potential market for or value of the copyrighted work" [17 U.S.C. §107(4)].

According to the Department of Justice, the most common basis for the assertion of the federal Act's "trade secret" exception involves "a showing of competitive harm," and in the context of a request for a copyrighted work, the exception may be invoked "whenever it is determined that the copyright holder's market for his work would be adversely affected by FOIA disclosure" (FOIA Update, supra). As such, it was concluded that the trade secret exception:

"stands as a viable means of protecting commercially valuable copyrighted works where FOIA disclosure would have a substantial adverse effect on the copyright holder's potential market. Such use of Exemption 4 is fully consonant with its broad purpose of protecting the commercial interests of those who submit information to government... Moreover, as has been suggested, where FOIA disclosure would have an adverse impact on 'the potential market for or value of [a] copyrighted work,' 17 U.S.C. §107(4), Exemption 4 and the Copyright Act actually embody virtually congruent protection, because such an adverse economic effect will almost always preclude a 'fair use' copyright defense... Thus, Exemption 4 should protect such materials in the same instances in which copyright infringement would be found" (id.).

Conversely, it was suggested that when disclosure of a copyrighted work would not have a substantial adverse effect on the potential market of the copyright holder, the trade secret exemption could not appropriately be asserted. Further, "[g]iven that the FOIA is designed to serve the public interest in access to information maintained by government," it was contended that "disclosure of nonexempt copyrighted documents under the Freedom of Information act should be considered a 'fair use'" (id.) (FOIA Update, published by the Office of Information and Privacy at the U.S. Department of Justice, (1983)).

Again, DOT does not prepare the records for economic gain; it has no "commercial interest" in so doing; on the contrary, the records are prepared because it is the agency's statutory obligation to do so.

In short, it is questionable in my view whether DOT can claim copyright protection at all.

In a letter to me, an attorney for DOT referred to other agencies, notably the State Department of Health, which, according to his letter:

"...owns intellectual property rights, in the form of patents on medical discoveries, devices, medications, and the like. DOH holds these either directly, or through Health Research Incorporated (HRI), a not-for-profit corporation, which is wholly owned by the Health Department. The patents cover intellectual properties developed by doctors and scientists at DOH's Wadsworth Center, which conducts basic and applied biomedical and environmental research; at DOH's Roswell Park Cancer Institute, which conducts research into the causes, treatment and prevention of cancer; and at DOH's Helen Hayes Hospital, which conducts research in the fields of metabolic disorders, musculoskeletal problems and rehabilitation technology... HRI regularly retains counsel to obtain formal, registered patent rights to intellectual property developed by researchers at those facilities. Two of HRI's main functions are, in fact 'technology transfer' and

'industrial partnering,' which collectively involve the licensing of patents developed by DOH facilities to manufacturers, medical facilities and others for commercial use."

In my view, the activities described above are distinguishable from DOT's functions regarding maps. The former involves research, "discovery", the creation of new medicines and the like, all of which are carried out by the Department as a "player" or "competitor" in marketplace. It acts, in essence, as if it were a commercial enterprise. As I understand DOT's functions in relation to the records at issue, they are different; they involve the compilation of factual data, not scientific research or discovery analogous to the activities in which the Health Department is engaged.

In a related vein, Perritt and others have contended that the assertion of copyright protections is contrary to public policy:

"Public entities need not give away their data without recovering the cost of dissemination, but they must not set up monopolies to enable themselves or favored contractors to earn a profit from information collected and organized at taxpayer expense or to finance particular value-added elements at the expense of competitive access to those elements" (Perritt, supra, 449-450).

He referred to the "temptation" to generate revenue, stating that:

"...it is natural for public agencies to suppose that they can ease their budget pressures and serve their publics better by appropriating some of the potential revenue stream; they can sell their information. Beyond that, it is natural for them to suppose that the quality of results and perhaps also the size of revenue stream can be increased by 'partnerships' with private entities.

"Unfortunately, this is but a short step away from imposing restrictions on what other vendors and distribution channels can do. Most public agencies responsible for geographic information have either a natural or de jure monopoly on the information. Monopolists perceive that they can increase their total revenue stream by setting prices higher than they would be in a competitive market. Monopolists also are tempted to extend their monopolies into downstream markets. Thus, public agency decisionmakers, behaving like rational monopolists in private sector, implement their partnership aspiration by prohibiting private sector competition with their chosen partners. The result is a state monopoly that limits economic and technological benefits to a broad range of potential distributors of the public information. As, as the monopolies are extended downstream by exclusive 'partnerships,' they block competition in a variety of

rapidly changing and diverse markets for value-added information products” (id., 454).

Perritt added that:

“...it is important to distinguish between making information and value-added features already developed with taxpayer money for pursuit of agency missions available, and using new money to finance things of use only to particular private sector vendors. The former is not subsidization, it is allowing the public access to something it already has paid for” (id., 456).

He also argued that an assertion of copyright may violate the First Amendment:

“When a monopoly is granted or asserted with respect to public information through copyright or otherwise, the monopoly may be enforced by denying access to the information or by penalizing publication of the information. Punishing publication or dissemination directly collides with the First Amendment’s protection of publishing and speaking, and denying access indirectly collides with the First Amendment’s free speech and free press protections” (id., 463).

Further, restricting the use of data by means of a copyright claim may diminish the revenues that may be generated through commercial activity by private enterprises. In the REIPA Whitepaper cited earlier, reference was made to the dissemination of real property data, and it was suggested that:

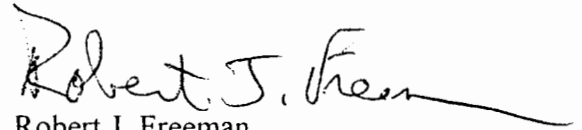
“Every dollar invested by the government in data sets that are shared with the public multiplies employment in the private sector and fosters economic growth and additional tax revenue. Providing easy access to real property data will generate significant new tax revenues as a natural by-product to the free market process. It is in the society’s best interest for government to encourage and facilitate a vibrant and healthy information industry, where the private sector is investing in new information technologies and applications, and where no government agency or single private enterprise is allowed monopolistic advantage” (REIPA, supra).

In sum, the assertion of copyright claims in the context of your inquiry is, in my opinion, contrary to the intent of both the Freedom of Information Law and the Copyright Act. Further, despite any increased revenue that DOT might derive via agreements based on copyright, the absence of copyright may result in greater overall economic benefit to the State, its residents and its commercial enterprises.

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

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.

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Clerk, Town of Clifton Park
Peter Shawhan
Bill Johnson

FOIL-AO-11977

From: Robert Freeman
To: [REDACTED]
Date: 3/2/00 8:08AM
Subject: Re: FOI requests by e-mail

There are no precedents in NY involving the use of email to request records under the FOIL. However, this office has advised that any request made in writing, including a request by email, that reasonably describes the record sought should suffice.

There may be situations, however, in which email may not be adequate. For instance, if a person requests records pertaining to himself or herself that could be withheld from others as an unwarranted invasion of personal privacy, the agency could require the applicant to provide proof of his or her identity. Until digital signatures become prevalent, the email request for records accessible only to the subject of the records may not be adequate.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11978

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March 6, 2000

Executive Director

Robert J. Freeman

Mr. Rick Karlin
Times Union
P.O. Box 15000
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Albany, NY 12212

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

Dear Mr. Karlin:

I have received your letter of February 10 in which you sought an advisory opinion concerning a request for records of the Department of Motor Vehicles. You wrote that you are attempting to obtain "a list of school bus drivers in the Capital Region, their names, ages and driving records as they relate to moving violations and accidents" and that you are focusing on drivers "who work with school bus companies licensed by the Department" and operating in Albany, Schenectady, Saratoga and Rensselaer Counties. You added that you would prefer to obtain the data "on an Excel spreadsheet or computer disc", but that the Department indicated that it could not release the data due to the federal Driver's Privacy Protection Act.

In this regard, I offer the following comments.

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

Second, with respect to the Department's claim, pertinent is §87(2)(a), which relates to records that "are specifically exempted from disclosure by state or federal statute." In many instances, the Driver's Privacy Protection Act, 18 USC §2721 *et seq.* prohibits the disclosure of personal information maintained by the Department that is derived from license records. However, in the context of your request, I do not believe that it would apply. For purposes of that Act, §2725(3) defines the phrase "personal information" to mean:

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"Information that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information, *but does not include information on vehicular accidents, driving violations, and driver's status*" (emphasis mine).

Since your request involves data relating to "moving violations and accidents", again, I do not believe that the Driver's Privacy Protection Act would exempt the data from disclosure.

Third, while I know of no case law on the subject, it has been advised that portions of records identifiable to individuals that include their ages may be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" pursuant to §§87(2)(b), 89(2)(b), and 89(2-a) of the Freedom of Information Law. If, however, one's age appears on an accident report, which is available from the Department under the Freedom of Information Law and §66-a of the Public Officers Law, I believe that the same item would be available from a different record maintained by the Department containing equivalent information.

If indeed ages of bus drivers may properly be withheld, but ages are of primary interest to you, names of the drivers could be withheld from the records prior to disclosure; conversely, if you are interested more in the names than the ages, portions of the data indicating age might be withheld prior to the disclosure of the remainder.

Lastly, as you may be aware, the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that an agency need not create a record in response to a request. It is also important to note, however, that §86(4) of the Law defines the term "record" to include:

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

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

When information is maintained electronically, it has been advised that if the information sought is available under the Freedom of Information Law and may be retrieved by means of existing computer programs, an agency is required to disclose the information. In that kind of situation, the agency would merely be retrieving data that it has the capacity to retrieve. Disclosure

Mr. Rick Karlin
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may be accomplished either by printing out the data on paper or perhaps by duplicating the data on another storage mechanism, such as a computer tape or disk. On the other hand, if information sought can be retrieved from a computer or other storage medium only by means of new programming or the alteration of existing programs, those steps would be the equivalent of creating a new record. As stated earlier, since §89(3) does not require an agency to create a record, an agency is not required to reprogram or develop new programs to retrieve information that would otherwise be available [see Guerrier v. Hernandez-Cuebas, 165 AD 2d 218 (1991)].

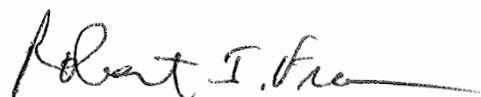
Often information stored electronically can be extracted by means of a few keystrokes on a keyboard. While some have contended that those kinds of minimal steps involve programming or reprogramming, and, therefore, creating a new record, so narrow a construction would tend to defeat the purposes of the Freedom of Information Law, particularly as information is increasingly being stored electronically. If electronic information can be extracted or generated with reasonable effort, if that effort involves less time and cost to the agency than engaging in manual deletions, it would seem that an agency should follow the more reasonable and less costly and labor intensive course of action.

In my view, there is clearly a distinction between extracting information and creating it. If an applicant knows that an agency's database consists of 10 items or "fields", asks for items 1, 3 and 5, but the agency has never produced that combination of data, would it be "creating" a new record? The answer is dependent on the nature of the agency's existing computer programs; if the agency has the ability to retrieve or extract those items by means of its existing programs, it would not be creating a new record; it would merely be retrieving what it has the ability to retrieve in conjunction with its electronic filing system. An apt analogy may be to a filing cabinet in which files are stored alphabetically and an applicant seeks items "A", "L" and "X". Although the agency may never have retrieved that combination of files in the past, it has the ability to do so, because the request was made in a manner applicable to the agency's filing system.

In the context of your request, if the Department has the ability to generate the data of your interest, subject to the qualifications discussed earlier regarding name and age, and if you are willing to pay the actual cost of reproduction as envisioned by §87(1)(b)(iii) of the Freedom of Information Law, I believe that the Department would be obliged to do so.

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: Alexandra Sussman



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11979

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David A. Schulz
Joseph J. Seymour
Carole E. Stone
Alexander F. Treadwell

March 6, 2000

Executive Director

Robert J. Freeman

Mr. Ronald J. Hall
96-A-5913
Upstate Correctional Facility
P.O. 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. Hall:

I have received a series of letters from you relating to your efforts in gaining access to records. Some of the issues raised have been considered in previous correspondence, but I offer the following additional remarks.

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

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

Second, based on the language of §89(3), a certification made under the Freedom of Information Law does not pertain to the accuracy of the contents of a record, but rather would involve an assertion that a copy is a true copy. In other words, a certification prepared pursuant to §89(3) would not indicate that the contents of a record are complete, accurate or "legal"; it would merely indicate that the copy of the record is a true copy.

Mr. Ronald J. Hall
March 6, 2000
Page 2-

Further, it has been consistently advised, particularly when certification is requested with respect to a voluminous number of records, that a single certification, given by means of a written assertion, statement or affidavit, for example, describing or identifying the records that were copied, would be sufficient. I do not believe that each copy of records made available under the Freedom of Information Law must be stamped or "certified" separately.

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

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

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AU-11980

Committee Members

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March 7, 2000

Executive Director

Robert J. Freeman

Mr. Stephen M. Winding

[REDACTED]

Dear Mr. Winding:

I have received your letter of January 26, as well as a variety of related correspondence concerning your efforts in gaining access to records. At this juncture, particularly in view of a response by Derrick Robinson of the Office of the Suffolk County Attorney, it appears that the records that you requested have been disclosed.

For future reference and as you may be aware, although the Freedom of Information Law generally governs rights of access to records of state and local government, different provisions of law were applicable in the context of your requests. In brief, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Pertinent in the circumstances that you presented is §87(2)(a), which provides that an agency may deny access to records or portions thereof that:

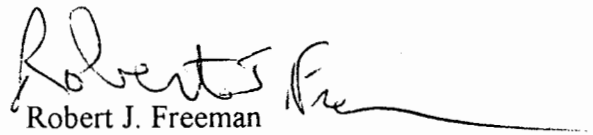
"are specifically exempted from disclosure by state or federal statute..."

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. In short, your right to obtain the records of your interest would not have been conferred by the Freedom of Information Law, but rather by provisions of the Social Services Law.

Mr. Stephen Winding
March 7, 2000
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 long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Derrick Robinson



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AJ-11981

Committee Members

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Alexander F. Treadwell

March 7, 2000

Executive Director

Robert J. Freeman

E-Mail

TO: Jack Bathrick [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. Bathrick:

I have received your recent letter in which you questioned the course of action that you might take in relation to delays by the State Insurance Department 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..."

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

Mr. Jack Bathrick

March 7, 2000

Page 2-

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

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

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

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

I hope that I have been of assistance.

RJF:jm

cc: Lester Grimmell



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AJ-11982

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Alexander F. Treadwell

March 7, 2000

Executive Director

Robert J. Freeman

Hon. Dennis W. Hardy
Mayor
Village of Piermont
478 Piermont Avenue
Piermont, 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 Mayor Hardy:

I have received your letter of January 26 in which you sought my views concerning a series of events occurring in the Village of Piermont.

According to your letter, on January 21, an employee of the Village "was arraigned in open court and charges were read to him", and a copy of the charges were placed in the records of the Piermont Police Department. In your capacity as chief executive officer of the Village, you requested a copy of the charges, but the Chief of Police denied your request, "stating that the District Attorney had instructed him not to give [you] a copy." You asked whether, under the circumstances that you described, the Chief of Police "could legitimately refuse a request for documents from the Mayor..."

From my perspective, the denial of your request was inconsistent with law. In this regard, I offer the following comments.

First, although the courts are not subject to the Freedom of Information Law, other statutes confer rights of access to court records. In this instance, pursuant to §2019-a of the Uniform Justice Court Act, which applies to village and town justice courts, the record of the arraignment and charges would in my view have been available to any person.

Second, in a related vein, even when records may ordinarily be withheld under the Freedom of Information Law, once they have been introduced in a public judicial proceeding, an agency no longer has the authority to deny access [see Moore v. Santucci, 151 AD2d 677 (1989)]. In this instance, because the arraignment occurred in a public proceeding during which any member of the

Hon. Dennis W. Hardy

March 7, 2000

Page 2-

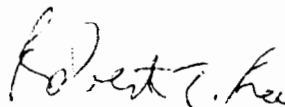
public could have been present, and since the court's record of that proceeding would be public, a duplicate of the same record would, in my opinion, be available from the Village under the Freedom of Information Law.

Third, as you are aware, provisions of the Village Law detail the powers and duties of various village officials. Pertinent in this instance is §4-400(1)(e), which states that "[i]t shall be the responsibility of the mayor...to exercise supervision over the conduct of the police and other subordinate officers of the village." Additionally, §4-402(a) provides that the village clerk is the custodian of village records. Based on those provisions, while the Police Chief may have had physical custody of the record in question, I do not believe that he had legal custody or control over the record.

Lastly, since the person arraigned was a Village employee, it would appear that you were seeking the record not as a member of the public under the Freedom of Information Law, but rather in the performance of your official duties as chief executive officer of the Village. In my view, since there was no statute barring disclosure, the Chief should have honored your request.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-A0-11983

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Alexander F. Treadwell

March 7, 2000

Executive Director

Robert J. Freeman

Mr. Ronald Logan
87-A-9529
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. Logan:

I have received your letter of January 6 concerning your attempts to obtain a Department of Correctional Services policy or directive in effect at a certain time. You were informed by the Department that the record of your interest does not exist.

In this regard, it is noted that the Freedom of Information Law does not deal with the retention and disposal of records. Further, that statute pertains to existing records, and §89(3) provides in relevant part that an agency is not required to create or prepare a record in response to a request. In short, if the record of your interest no longer exists, the Freedom of Information Law, in my view, would not be applicable.

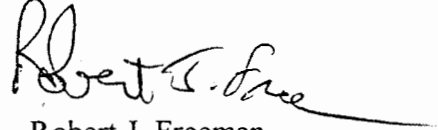
I point out that when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it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

Mr. Ronald Logan
March 7, 2000
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



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11984

Committee Members

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Wade S. Norwood
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Carole E. Stone
Alexander F. Treadwell

March 9, 2000

Executive Director

Robert J. Freeman

Mr. Andre Dolberry
99-A-4612
Wyoming Correctional Facility
P.O. Box 501
Attica, NY 14011

Dear Mr. Dolberry:

I have received a variety of correspondence from you involving your efforts in obtaining records, including appeals directed to this office relating to denials of access to records.

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee is not empowered to determine appeals or compel an agency to grant or deny access to records. The provision dealing with the right to appeal, §898(4)(a) of the Freedom of Information Law, states in relevant part that:

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

It is also noted that the Committee does not obtain records on behalf of individuals. It is not, therefore, the duty of this office to ascertain whether an attorney appeared in court on a certain date.

Lastly, I point out that the Freedom of Information Law is applicable to agency records. Section 86(3) of that statute defines the term "agency" to 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. Andre Dolberry
March 9, 2000
Page -2-

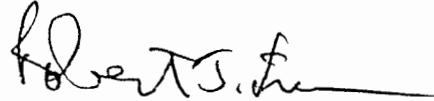
Further, §86(1) defines the term "judiciary" to mean:

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

Based on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. Similarly, a private attorney would not constitute an agency subject to the Freedom of Information Law.

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

Sincerely,

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-11985

Committee Members

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Wade S. Norwood
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Carole E. Stone
Alexander F. Treadwell

March 9, 2000

Executive Director

Robert J. Freeman

Mr. Michael S. Elder
Counsel
Northeast/Midwest Region
General Electric Company
320 Great Oaks Office Park, Ste. 323
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. Elder:

I have received your letter of February 4 in which you sought an advisory opinion concerning a partial denial of a request directed to the Department of Environmental Conservation (DEC).

By way of background, in February of last year, you submitted a request to DEC for "the entire agency file with respect to General Electric Company's Ft. Edward facility" in order to assist General Electric in preparing comments "on DEC's Proposed Remedial Action Plan ('PRAP') for that facility. You wrote that DEC responded approximately three months later by disclosing certain documents but withholding "approximately 430" others. Following an appeal, certain of the records initially withheld were disclosed in whole or in redacted form, and others were withheld in their entirety. You referred specifically to a denial of access to communications between DEC and the United States Environmental Protection Agency (EPA) on the ground that they fall within exceptions concerning inter-agency or intra-agency materials.

In conjunction with the foregoing, you raised the following questions:

1. Whether a memo regarding EPA's review of a DEC draft of a proposed remedial action plan for GE's Ft. Edward plant site is exempt from disclosures as an intra-agency document;
2. Whether a letter from DEC to EPA commenting on an EPA document regarding the Hudson River PCB Remnant Site is exempt from disclosure because it is specifically exempt from disclosure by a

Mr. Michael S. Elder

March 9, 2000

Page 2-

federal statute, namely, the federal Freedom of Information Act, 5 U.S.C. §552(b)(5) (1999), as part of EPA's pre-decisional and deliberative process; and

3. Whether the ALJ's letter deciding GE's appeal 'fully explain[s]' the basis for the denial of the documents specified in that letter, as required by §89.4(a) of the Public Officers Law. See N.Y. PUB. OFF. LAW §89.4 (McKinney 1999)."

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. 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.

Second, the provision to which DEC alluded, §87(2)(g), pertains to the ability to withhold "inter-agency or intra-agency materials" depending on their contents. For purposes of the Freedom of Information Law, §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."

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 or from 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, Supreme Court, Queens Cty., NYLJ, July 27, 1992; aff'd 613 NYS 2d 46, 205 AD2d 540 (1994)].

DEC also cited decisions involving records prepared by consultants for agencies in which it was held that those records should be treated, in essence, as if they were prepared by agency staff, and that they constitute "intra-agency materials" [see Xerox Corp. v. Town of Webster, 65 NY2d 131 (1985); SeaCrest v. Stubing, 82 AD2d 546 (1981)]. It is emphasized, however, that the Court of Appeals referred to "outside consultants retained by agencies" (Xerox, *supra*, 133). I do not believe that either DEC or EPA would have been "retained" by the other or that either could be characterized as a consultant as that term has been used in the context of judicial decisions.

Again, while the EPA is an agency for purposes of the federal Freedom of Information Act (5 USC §552) and its exceptions, it falls beyond the definition of "agency" as that term is defined by the state statute. The reverse would also be so: while DEC is an agency under the state statute, it is not an agency for purposes of the federal Act (see 5 USC §551).

The second question, in essence, involves a situation in which a federal agency may withhold a record under the federal Freedom of Information Act, and whether a state agency in possession of that record may claim that the records is "specifically exempted from disclosure by...statute" pursuant to §87(2)(a) of the New York Freedom of Information Law. In my opinion a claim of that nature cannot be validly be made.

DEC has contended that certain records prepared by EPA that could be withheld by that agency pursuant to §552(b)(5), the exemption in the federal Act analogous to §87(2)(g) of the state statute, the so-called "deliberative process" exemption, may be withheld by DEC on the ground that they are specifically exempted from disclosure by statute. However, several decisions indicate that only federal agencies subject to the federal Act may assert an exemption appearing in the federal Act [see Grand Central Partnership, Inc. v. Cuomo, 166 F.2d 473, 484 (1999); also Philip Morris, Inc. v. Harshbarger, 122 F.3d 58, 83 (1st Cir.1997); Day v. Shalala, 23 F.3d 1052, 1064 (9th Cir.1994); Brown v. Kelly, No. 93-5222, 1994 WL 36144, at *1 (D.C.Cir. January 27, 1994); St. Michael's Convalescent Hosp. v. State of California, 643 F.2d 1369, 1373 (9th Cir.1981); Johnson v. Wells, 566 F.2d 1016, 1018 (5th Cir.1978)].

More importantly, based on judicial decisions involving exceptions to rights of access in both the state and federal freedom of information statutes, the records at issue would not be "specifically

Mr. Michael S. Elder

March 9, 2000

Page 4-

exempted from disclosure by...statute pursuant to §87(2)(a) of the New York Freedom of Information Law or pursuant to its counterpart in the federal Act, the "(b)(3)" exception. Both the Court of Appeals and federal courts in construing access statutes have determined that the characterization of records as "confidential" or "exempted from disclosure by statute" must be based on statutory language that specifically confers or requires confidentiality. As stated by the Court of Appeals:

"Although we have never held that a State statute must expressly state it is intended to establish a FOIL exemption, we have required a showing of clear legislative intent to establish and preserve that confidentiality which one resisting disclosure claims as protection" [Capital Newspapers v. Burns, 67 NY2d 562, 567 (1986)].

An example of the proper assertion of a claim that records were "specifically exempted from disclosure by...statute" was offered in an opinion addressed to Frank V. Bifera, then Acting General Counsel to DEC, in 1997 concerning a provision of the Environmental Conservation Law stating that the Commissioner of DEC "shall not provide" certain information. In that situation, there was clear direction in a statute prohibiting the disclosure of certain information, and it was advised that §87(2)(a) could be cited.

Similarly, in construing the equivalent exception to rights of access in the federal Act, it has been found that:

"Exemption 3 excludes from its coverage only matters that are:

specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

"5 U.S.C. § 552(b)(3) (1982) (emphasis added). Records sought to be withheld under authority of another statute thus escape the release requirements of FOIA if – and only if – that statute meets the requirements of Exemption 3, including the threshold requirement that it specifically exempt matters from disclosure. The Supreme Court has equated 'specifically' with 'explicitly.' *Baldrige v. Shapiro*, 455 U.S. 345, 355, 102 S. Ct. 1103, 1109, 71 L.Ed.2d 199 (1982). '[O]nly *explicitly* non-disclosure statutes that evidence a congressional determination that certain materials ought to be kept in confidence will be sufficient to qualify under the exemption.' *Irons & Sears v. Dann*, 606 F.2d 1215, 1220 (D.C.Cir.1979) (emphasis added). In other words, a statute that is claimed to qualify as an Exemption 3

withholding statute must, on its face, exempt matters from disclosure” [Reporters Committee for Freedom of the Press v. U.S. Department of Justice, 816 F.2d 730, 735 (1987); modified on other grounds, 831 F.2d 1184 (1987); reversed on other grounds, 489 U.S. 789 (1989); see also British Airports Authority v. C.A.B., D.C.D.C.1982, 531 F.Supp. 408; Inglesias v. Central Intelligence Agency, D.C.D.C.1981, 525 F.Supp, 547; Hunt v. Commodity Futures Trading Commission, D.C.D.C.1979, 484 F.Supp. 47; Florida Medical Ass’n, Inc. v. Department of Health, Ed. & Welfare, D.C.Fla.1979, 479 F.Supp. 1291].

In short, to be “exempted from disclosure by statute”, both state and federal courts have determined that a statute must leave no discretion to an agency: it must withhold such records.

In contrast, when records are not exempted from disclosure by a separate statute, both the Freedom of Information Law and its federal counterpart are permissive. Although an agency *may* withhold records in accordance with the grounds for denial appearing in §87(2), the Court of Appeals in a decision cited earlier held that the agency is not obliged to do so and may choose to disclose, stating that:

“...while an agency is permitted to restrict access to those records falling within the statutory exemptions, the language of the exemption provision contains permissible rather than mandatory language, and it is within the agency’s discretion to disclose such records...if it so chooses” (Capital Newspapers, *supra*, 567).

The only situations in which an agency cannot disclose would involve those instances in which a statute other than the Freedom of Information Law prohibits disclosure. The same is so under the federal Act. While a federal agency *may* withhold records in accordance with the grounds for denial, it has discretionary authority to disclose.

Even if DEC or EPA had the authority to withhold records under either §87(2)(g) of the state statute or the (b)(5) exception in the federal Act, neither would be required to withhold the records; on the contrary, they would have the discretionary authority to disclose. That being so, I do not believe that the records at issue could be characterized as being exempted from disclosure by statute.

In a somewhat related vein, it has been suggested that “executive privilege” or the common law “governmental privilege” may be asserted to withhold records, notwithstanding the requirements of the Freedom of Information Law. From my perspective, reliance on a claim of privilege would be misplaced. Reference to executive privilege and the Freedom of Information Law was made in a footnote in Cirale v. 80 Pine St. Corp. [35 NY2d 113 (1974)], which was decided after the enactment but before the effective date of the Freedom of Information Law in 1974. In 1977, the original enactment was repealed and replaced with the current version of that statute, which became effective in 1978. Soon after the change in the law, the Court of Appeals appears to have abolished the governmental privilege in the context of requests made under the Freedom of Information Law.

As stated by the Court in 1979: "[T]he common-law interest privilege cannot protect from disclosure materials which that law requires to be disclosed" [Doolan v. BOCES, 48 NY2d 341, 347]. In short, either records or portions thereof fall within the grounds for denial appearing in §87(2) or they do not; if they do not, there would be no basis for denial, notwithstanding a claim based on an assertion of executive or governmental privilege.

The remaining question is whether DEC's determination of your appeal "fully explains" the reasons for further denial as required by §89(4)(a) of the Freedom of Information Law. In this regard, there is no judicial decision of which I am aware that specifies the degree of detail necessary to satisfy the requirements of that provision. In my view, a determination sustaining an initial decision to deny access must include sufficient detail to enable the applicant for the records to ascertain that records or portions thereof were withheld, at least arguably, with justification.

Even though the DEC prepared such records, I am also unaware of any provision of the Freedom of Information Law or judicial decisions 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. While a final administrative determination must "fully explain" the reasons for denial, I note that an agency's burden of justifying a denial in a judicial challenge is clearly more stringent. As stated by the Court of Appeals in a case in which it referred to several decisions it had previously rendered:

"...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)" (Gould, *supra*, 275).

In the context of your request, it appears that several records were withheld in their entirety on the ground that they reflect "Intra-agency deliberative process" or are "Non-final agency documents." It is possible that those blanket denials of access may have been inappropriate.

As you are aware, §87 (2)(g) enables an agency to withhold records that:

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

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

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

One of the contentions offered by the New York City Police Department in Gould 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)]). 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" (id., 276).

In short, that a record is reflective of the "deliberative process" 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,

Mr. Michael S. Elder

March 9, 2000

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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 intra-agency materials 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, unless a different ground for denial can be asserted. In short as stated by the Court of Appeals: "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275).

Lastly, many of the records sought were denied on the ground that they are attorney work product, material prepared for litigation or are subject to the attorney-client privilege. Insofar as those claims are accurate, I believe that the records would be exempt from disclosure pursuant, respectively, to subdivisions (c) and (d) of §3101 and §4503 of the CPLR and, therefore, §87(2)(a) of the Freedom of Information Law. However, the ability to withhold records under those provisions is specific and limited.

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 to others. In a decision in which it was determined that records could justifiably be withheld as attorney work product, the "disputed documents" were "clearly work product documents which contain the opinions, reflections and thought process of partners and associates" of a law firm "which have not been communicated or shown to individuals outside of that law firm" [Estate of Johnson, 538 NYS 2d 173 (1989)]. In another decision, the relationship between the attorney-privilege and the ability to withhold the work product of an attorney was discussed, and it was found that:

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

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

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

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

Mr. Michael S. Elder
March 9, 2000
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It is also noted that it has been determined judicially that if records are prepared for multiple purposes, one of which includes eventual use in litigation, §3101(d) does not serve as a basis for withholding records; only when records are prepared solely for litigation can §3101(d) be properly asserted to deny access to records [see e.g., Westchester-Rockland Newspapers v. Moszydlowski, 58 AD 2d 234 (1977)].

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 that extends to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Susan J. DuBois
Ruth Earl
Harold Iselin
Liz Grisaru

PPPL-AO -
FOIL-AO - 11986

From: Robert Freeman
To: [REDACTED]
Date: Fri, Mar 10, 2000 4:47 PM
Subject: Dear Mr. Xanthos:

Dear Mr. Xanthos:

I have received your letter concerning the Freedom of Information and Personal Privacy Protection Laws. Both are indeed in effect: the former appears in the Public Officers Law, sections 84-90, and the latter in sections 91-99.

The Freedom of Information Law applies to units of state and local government in New York and pertains to all records kept by or for those agencies. In brief, that law is based on a presumption of access, stating that all records are available, with certain exceptions.

The Personal Privacy Protection Law pertains to personal information maintained by state agencies; it does not apply to local government. In general, that statute provides the subject of records with rights of access to those records; it limits the ability of state agencies to collect personal information, and it restricts the ability of those agencies to disclose personal information.

The Freedom of Information Law is described in our publication, "Your Right to Know", which includes a sample letter of request. The Personal Privacy Protection Law is described in "You Should Know", and it also contains a sample request letter. Both statutes and both publications are available in full text via our website.

I hope that I have been of assistance. Should any questions arise, 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
Website - www.dos.state.ny.us/coog/coogwww.html



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COMMITTEE ON OPEN GOVERNMENT

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March 13, 2000

Executive Director

Robert J. Freeman

Ms. Suanne Merlino



Dear Ms. Merlino:

Your letter addressed to Governor Pataki has been forwarded to the Committee on Open Government, a unit of the Department of State. The Committee is authorized to offer guidance concerning the Freedom of Information Law.

You indicated that you are tracing your family history, and you questioned the fees charged by municipalities for searching for birth and death records.

In this regard, although the Freedom of Information Law pertains generally to access to government records and the fees that may be charged for copies of records, the provisions of the Public Health Law deal with birth and death records and fees for services rendered concerning searches for and copies of those records. Specifically, subdivision (3) of §4174 refers to searches for and the fees for records sought for genealogical or research purposes that may be imposed by "any person authorized" by the State Commissioner of Health, i.e., municipal clerks. That provision states that:

"For any search of the files and records conducted for authorized genealogical or research purposes, the commissioner or any person authorized by him shall be entitled to, and the applicant shall pay, a fee of ten dollars for each hour or fractional part of an hour of time for search, together with a fee of one dollar for each uncertified copy or abstract of such records requested by the applicant or for a certification that a search discloses no record."

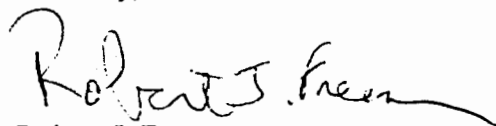
It is noted that the Commissioner of Health has promulgated "Administrative Rules and Regulations" pertaining to genealogical research, and enclosed is a summary of those provisions that have been obtained on your behalf. According to the summary, birth records need not be disclosed unless the subject of the birth record is known to have been deceased prior to 1924; death records need not be disclosed regarding deaths occurring after 1949.

Ms. Suanne Merlino
March 13, 2000
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An alternative source of the records is likely the State Department of Health. In general, its Bureau of Vital Records maintains duplicates of records of birth, death and marriage regarding all such events occurring outside of New York City. You may call that office at (518)474-3055 or write for further information to the Bureau of Vital Records, New York State Department of Health, Empire State Plaza, Corning Tower, Albany, NY 12237.

I hope that I have been of assistance.

Sincerely,

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



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11988

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March 14, 2000

Executive Director

Robert J. Freeman

E-Mail

TO: Jim Parker [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. Parker:

I have received your letter of January 20 in which you raised two issues concerning access to records.

The first pertains to an incident in which a person was taken into custody by a police department but not charged. However, he was allegedly "slammed...against the wall" by a police officer, and a request for the police blotter relating to the incident was denied on the ground that it included "investigative material."

In this regard, 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 ability to withhold "records or portions thereof" that fall within the grounds for denial that follow. In view of the highlighted phrase, even though a portion of a record might justifiably be withheld, it does not mean that the record may be withheld in its entirety; on the contrary, an agency is required to review the record sought in its entirety to determine which portions, if any, may properly be withheld, delete those portions, and disclose the remainder.

Second, the phrase "police blotter" is not specifically defined in any statute. It is my understanding that it is a term that has been used, 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.

Third, there is no general exception in the Freedom of Information Law concerning "investigative materials." The provision that deals most directly with those kinds of materials, §87(2)(e), states that an agency may withhold records that:

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

- i. interfere with law enforcement investigations or judicial proceedings;
- ii. deprive a person of a right to a fair trial or impartial adjudication;
- iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
- iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

Based on the language quoted above, only to the extent that disclosure would result in the harmful effects described in subparagraphs (i) through (iv) of §87(2)(e) would an agency have the authority to withhold information under that provision.

The remaining issue involves an unanswered request made to Herkimer County Court for statistical data involving certain kinds of cases before that court since 1988. Here I point out that the Freedom of Information Law pertains to agency records and that §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

Mr. Jim Parker
March 14, 2000
Page 3-

proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(3) defines the term "judiciary" to mean:

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

Based on those provisions, the courts and court records are not subject to the Freedom of Information Law. That is not to suggest that court records are confidential; on the contrary, most court records are available under other provisions of law (see e.g., Judiciary Law, §255). Nevertheless, neither an agency subject to the Freedom of Information Law nor a court subject to other statutes granting access to records require that a new record be prepared in order to satisfy a request for information. In short, if the statistical data in which you are interested does not exist, an entity would not be required to create a new record containing the data on your behalf.

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

RJF:jm

cc: Clerk, Herkimer County Court



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-A-11989

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Alexander F. Treadwell

March 14, 2000

Executive Director

Robert J. Freeman

Mr. Ken Dufty
Executive Director
Rensselaer County Environmental
Management Council
Rensselaer County Office Building
Troy, NY 12180

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

Dear Mr. Dufty:

I have received your letter of January 18 in which you sought guidance concerning a request made under the Freedom of Information Law. Please accept my apologies for the delay in response.

You referred to a request for all files and correspondence relating to a particular landfill, and you indicated that "the only way to gather the information...is to peruse computer discs and hard drives...searching and finding documents with the word 'Dewey' as a locator." With respect to the foregoing, you raised the following questions:

- "1) Does a filer of a FOIL request have the right to demand records 'immediately', even when those records are not easily amassed?
- 2) Can a filer of a FOIL request be required to compensate the Responding agency for the employee time that is required to be committed to fulfill their request?"

In this regard, I offer the following comments.

First, the primary 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 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 Council, 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 staff might begin to look for records. If the Council maintains all of its records regarding "Dewey" in a single file or location, it may be a simple task to locate the records. If, however, the records falling within the scope of the request cannot be found except by reviewing the content of thousands items individually, based on the decision rendered by the state's highest court, you would not be required to engage in that kind of effort.

Second, with respect to fees, as a general matter, an agency may charge only for the duplication of records; it cannot charge for searching for records or the personnel time involved in dealing with a request [see Freedom of Information Law, §87(1)(b)(iii); 21 NYCRR Part 1401]. However, if a request does not reasonably describe the records, and an agency consents to exceed its responsibilities imposed by law, the agency may, in my opinion, by prior agreement, charge a fee that reflects its additional effort.

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:

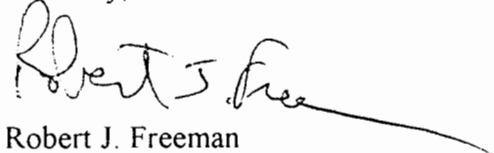
Mr. Ken Dufty
March 14, 2000
Page 3-

"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 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,

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

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11990

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Carole E. Stone
Alexander F. Treadwell

March 14, 2000

Executive Director

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 January 20, as well as the materials relating to it. You have complained that the Department of Environmental Conservation failed to respond to your appeal under the Freedom of Information Law in a timely manner.

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."

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)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Office of Hearings and Mediation Services



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11991

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March 14, 2000

Executive Director

Robert J. Freeman

Mr. Norman L. Grauerholz

[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. Grauerholz:

I have received your letter of January 17 and the materials attached to it. You have sought guidance concerning your right to obtain a copy of a search warrant from the City of Niagara Falls. You indicated that the search resulted in damage to your property, and that a City Court official said that you could obtain a copy with "an order from a higher court."

In this regard, I offer the following comments.

First, the Freedom of Information Law, the statute within the advisory jurisdiction of the Committee on Open Government, 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

Mr. Norman L. Grauerholz
March 14, 2000
Page -2-

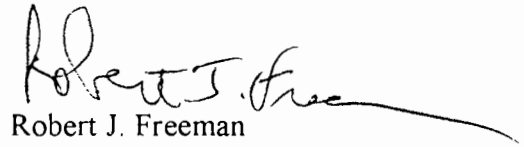
to the public, for other provisions of law (see e.g., Judiciary Law, §255) may grant broad public access to those records. It is recommended that a request for court records be directed to the clerk of the court in possession of the document, citing an applicable statute as the basis for the request.

Second, assuming that copies of the warrant are maintained by the Office of the District Attorney or the Police Department, for example, because they are agencies, the Freedom of Information Law would apply. In brief, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Since the warrant has been executed and the search made, it is unlikely in my view that any of the grounds for denial would be applicable.

Lastly, notwithstanding the foregoing, pursuant to §160.50 of the Criminal Procedure Law, if a person is charged with a crime and the charge is later dismissed, the records relating to event become sealed. If the records have been sealed, neither the court nor an agency in possession of the record would be required to disclose the record in question to you. If the records regarding the event have not been sealed, however, it appears that the record of your interest should be disclosed.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Martha J. Farbo-Lincoln



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11992

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March 14, 2000

Executive Director

Robert J. Freeman

Ms. Christina T. Fisk
Vice President
JIMAPCO
P.O. Box 1137
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. Fisk:

As you are aware, I have received your letters of October 29 and December 13. Both deal with difficulties that you have encountered in your attempts to obtain government records to enable JIMAPCO to produce map products that are as accurate as possible. You wrote that:

“We have repeatedly experienced refusal of our requests for access to geographic information based upon such reasons as:

- 1) we are a commercial business
- 2) they paid to compile the information and they will not release it.

“The type of documents and files we seek generally are details about street names, political boundaries, fire and ambulance boundaries, and locations of public facilities. We do not expect the materials to be compiled in any special manner for our requests.”

In the first letter, you wrote that a municipality contracted with a private firm to create a “digital GIS system” for the municipality and has contended that only that firm can gain access to the data. The second involves requests directed to the New York State Department of Transportation (DOT) for “digital datasets.” In response, you were informed that you must sign a “copyright agreement” stating that you will not use the materials for commercial purposes. DOT has contended that:

Ms. Christina T. Fisk

March 14, 2000

Page 2-

"...when a commercial enterprise wishes to make commercial profits based on the use and exploitation of property owned by the government, including intellectual property as well as real estate or physical property, it cannot simply take that property from its public owners without compensation, but must instead purchase or license the property and provide the State and its taxpayers with fair compensation for the property that it wishes to use. Requestors will be granted access in compliance with FOIL, but if they wish to sell what they obtain to other people at a profit, they will have to license it first."

In short, DOT is stating that you may acquire a copy of its data, but that you cannot use it in your business activities.

In some respects, the two situations involve common issues of public policy. In the case of the former, I believe that the answer is reasonably clear. The latter, however, raises somewhat novel issues.

With regard to the GIS data prepared by a firm for a municipality, it is emphasized that the Freedom of Information Law pertains to agency records. Section 86(4) of that statute defines the term "record" expansively to include:

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

The Court of Appeals, 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).

More recently, the Court of Appeals found that materials maintained 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 [see Encore College Bookstores, Inc. v. Auxiliary Services Corporation of the State University of New York at Farmingdale, 87NY2d 410, 417 (1995)]. Therefore, if records are produced for an agency, as in the case of GIS data produced by a private entity for a municipality, they constitute agency records, irrespective of their origin.

That JIMAPCO is a private entity seeking records for a profit making purpose is likely irrelevant.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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, when records are accessible under the Freedom of Information Law, it has been held that they should be made equally available to any person, regardless of one's status, interest or the intended use of the records [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Moreover, the Court of Appeals has held that:

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

Farbman pertained to a situation in which a person involved in litigation against an agency requested records from that agency under the Freedom of Information Law. In brief, it was found that one's status as a litigant had no effect upon that person's right as a member of the public when using the Freedom of Information Law, irrespective of the intended use of the records. Similarly, unless there

is a basis for withholding records in accordance with the grounds for denial appearing in §87(2), the use of the records, including the potential for commercial use or the status of the applicant, is in my opinion irrelevant.

The only exception to the principles described above involves the protection of personal privacy. By way of background, §87(2)(b) of the Freedom of Information Law permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." Further, §89(2)(b) of the Law provides a series of examples of unwarranted invasions of personal privacy, one of which pertains to:

"sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes" [§89(2)(b)(iii)].

The provision quoted above represents what might be viewed as an internal conflict in the law. As indicated earlier, the status of an applicant or the purposes for which a request is made are irrelevant to rights of access, and an agency cannot inquire as to the intended use of records. However, due to the language of §89(2)(b)(iii), rights of access to a list of names and addresses, or equivalent records, may be contingent upon the purpose for which a request is made [see Scott, Sardano & Pomeranz v. Records Access Officer of Syracuse, 65 NY 2d 294, 491 NYS 2d 289 (1985); Goodstein v. Shaw, 463 NYS 2d 162 (1983)].

In a case involving a list of names and addresses in which the agency inquired as to the purpose of which the list was requested, it was found that an agency could make such an inquiry. Specifically, in Golbert v. Suffolk County Department of Consumer Affairs (Supreme Court, Suffolk County, September 5, 1980), the Court cited and apparently relied upon an opinion rendered by this office in which it was advised that an agency may appropriately require that an applicant for a list of names and addresses provide an indication of the purpose for which a list is sought. In that decision, it was stated that:

"The Court agrees with petitioner's attorney that nowhere in the record does it appear that petitioner intends to use the information sought for commercial or fund-raising purposes. However, the reason for that deficiency in the record is that all efforts by respondents to receive petitioner's assurance that the information sought would not be so used apparently were unsuccessful. Without that assurance the respondents could reasonably infer that petitioner did want to use the information for commercial or fund-raising purposes."

As such, there is precedent indicating that an agency may inquire with respect to the purpose of a request when the request involves a list of names and addresses. That situation, however, represents the only case under the Freedom of Information Law in which an agency may inquire as to the purpose for which a request is made, or in which the intended use of the record has a bearing upon rights of access.

I would conjecture that the data requested from the municipality does not constitute a list of names and addresses of natural persons. If that is so, I do not believe that there would be any basis for a denial of access.

In sum, assuming that the GIS data has been produced for an agency, it is, in my opinion, an agency record subject to rights of access conferred by the Freedom of Information Law. Further, unless a record sought is a list of names and addresses, the intent of the applicant and the intended use of the record are irrelevant.

The response by DOT to your request poses a more difficult series of issues. I note that every state has enacted a statute dealing with public access to records of state and local government. However, I know of no judicial decision that has focused squarely on the ability of an agency to limit, restrict or condition the use of records acquired as of right pursuant to a statute that requires the agency to disclose and copy its records. Further, federal agencies cannot copyright their works, and there is no precedent dealing with copyright by the federal government. DOT contends that by making copies of records available, it is in no way infringing rights conferred by the Freedom of Information Law. The restriction, which is based on a copyright, merely deals with "a situation involving a separate set of rights to the ownership and possession of property which the State enjoys under a separate set of federal laws."

The stance taken by DOT, in view of the Copyright Act (17 U.S. §101 et seq.), arguably is correct. However, due to the inherent purpose of the Freedom of Information Law and a review of the constitutional and statutory underpinnings of copyright protection, I respectfully disagree.

In enacting the Freedom of Information Law, the State Legislature declared that:

"The more open a government is with its citizenry, the greater the understanding and participation of public in government.

"As state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible."

"Extending" accountability through the Freedom of Information Law "wherever and whenever feasible" in my view evidences an intent that the public good is best served when records available under that statute are disclosed as widely as possible and without impediment. As suggested earlier, in construing the Freedom of Information Law, the courts have held that the status or interest of a person seeking records are irrelevant; the only question (unless the record is a list of names and addresses of natural persons) is whether there is a basis for a denial of access pursuant §87(2). "Interest" in my opinion relates to the intended use of records. That a record may not be used for a purpose relating to the accountability of government is of no moment (see Farbman, supra), and in general, I do not believe that it is the government's business to know or even to inquire as to the intended use of records. Once the records have been found to be available, the applicant should be

Ms. Christina T. Fisk
March 14, 2000
Page 6-

able to do with them as he or she sees fit. As stated by a renowned commentator, Professor Henry H. Perritt, Jr., Professor of Law at the Villanova University School of Law:

“...most state statutes, like the federal FOIA, do not allow for interest balancing or assessing the reason for access. The mere fact that an individual or entity may obtain income from an activity that serves a public purpose does not negate the public nature of the activity. When a commercial publisher disseminates public information, it is serving a public purpose - the very purpose that is central justification for FOIAs” [Should Local Governments Sell Local Spatial Databases Through State Monopolies? 35 *Jurimetrics Journal* 449, 45, Summer, 1995).

Similarly, it has been asserted that “Our democratic American Tradition has historically supported policies and programs which foster the broad-based dissemination of public information, for the benefit of all who properly apply it” (Principles of Government Sourced Data, Commercial Dissemination and Responsible Information Handling, an Industry Whitepaper prepared by the Real Estate Information Providers Association (REIPA), January 11, 1997). From my perspective, the commentary quoted above is consistent with and supports the notion that an access statute, like the Freedom of Information Law, is intended to remove barriers to the dissemination of government records and encourage the widest possible distribution of those records.

In relating the foregoing to copyright, it is important, in my opinion, to review the history and intent of copyright protection.

The basis of copyright is Article I, §8 of the United States Constitution, which indicates the framer’s intent:

“To promote the Progress of Science and Useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”

In construing the “copyright clause”, the United States Supreme Court has stated that its purpose is as follows:

“The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts’” [Mazer v. Stein, 347 U.S. 201, 219 (1954)].

At heart of copyright protection, therefore, is “personal gain”, an economic incentive, and several decisions support that principle. For instance, in National Rifle Ass’n v. Hand Gun Control Federal, 15 F.3d 559, 561 (6th Cir. 1994), it was held that the use of mailing list was fair use and noted that the scope of *prima facie* copyright protection is limited to uses of a work that would

Ms. Christina T. Fisk

March 14, 2000

Page 7-

undermine the incentive for creation [*see also Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984), which discussed the goals and incentives of copyright protection]. In *Twentieth Century Music Corp. v. Akin*, [422 U.S. 151, 156 (1975)] it was determined that the "ultimate aim is by this incentive [securing a fair return for author's creative labor] to stimulate artistic creativity for the general public good."

Unlike authors and creators, DOT needs no similar incentives. On the contrary, it is that agency's statutory duty to prepare and preserve the kinds of records that you are seeking. In a broad statement of his responsibilities, subdivision (21) of §14 of the Transportation Law provides that:

"The commissioner shall continue to

(a) Keep in his office a map of the state and cause to be delineated thereon all changes in the bounds thereof or of the counties therein.

(b) Collect and preserve all maps, plans, drawings, field notes, levels and surveys of every description made for the use of the state and all engineering instruments belonging to the state."

As stated by Perritt:

"Such incentives are unnecessary for public agencies, since these entities have a statutory duty to collect, organize and disseminate information, such as that represented in spatial databases" (Perritt, *supra*, 460).

Pertinent to an analysis of the intent of copyright is consideration of the application of access law to records that come into the possession of government from private sources. In considering the issue, the United States Department of Justice referred to the federal Freedom of Information Act (5 U.S.C. §552) and its exemption analogous to §87(2)(d) of the Freedom of Information Law in conjunction with 17 U.S.C. §107, which codifies the doctrine of "fair use". Section 87(2)(d) permits an agency to withhold records that "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise." Under §107, copyrighted work may be reproduced "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research" without infringement of the copyright. Further, the provision describes the factors to be considered in determining whether a work may be reproduced for a fair use, including "the effect of the use upon the potential market for or value of the copyrighted work" [17 U.S.C. §107(4)].

According to the Department of Justice, the most common basis for the assertion of the federal Act's "trade secret" exception involves "a showing of competitive harm," and in the context of a request for a copyrighted work, the exception may be invoked "whenever it is determined that the copyright holder's market for his work would be adversely affected by FOIA disclosure" (*FOIA Update, supra*). As such, it was concluded that the trade secret exception:

"stands as a viable means of protecting commercially valuable copyrighted works where FOIA disclosure would have a substantial adverse effect on the copyright holder's potential market. Such use of Exemption 4 is fully consonant with its broad purpose of protecting the commercial interests of those who submit information to government... Moreover, as has been suggested, where FOIA disclosure would have an adverse impact on 'the potential market for or value of [a] copyrighted work,' 17 U.S.C. §107(4), Exemption 4 and the Copyright Act actually embody virtually congruent protection, because such an adverse economic effect will almost always preclude a 'fair use' copyright defense... Thus, Exemption 4 should protect such materials in the same instances in which copyright infringement would be found" (id.).

Conversely, it was suggested that when disclosure of a copyrighted work would not have a substantial adverse effect on the potential market of the copyright holder, the trade secret exemption could not appropriately be asserted. Further, "[g]iven that the FOIA is designed to serve the public interest in access to information maintained by government," it was contended that "disclosure of nonexempt copyrighted documents under the Freedom of Information act should be considered a 'fair use'" (id.) (FOIA Update, published by the Office of Information and Privacy at the U.S. Department of Justice, (1983)).

Again, DOT does not prepare the records for economic gain; it has no "commercial interest" in so doing; on the contrary, the records are prepared because it is the agency's statutory obligation to do so.

In short, it is questionable in my view whether DOT can claim copyright protection at all.

In a letter to me, an attorney for DOT referred to other agencies, notably the State Department of Health, which, according to his letter:

"...owns intellectual property rights, in the form of patents on medical discoveries, devices, medications, and the like. DOH holds these either directly, or through Health Research Incorporated (HRI), a not-for-profit corporation, which is wholly owned by the Health Department. The patents cover intellectual properties developed by doctors and scientists at DOH's Wadsworth Center, which conducts basic and applied biomedical and environmental research; at DOH's Roswell Park Cancer Institute, which conducts research into the causes, treatment and prevention of cancer; and at DOH's Helen Hayes Hospital, which conducts research in the fields of metabolic disorders, musculoskeletal problems and rehabilitation technology... HRI regularly retains counsel to obtain formal, registered patent rights to intellectual property developed by researchers at those facilities. Two of HRI's main functions are, in fact 'technology transfer' and

'industrial partnering,' which collectively involve the licensing of patents developed by DOH facilities to manufacturers, medical facilities and others for commercial use."

In my view, the activities described above are distinguishable from DOT's functions regarding maps. The former involves research, "discovery", the creation of new medicines and the like, all of which are carried out by the Department as a "player" or "competitor" in marketplace. It acts, in essence, as if it were a commercial enterprise. As I understand DOT's functions in relation to the records at issue, they are different; they involve the compilation of factual data, not scientific research or discovery analogous to the activities in which the Health Department is engaged.

In a related vein, Perritt and others have contended that the assertion of copyright protections is contrary to public policy:

"Public entities need not give away their data without recovering the cost of dissemination, but they must not set up monopolies to enable themselves or favored contractors to earn a profit from information collected and organized at taxpayer expense or to finance particular value-added elements at the expense of competitive access to those elements" (Perritt, supra, 449-450).

He referred to the "temptation" to generate revenue, stating that:

"...it is natural for public agencies to suppose that they can ease their budget pressures and serve their publics better by appropriating some of the potential revenue stream; they can sell their information. Beyond that, it is natural for them to suppose that the quality of results and perhaps also the size of revenue stream can be increased by 'partnerships' with private entities.

"Unfortunately, this is but a short step away from imposing restrictions on what other vendors and distribution channels can do. Most public agencies responsible for geographic information have either a natural or de jure monopoly on the information. Monopolists perceive that they can increase their total revenue stream by setting prices higher than they would be in a competitive market. Monopolists also are tempted to extend their monopolies into downstream markets. Thus, public agency decisionmakers, behaving like rational monopolists in private sector, implement their partnership aspiration by prohibiting private sector competition with their chosen partners. The result is a state monopoly that limits economic and technological benefits to a broad range of potential distributors of the public information. As, as the monopolies are extended downstream by exclusive 'partnerships,' they block competition in a variety of

rapidly changing and diverse markets for value-added information products” (id., 454).

Perritt added that:

“...it is important to distinguish between making information and value-added features already developed with taxpayer money for pursuit of agency missions available, and using new money to finance things of use only to particular private sector vendors. The former is not subsidization, it is allowing the public access to something it already has paid for” (id., 456).

He also argued that an assertion of copyright may violate the First Amendment:

“When a monopoly is granted or asserted with respect to public information through copyright or otherwise, the monopoly may be enforced by denying access to the information or by penalizing publication of the information. Punishing publication or dissemination directly collides with the First Amendment’s protection of publishing and speaking, and denying access indirectly collides with the First Amendment’s free speech and free press protections” (id., 463).

Further, restricting the use of data by means of a copyright claim may diminish the revenues that may be generated through commercial activity by private enterprises. In the REIPA Whitepaper cited earlier, reference was made to the dissemination of real property data, and it was suggested that:

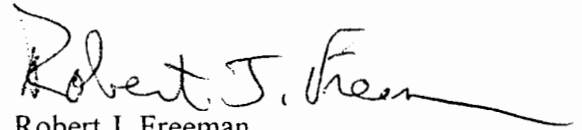
“Every dollar invested by the government in data sets that are shared with the public multiplies employment in the private sector and fosters economic growth and additional tax revenue. Providing easy access to real property data will generate significant new tax revenues as a natural by-product to the free market process. It is in the society’s best interest for government to encourage and facilitate a vibrant and healthy information industry, where the private sector is investing in new information technologies and applications, and where no government agency or single private enterprise is allowed monopolistic advantage” (REIPA, supra).

In sum, the assertion of copyright claims in the context of your inquiry is, in my opinion, contrary to the intent of both the Freedom of Information Law and the Copyright Act. Further, despite any increased revenue that DOT might derive via agreements based on copyright, the absence of copyright may result in greater overall economic benefit to the State, its residents and its commercial enterprises.

Ms. Christina T. Fisk
March 14, 2000
Page 11-

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

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.

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Clerk, Town of Clifton Park
Peter Shawhan
Bill Johnson



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11993

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March 14, 2000

Executive Director

Robert J. Freeman

Mr. Ken Dufty

[REDACTED]

The staff of the Committee on Open 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:

I have received your letter of January 24 in which you sought assistance in relation to a request directed to the City of Rensselaer Police Department for complaints or similar records pertaining to you made by a particular individual since July 7, 1999. In short, you wrote that you were informed by the Chief of Police that the request could not be granted unless you provide the "exact dates" of the complaints or incidents.

In this regard, by way of background, when the Freedom of Information Law was initially enacted in 1974, it required that an applicant request "identifiable" records. Therefore, if an applicant could not name the record sought or "identify" it with particularity, that person could not meet the standard of requesting identifiable records. In an effort to enhance its purposes, when the Freedom of Information Law was revised, the standard for requesting records was altered. Since 1978, §89(3) has stated that an applicant must merely "reasonably describe" the records sought. I point out that it has been held by the Court of Appeals that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

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

"respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under

Mr. Ken Dufty
March 14, 2000
Page -2-

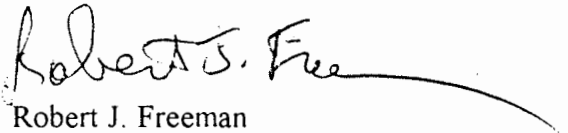
Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency']" (id. at 250).

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

I am unfamiliar with the Department's recordkeeping systems. However, if the records in question can be located by name, i.e., yours or the complainant's, or by address, the records could be found, and the request would, in my opinion, meet the standard of reasonably describing the records. On the other hand, if the records are kept chronologically and can be retrieved only by date, it would appear that requiring that a request indicate the date would be consistent with law.

I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:jm

cc: Maureen G. Nardacci
Frederick Fusco



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AJ-11994

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Alexander F. Treadwell

March 15, 2000

Executive Director

Robert J. Freeman

Ms. Karen M. Greene

[REDACTED]

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

Dear Ms. Greene:

I have received your letter of January 28, as well as the materials attached to it. You have questioned the extent to which the Town of Oyster Bay has complied with the Freedom of Information Law.

Having reviewed your request of December 21, it appears that you may misunderstand that statute, for in that request, you sought information by raising a series of questions. For instance, you asked what certain restrictions might be, where signs must be posted, who is required to maintain signs, and similar questions. You also raised legal questions and requested an explanation of "the logic or intent" of certain laws.

In this regard, the title of the Freedom of Information Law may be somewhat misleading, for it is not a vehicle that requires government agencies to answer questions or provide information *per se*; rather, it is a statute that may require agencies to disclose existing records. I point out that §89(3) of that statute provides in part that an agency is not required to create a record in response to a request

Some aspects of your request essentially involve 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 made, for example, for "section 5 of the Town Ordinances", or as in the case of a different request, for a traffic survey, no interpretation or judgment is necessary, for sections of the law appear numerically and can readily be identified, and a traffic survey is a discrete record.

Ms. Karen M. Greene

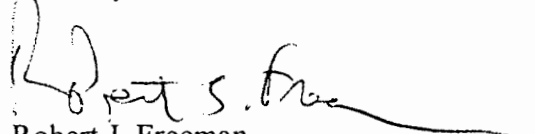
March 15, 2000

Page 2-

In the future, rather than seeking information by asking questions, it is suggested that you seek existing records. It is also suggested that you ask to review the Town's ordinances, or perhaps an index or table of contents relating to them. Based on your review of those materials, it is likely that you could inspect or seek copies of particular provisions of 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 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: Martha Offerman



STATE OF NEW YORK
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FOIL-AO-11995

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March 17, 2000

Executive Director

Robert J. Freeman

Mr. Arthur S. Bechhoefer



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

Dear Mr. Bechhoefer:

I have received your letter of January 29 concerning difficulties that you have encountered in your attempts to gain access to records of the Yates County Sheriff's Department. In relation to the foregoing, you raised the following questions:

1. Is there any legal reason why a public agency should not allow the making of digital photos of documents previously determined to be available for public examination under FOIL?
2. Can a Sheriff's Department withhold information on the total number of inmates being held on any particular day? This requested information has never been provided.
3. Is there any law and/or penalty for altering document copies by, for example, covering (i.e., redacting) portions thereof that appear to be embarrassing to the Department? This alteration has apparently occurred in at least one instance.
4. Is there some guidance your office can provide to help the Yates County Sheriff's Department better understand its legal obligations in this matter?"

In this regard, I offer the following comments.

Ms. Arthur S. Bechhoefer
March 17, 2000
Page -2-

First, §87(2) of the Freedom of Information Law provides that records accessible under that statute must be made available for "inspection and copying." From my perspective, "copying" in the context of your inquiry would include the use of your own camera to prepare a duplicate of a record, and there is no valid reason for prohibiting you from photographing records that are accessible to the public.

Since you indicated that the Sheriff's Department charges twenty-five cents per photocopy, plus "a minimum of \$3.00 for any FOIL documents", it is noted that the additional fee of three dollars is inconsistent with law. By way of background, §87(1)(b)(iii) of the Freedom of Information Law stated until October 15, 1982, that an agency could charge up to twenty-five cents per photocopy unless a different fee was prescribed by "law". Chapter 73 of the Laws of 1982 replaced the word "law" with the term "statute". As described in the Committee's fourth annual report to the Governor and the Legislature of the Freedom of Information Law, which was submitted in December of 1981 and which recommended the amendment that is now law:

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

As such, prior to October 15, 1982, a local law, an ordinance, or a regulation for instance, establishing a search fee or a fee in excess of twenty-five cents per photocopy or higher than the actual cost of reproduction was valid. However, under the amendment, only an act of the State Legislature, a statute, would in my view permit the assessment of a fee higher than twenty-five cents per photocopy, a fee that exceeds the actual cost of reproducing records that cannot be photocopied, or any other fee, such as a fee for search. In addition, it has been confirmed judicially that fees inconsistent with the Freedom of Information Law may be validly charged only when the authority to do so is conferred by a statute [see Gandin, Schotsky & Rappaport v. Suffolk County, 640 NYS2d 214, 226 AD2d 339 (1996); Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)].

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

"Each agency shall promulgate rules and regulations in conformance with this article...and pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the

availability of records and procedures to be followed, including, but not limited to...

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

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

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

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

(1) inspection of records;

(2) search for records; or

(3) any certification pursuant to this Part" (21 NYCRR section 1401.8).

As such, the Committee's regulations specify that no fee may be charged for personnel time, for inspection of or search for records, except as otherwise prescribed by statute.

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

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. If no records exist containing the information sought, the Department would not be required to prepare new records on your behalf in an effort to satisfy your request. However, if the Department maintains records indicating "the total number of inmates being held on any particular day", those portions reflective of the total number would, in my view, be available. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Pursuant to subparagraph (i) of §87(2)(g), insofar as internal documents consist of "statistical or factual tabulations or data", they must be disclosed, unless an exception to rights of access may properly be asserted. In this instance, I do not believe that any ground for denial could properly be cited.

I note, too, that a record must be maintained by the at the County Jail that enables the public to obtain information concerning the population at such a facility on any given day. Specifically, §500-f of the Correction Law, which pertains to county jails, states that:

Ms. Arthur S. Bechhoefer

March 17, 2000

Page -4-

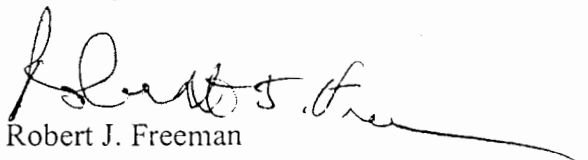
"Each keeper shall keep a daily record, to be provided at the expense of the county, of the commitments and discharges of all prisoners delivered to his charge, which shall contain the date of entrance, name, offense, term of sentence, fine, age, sex, place of birth, color, social relations, education, secular and religious, for what any by whom committed, how and when discharged, trade or occupation, whether so employed when arrested, number of previous convictions. The daily record shall be a public record, and shall be kept permanently in the office of the keeper."

Third, as suggested earlier, the Freedom of Information Law requires that all agency records be made available, except to the extent that their contents fall within one or more of the grounds for denial listed in §87(2). Embarrassment is not one of the grounds of denial, and unless an exception to rights of access may properly be asserted, records must be disclosed. If redactions or deletions are made prior to the disclosure of records, the agency is required to inform the applicant in writing that it has denied access to portions of the records and that the applicant has the right to appeal [see Freedom of Information Law, §89(3); also regulations promulgated by the Committee on Open Government, 21 NYCRR Part 1401].

Lastly, in an effort to enhance compliance with and understanding of the Freedom of Information Law, copy of this opinion will be forwarded to the Sheriff and the County Attorney. Additional information on the subject is available from the Committee and particularly through the use of its website, which is identified on its letterhead.

I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:jm

cc: Sheriff Ronald G. Spike
County Attorney



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DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11996

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Carole E. Stone
Alexander F. Treadwell

March 17, 2000

Executive Director

Robert J. Freeman

Ms. Sarah Nicholas

[REDACTED]

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

Dear Ms. Nicholas:

I have received your letter of January 19, as well as the materials attached to it. Please note that your correspondence did not reach this office until January 31, and that our current address is as indicated above.

You have questioned the propriety of responses to your requests for records by the City of Long Beach. In one instance, a request was denied in its entirety on the ground that the records "are inter-agency materials not subject to FOIL disclosure"; in another, it was indicated that reports would be withheld "until they are deemed final..."

From my perspective, the responses suggest that the City has inappropriately applied 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 provision that the City cited as the basis for denials of your requests, §87(2)(g), enables an agency to withhold records that:

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

- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;

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

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

One of the contentions offered by the New York City Police Department in a decision rendered by the Court of Appeals, the state's highest court, was that certain reports could be withheld because they are not final and because they relate to incidents for which no final determination had been made. The Court 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 "not final" would not represent an end of an analysis of rights of access or an agency's obligation to review the contents of a record.

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

"...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132

[quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549)]. Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][i]). Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182) id., 276-277).]

In my view, insofar as the records at issue consist of recommendations, advice or opinions, for example, they may be withheld; insofar as they consist of statistical or factual information, I believe that they must be disclosed.

I point out that the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the agency contended that complaint follow up reports, also known as "DD5's", could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g). The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276). The Court then stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, directing that:

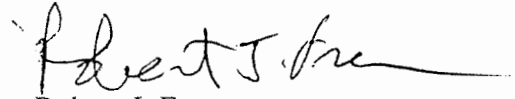
"...to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents (Matter of Fink v. Lefkowitz, supra, 47 N.Y.2d, at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). If the court is unable to determine whether withheld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

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

Ms. Sarah Nicholas
March 17, 2000
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 extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Joel K. Asarch
Bruce Nyman
Joseph Febrizio
Records Access Officer



STATE OF NEW YORK
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FJIL-AO-11997

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Executive Director

Robert J. Freeman

Mr. H. Corwin



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

Dear Mr. Corwin:

I have received your letter and the materials attached to it, which reached this office on January 31. You have sought assistance in relation to a denial of access to records by the Town of Riverhead. Specifically, in response to a request for a "rental inspection report", you were informed that disclosure of the report "would constitute an unwarranted invasion of personal privacy as follows...

(c) 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;

(d) disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency..."

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

Second, in most instances, the contents of records and the effects of disclosure serve as the factors necessary in determining the extent to which records must be disclosed, or conversely, may be withheld. As suggested in the response to your request, §87(2)(b) of the Freedom of Information Law 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) includes a series

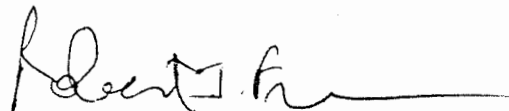
Mr. H. Corwin
March 17, 2000
Page 2-

of examples of unwarranted invasions of personal privacy, two of which are represented in the response by items (c) and (d).

It has been held that the provisions pertaining to the protection of privacy are intended to deal with intimate or personal information about natural persons [see e.g., Hanig v. State Department of Motor Vehicles, 79 NY2d 106 (1992)]. Insofar as the report consists of facts regarding the premises, such as findings of code violations, the size of rooms, condition of the property and similar information, it is unlikely that those kinds of entries could be characterized as "personal" or that disclosure would constitute an unwarranted invasion of privacy. On the other hand, insofar as the report includes personal or intimate information relating to an individual, the report could, in my opinion, have properly been 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

cc: Hon. Vincent G. Vilella
Records Access Officer



STATE OF NEW YORK
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FOIL-AO-11998

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March 17, 2000

Executive Director

Robert J. Freeman

Mr. Duane Mills
President
Property Owners Assn. of Elmira
P.O. Box 4073
Elmira, NY 14904-4073

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

Dear Mr. Mills:

I have received your letter of January 20 in which you questioned the status of Southern Tier Economic Development, Inc. (STED) in relation to the Freedom of Information Law.

You indicated that STED is a not-for-profit corporation and that you have been advised that:

“STED is not subject to the Freedom of Information Law as, since its formation, it has not been controlled by the state or any municipality, nor has it acted for or on behalf of any governmental entity. STED has, in effect, been operating independently from any level of governmental control.”

Nevertheless, you added that three of the nine members of STED's Board of Directors are government officials, specifically, the Mayor and City Manager of the City of Elmira and the Chemung County Executive.

In this regard, I offer the following comments.

First, the Freedom of Information Law 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,

Mr. Duane Mills
March 17, 2000
Page 2-

office or other governmental 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 pertains to entities of state and local government.

However, there are instances in which the courts have determined that certain not-for-profit corporations, due to their relationship with government, are "agencies" that fall within the requirements of that statute. Perhaps most pertinent is Buffalo News v. Buffalo Enterprise Development Corp., 84 NY2d 488 (1994), in which it was determined by the state's highest court, the Court of Appeals, that a not-for-profit corporation which operated within City Hall in the City of Buffalo and was under the substantial control of the City constituted an "agency" subject to the Freedom of Information Law. If, for instance, government officials have created a not-for-profit corporation to assist or carry out functions on behalf of government, or if the membership of the board of directors of a not-for-profit corporation must consist of a majority of members representing government or designated by government officials, I believe that the corporation would constitute an agency. On the other hand, if there is no substantial governmental control, it is unlikely, based on case law, that the Freedom of Information Law would apply.

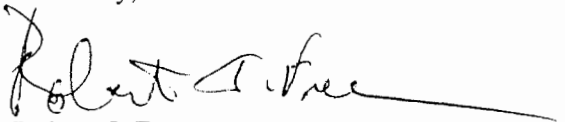
Notwithstanding the foregoing, and even if STED is not required to disclose its records, there appear to be other means of seeking and obtaining records pertaining to STED. As indicated earlier, the Freedom of Information Law applies to agency records, and I point out that §86(4) defines the term "record" expansively to include:

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

Since government officials serve on STED's Board of Directors, the records that they maintain in their capacities as Mayor, City Manager or County Executive would, in my view, constitute records of either the City of Elmira or Chemung County. As such, rather than seeking records from STED, it is suggested that the records be requested from the government officials serving on its Board.

I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:jm
cc: Southern Tier Economic Development, Inc.



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FOIL-AO-11999

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March 17, 2000

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P.O. Box 4073
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The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Mills:

I have received your undated letter, which reached this office on February 2. You complained that the City of Elmira has failed to respond to requests for records in a timely manner.

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

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

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

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

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

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

I 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

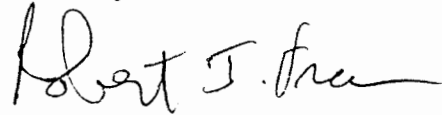
Mr. Duane Mills
March 17, 2000
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mentioned earlier, might be reasonable. On the other hand, if a record or report is clearly public and can be found easily, there would appear to be no rational basis for delaying disclosure. In a case in which it was found that an agency's "actions demonstrate an utter disregard for compliance set by FOIL", it was held that "[t]he records finally produced were not so voluminous as to justify any extension of time, much less an extension beyond that allowed by statute, or no response to appeals at all" (Inner City Press/Community on the Move, Inc. v. New York City Department of Housing Preservation and Development, Supreme Court, New York County, November 9, 1993).

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

I hope 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: City Manager
City Council



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12000

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March 17, 2000

Executive Director

Robert J. Freeman

Ms. Lisa Haarlander

The staff of the Committee on Open 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 February 7, as well as a variety of materials, including three requests for records directed to the Town of Amherst. Having reviewed the documentation, I offer the following comments.

The first involves a request for "the town's 1999 payroll in electronic format", and you indicated that you had been seeking the record for some three months, and that the Town's finance director said that the record includes individuals' social security numbers. She later wrote with respect to the record originally requested, however, that

"...because of the layout of this report someone would have to manually delete several fields from each employee records. The Computer Services Manager estimates this would take approximately sixteen to twenty-four man-hours. There is the possibility that another report, used by the Personnel Department, would have the information you require, and would have the proper layout, which allows for easy deletion of non-public information."

In this regard, for future reference, the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that an agency need not create a record in response to a request. It is also important to note, however, that §86(4) of the Law defines the term "record" to include:

"any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever

including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

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

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

Often information stored electronically can be extracted by means of a few keystrokes on a keyboard. While some have contended that those kinds of minimal steps involve programming or reprogramming, and, therefore, creating a new record, so narrow a construction would tend to defeat the purposes of the Freedom of Information Law, particularly as information is increasingly being stored electronically. If electronic information can be extracted or generated with reasonable effort, if that effort involves less time and cost to the agency than engaging in manual deletions, it would seem that an agency should follow the more reasonable and less costly and labor intensive course of action.

In my view, there is clearly a distinction between extracting information and creating it. If an applicant knows that an agency's database consists of 10 items or "fields", asks for items 1, 3 and 5, but the agency has never produced that combination of data, would it be "creating" a new record? The answer is dependent on the nature of the agency's existing computer programs; if the agency has the ability to retrieve or extract those items by means of its existing programs, it would not be creating a new record; it would merely be retrieving what it has the ability to retrieve in conjunction with its electronic filing system. An apt analogy may be to a filing cabinet in which files are stored alphabetically and an applicant seeks items "A", "L" and "X". Although the agency may never have retrieved that combination of files in the past, it has the ability to do so, because the request was made in a manner applicable to the agency's filing system.

In the context of your request, if the Town has the ability to generate the data of your interest, if it has the capacity to segregate that data from items that need not be disclosed, and if you are willing to pay the actual cost of reproduction as envisioned by §87(1)(b)(iii) of the Freedom of Information Law, I believe that the an agency, such as the Town, would be obliged to do so.

With respect to the fee for reproducing the data, the basis is the "actual cost of reproduction." That standard was considered in detail in Schulz 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, sec. 87(1)(b)(iii), which limits charges for requested public records to 'the actual cost of reproducing' [emphasis added], is elucidating. 'Actual cost' would reasonably seem to mean more finite, direct and less inclusive than '[indirect] cost', which is a concept as infinite and expandable as the mind of man. 'Reproducing' a record certainly does not include 'producing' a record in the first place - i.e., compiling the information from which the record is produced. The purpose and intention of the Freedom of Information Law is to further the concept of open government. For this reason charges for public records must be kept to a minimum. In a sense the information compiled by counties under election Law 5-602 and 5-604 is a part of that concept and charges for that information must be kept to a minimum so as to maximize access thereto."

Further, using the standard of "actual cost of reproduction", it was stated that:

"Where the record is a computerized record the charge shall be limited to the cost of a diskette or other computerized tape and a reasonable amount for the salary of the employee downloading said diskette or tape during the time such diskette or tape is being downloaded."

Another request involves "copies of any and all checks written by Todd Champlin or his company, Sports Performance Center, to determine how much rent he has made for the space he leased at the Amherst Pepsi Center", as well as "copies of the profit/loss statements for the Pepsi Center" for certain months.

As I understand the matter, the Pepsi Center is a Town of Amherst facility. If that is so, the application of the Freedom of Information Law with respect to the portion of your request involving checks would, in my view, be dependent on the nature of the relationship or agreement between Mr. Champlin and his company and the Town.

To reiterate a point made earlier, the Freedom of Information Law defines the term "record" expansively and includes not only records kept by an agency, but also records kept *for* an agency. 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 pursuant to a contract 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 short, insofar as the records sought are maintained for the Town, I believe that the Town would be required to direct the custodian of the records to disclose them in accordance with the Freedom of Information Law, or obtain them in order to disclose them to you to the extent required by law.

With respect to the "profit/loss statements", again, if the Pepsi Center is a Town facility, it would appear that any such records would be available. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

The remainder of the correspondence pertains to access to requests for proposals (RFP's). In my view, two of the grounds for denial may be significant to an analysis of rights of access.

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

are different. In the traditional competitive bidding process, so long as the bids meet the requisite specifications, an agency must accept the low bid and enter into a contract with the submitter of the low bid. When an agency seeks proposals by means of RFP's, there is no obligation to accept the proposal reflective of the lowest cost; rather, the agency may engage in negotiations with the submitters regarding cost as well as the nature or design of goods or services, or the nature of the project in accordance with the goal sought to be accomplished. As such, the process of evaluating RFP's is generally more flexible and discretionary than the process of awarding a contract following the submission of bids.

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

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

Claims have been made that proposals and other records pertaining to the RFP process may always be withheld prior to the final award of a contract. In general, I have disagreed with those kinds of blanket assertions. Again, unlike the bid process in which an agency essentially has no choice but to accept the low appropriate bid, in the RFP process, the figures offered by submitters are subject to negotiation and change; they do not reflect the "bottom line." In view of the flexibility of the process, it is difficult to envision how disclosure of those figures would adversely affect an agency's ability to engage in the best contractual arrangement on behalf of the taxpayers.

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

encourage submitters to better accommodate the needs of the agency or propose what might be characterized as a better deal. Rather than impairing the process, disclosure might enhance it.

The other provision of potential 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..."

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.

Pertinent 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,

Ms. Lisa Haarlander
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§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:

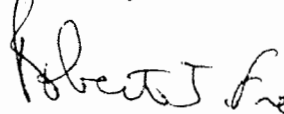
"...to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents (*Matter of Fink v. Lefkowitz, supra*, 47 N.Y.2d, at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). If the court is unable to determine whether 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 sum, I believe that a blanket denial of a request for RFP's would be inconsistent with law.

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

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Susan K. Jaros, Town Clerk
Town Attorney
Town Board
Maureen Cilano, Finance Director



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12001

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Alexander F. Treadwell

March 17, 2000

Executive Director

Robert J. Freeman

Ms. Linda Trischitta
Staff Writer
Times-Union
2nd Floor Arcade Building
376 Broadway Avenue
Saratoga Springs, NY 12866

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

Dear Ms. Trischitta:

As you are aware, I have received your letter of January 31. You have requested an advisory opinion concerning a request for records of the Village of Ballston Spa. Specifically, you sought "copies of the village police department's monthly checking account statements, checks and deposits from Jan. 1990 to present."

In relation to the foregoing, you asked whether "those records – which are missing and were unavailable to the state comptroller during its on-going examination of the police department – must be provided even if those statements are maintained at another site, the Ballston Spa National Bank." You added that a representative of the State Archives and Records Administration informed you that the minimum period of retention concerning the records at issue is six years. Consequently, you asked whether the Village "should be allowed to charge to provide such documents."

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. Based on the correspondence, as well as conversations with you and the Village Clerk, there does not appear to be an issue involving rights of access to the records or any contention that they may be withheld in accordance with the grounds for denial.

Second, as I understand the matter, among the records sought, those covering the period of the last six years, should be maintained by the Village. I note that the Freedom of Information Law does not pertain to the retention and disposal of records. Relevant, however, 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. 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, and based on information provided by that agency, the

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records in question must be retained for a minimum of six years. If that is so, although the Village does not have physical custody of the records, it is required to have custody for a minimum of six years and should have records in its possession covering at least that period.

Third, according to your letter, the bank used by the Village maintains duplicates of the records that the Village is required to maintain, or records equivalent in content. It is unclear whether those records are maintained on behalf of the Village. If they are, I believe that they would be Village records subject to the Freedom of Information Law. Section 86(4) of that statute defines the term "record" expansively to include:

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

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, 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)].

Even if the records maintained by the bank are not "agency records", in view of the requirements of the Local Government Records Law, in my opinion, it is incumbent on the Village to acquire records from the bank to the extent necessary to comply with those requirements. The acquisition of the records would bring the Village into compliance with that statute and would enable

Ms. Linda Trischitta

March 17, 2000

Page 4-

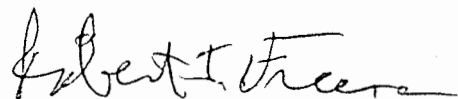
Village and other agency officials, as well as the public, to treat those records as they would have been treated had they been maintained by the Village in full compliance with law.

In sum, insofar as the bank maintains records for the Village, I believe that they are agency records that fall within the coverage of the Freedom of Information Law. In responding to a request for those records, the Village in my view would be required either to direct the bank to disclose the records to the extent required by that statute, or obtain copies of the records for the purpose of reviewing and disclosing them in accordance with law. If they are not agency records, to satisfy the requirements of the Local Government Records Law, I believe that the Village is obliged to acquire from the bank those records that it is required to maintain for a minimum of six years.

In either case, if and when the records are kept or held by the Village, the basis for charging fees in my opinion would be the Freedom of Information Law. Under §87(1)(b)(iii) of that statute, there is no charge for the inspection of accessible records; for photocopies up to nine by fourteen inches, the fee is a maximum of twenty-five cents per photocopy; for records that cannot be photocopied, such as computer tapes or disks, the fee is based on the actual cost of reproduction, i.e., computer time and the cost of a tape, a disk, or the paper used to print out records. I believe that the acquisition of bank records by the Village should be considered to be the means of complying with the Local Government Records Law, since that law requires that the Village maintain the records for at least six years. Any cost incurred by the Village to do so would in my view be separate and distinct from fees associated with requests made under the Freedom of Information Law. Again, the Village, by law, is required to maintain the records, and its failure to do so should not in my opinion result in any additional charge to a person seeking the records under the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees
Patricia A. Bowers



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FOIL-AO-12002

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March 17, 2000

Executive Director

Robert J. Freeman

E-Mail

TO: William R. Morehouse [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. Morehouse:

I have received your letter of March 4. You indicated that you were informed that you cannot use an area outside a store that you rented even though it had been used in the manner you intend in the past, and other properties use their space in that manner. You have asked town officials "where in the zoning law" any restriction exists and questioned whether a "FOIL" would help you "in this case to either get the document or be told there is no such document." You added that you have tried to find "FOIL" request forms in stationary stores without success.

In this regard, I offer the following comments.

First, while an agency, such as a town, may require that a request be made in writing [see Freedom of Information Law, §89(3)], there is no particular form that must be used. In short, any request in writing that reasonably describes the record sought should suffice. I note that a sample letter of request appears in "Your Right to Know", which describes the Freedom of Information Law and is available through our website under "publications."

Second, from my perspective, a request for a law that may applicable might not be viewed as a request for a record, but rather an interpretation of law that requires a judgment. Depending on the nature of the matter, 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 made, for example, for "section 10 of the Town Ordinances", no interpretation or judgment is

Mr. William R. Morehouse

March 17, 2000

Page 2-

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.

It is suggested that you contact the town clerk for the purpose of either reviewing the zoning law or seeking an index to or table of contents relating to the zoning law in order that you might find whether any applicable provision of law exists.

I hope that I have been of assistance.

RJF:jm



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March 20, 2000

Executive Director

Robert J. Freeman

Mr. J. Kaehny
Transportation Alternatives
115 West 30th Street #1207
New York, NY 10001

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

Dear Mr. Kaehny:

I have received your note, which appears on a response by the New York City Police Department to a request made by your organization, Transportation Alternatives, pursuant to the Freedom of Information Law. Specifically, you questioned the propriety of a response indicating that the retrieval and review of the records sought would be completed within an estimated 120 days of the February 3.

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)].

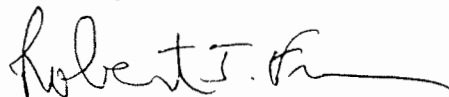
Further, in my opinion, if, as a matter of practice or policy, an agency acknowledges the receipt of requests and indicates in every instance that it will determine to grant or deny access to records within a particular period following the date of acknowledgement, such a practice or policy would be contrary to the thrust of the Freedom of Information Law. If a request is voluminous and

Mr. J. Kaehny
March 20, 2000
Page 3-

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:jm

cc: Sgt. Richard Evangelista



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COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12004

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March 20, 2000

Executive Director

Robert J. Freeman

Mr. Mike Kilian
Managing Editor
Observer-Dispatch
221 Oriskany Plaza
Utica, NY 13501

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

Dear Mr. Kilian:

I have received your letter of February 8, as well as the materials attached to it. Although a review of the correspondence raises a variety of issues, you asked that I focus on an assertion by the City of Utica that "looking at City Court arraignment records is sufficient" in order to "monitor" criminal activity in the City, as opposed to reviewing a "list" of calls made to the Police Department within a given period, i.e., the previous 24 hours. You contend that the acquisition of information by attending arraignments is inadequate, for "court cases involve only crimes that are solved - - not those that remain unsolved." You also referred to your efforts in obtaining "incident reports."

City officials asserted that, based on contacts with police agencies "throughout" the state, they found "no instance" in which a police agency was "responsible for generating a list to be provided to the media of all calls to the police from the previous 24 hour period."

In this regard, I offer the following comments.

First, while it may be so that police agencies do not generate lists specifically involving a 24 hour period, many, in my experience, maintain a police blotter or its equivalent, either manually or electronically. Those kinds of records might not constitute "lists" that are generated with respect to a particular time period; rather, my understanding is that they are records that are continually updated. In essence, they are records that change with each new entry and that are never "final" or "complete."

Second, as you are aware, the Freedom of Information Law pertains to all agency records, and §86(4) of that statute defines the term "record" expansively" to include:

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

Based on the foregoing, whether a police agency maintains information in the traditional blotter or a paper or electronic equivalent, the format in which the information is kept is irrelevant: it would constitute a "record" that falls within the coverage of the Freedom of Information Law. Further, as advised in a recent opinion addressed to you, if an agency has the ability to generate the data of an applicant's interest, if the data is accessible under the law, and if the applicant is willing to pay the actual cost of reproduction, the agency is obliged to do so.

Third, perhaps most importantly, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. It is emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In my view, the phrase quoted in the preceding sentence evidences a recognition on the part of the Legislature that a single record or report, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld. That being so, I believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

The Court of Appeals reiterated its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department [89 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, a police department 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), 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.*).

If the City maintains the traditional police blotter or equivalent, whether manually or electronically, I believe that such a record would, based on case law, be accessible. In Sheehan v. City of Binghamton [59 AD2d 808 (1977)], it was determined, based on custom and usage, that a police blotter is a log or diary in which events reported by or to a police department are recorded. That kind of record would consist of a summary of events or occurrences, it would not include investigative information, and would be available under the law.

The distinction between that kind of record and the ability to be present during or obtain records of arraignments is, as you suggested, obvious. In the case of the former, a review of a police blotter or equivalent records would enable the public to know of events reported by or to police departments in their community. The arraignment deals only with situations in which persons are charged.

If a police blotter, incident reports or other records include more information than the traditional police blotter, it is likely in my view that portions of those records, depending on their contents and the effects of disclosure, may properly be withheld. The remainder, however, would be available. For instance, the fact that a robbery of a convenience store occurred and is recorded in a paper or electronic document would clearly be available, even if no one has been arrested or arraigned; the names of witnesses or suspects, however, might properly be withheld for a time or perhaps permanently, depending on the facts. The fact that an arson fire occurred and is recorded would represent information accessible under the law; records indicating the course of the investigation might, for a time, justifiably be withheld.

In considering the kinds of records at issue, several of the grounds for denial might be pertinent and serve to enable the City to withhold portions, but not the entire contents of records.

For instance, the provision at issue in a decision cited earlier, 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. 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" [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.

Mr. Mike Kilian
March 20, 2000
Page 6-

Also of potential significance is §87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". That provision might be applicable relative to the deletion of identifying details in a variety of situations, i.e., where a record identifies a confidential source or a witness, for example.

Often the most relevant provision concerning access to records maintained by law enforcement agencies is §87(2)(e), which permits an agency to withhold records that:

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

- i. interfere with law enforcement investigations or judicial proceedings;
- ii. deprive a person of a right to a fair trial or impartial adjudication;
- iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
- iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

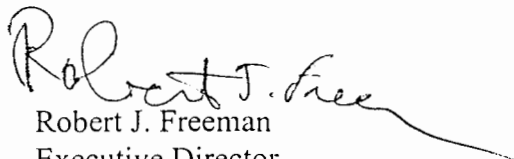
In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in subparagraphs (i) through (iv) of §87(2)(e).

Another possible ground for denial is §87(2)(f), which permits withholding to the extent that disclosure "would endanger the life or safety of any person". The capacity to withhold on that basis is dependent upon the facts and circumstances concerning an event.

In sum, irrespective of the title or characterization of records, insofar as they exist, they are subject to rights conferred by the Freedom of Information Law, and an agency is obliged to review them for the purpose of determining the extent, if any, to which they may properly be withheld.

I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:jm
cc: FOIL Appeal Committee



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DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO-
FOIL-AO-12005

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March 21, 2000

Executive Director

Robert J. Freeman

Mr. Edward J. Greene, Jr.
Hinman, Straub, Pigors & Manning, P.C.
121 State Street
Albany, NY 12207-1693

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

Dear Mr. Greene:

I have received your letter of February 4 in which you sought an advisory opinion concerning rights of access to certain records maintained by the Department of Correctional Services. You wrote that the "record at issue is a disciplinary decision rendered by a Department employee with regard to an allegation of inmate misbehavior in a correctional facility", and that "the decision at issue is a final finding of fact in the disciplinary proceeding and the Department's findings of guilt or innocence of the charges."

You referred to an opinion rendered by this office in 1991 that you characterized as "relevant, but not dispositive" of the matter. Having reviewed that opinion, I would agree with your consideration of that opinion.

In this regard, I offer the following comments.

As suggested in the opinion to which you referred, two statutes, the Freedom of Information Law and the Personal Privacy Protection Law (respectively Articles 6 and 6-A of the Public Officers Law), are pertinent to the matter. Due to the language of those statutes, they must be construed together and in relation to one another.

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

Mr. Edward J. Greene

March 21, 2000

Page 2-

The Personal Privacy Protection Law deals in part with the disclosure of records or personal information by state agencies concerning data subjects. A "data subject" is "any natural person about whom personal information has been collected by an agency" [Personal Privacy Protection Law, §92(3)]. "Personal information" is defined to mean "any information concerning a data subject which, because of name, number, symbol, mark or other identifier, can be used to identify that data subject" [§92(7)]. For purposes of that statute, the term "record" is defined to mean "any item, collection or grouping of personal information about a data subject which is maintained and is retrievable by use of the name or other identifier of the data subject" [§92(9)].

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

I note that a similar issue was reviewed in Kavanagh v. Department of Correctional Services (Supreme Court, Albany County, April 22, 1986). In brief, in that case, a district attorney requested misbehavior reports and their final dispositions pertaining to particular inmate, and it was held that the reports, which included allegations that were not substantiated, could be withheld on the ground that disclosure would result in "personal hardship" to the inmate and constitute "an unwarranted invasion of personal privacy" pursuant to §89(2)(b)(iv) of the Freedom of Information Law.

On the other hand, however, if an inmate was found to have engaged in a violation or misconduct, a final determination reflective of such a finding would, in my view, be accessible. In numerous contexts, it has been advised that records relating to unsubstantiated charges, complaints or allegations may be withheld to protect the privacy of the accused. But when there is a determination indicating misconduct with respect to public employees (with the exception of those employees subject to §50-a of the Civil Rights Law), licensees and others, it has consistently been advised that the determination is accessible, for there is a finding or admission of wrongdoing, and disclosure in those instances would constitute a permissible rather than an unwarranted invasion of personal privacy.

The regulations promulgated by the Department of Correctional Services appear to bolster such a conclusion. In 7 NYCRR §5.21(a), public rights of access are conferred with respect to a variety of items relating to inmates, including commitment information and "departmental actions regarding confinement and release." Frequently a departmental action based on a finding of misconduct will result in placement in a special housing unit or in solitary confinement. In Bensing v. LeFevre, the issue involved a request for a list of inmates held in a special housing unit, "an area

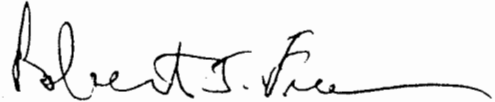
Mr. Edward J. Greene
March 21, 2000
Page 3-

primarily used for housing inmates who have been segregated from the general population for punitive reasons", and the court rejected contentions under both the Freedom of Information and Personal Privacy Protection Laws that disclosure would constitute an unwarranted invasion of personal privacy [506 NYS2d 822, 823 (1986)]. As such, the court confirmed that the names of those found to have engaged in misconduct, as well as the sanction, placement in a segregated unit, must be disclosed.

In sum, I believe that records involving unsubstantiated allegations may be withheld, but that final determinations reflective findings of misconduct must be disclosed.

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



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12006

Committee Members

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

March 21, 2000

Executive Director

Robert J. Freeman

Mr. Lam Trang
91-A-8960
Upstate Correctional Facility
P.O. Box 2001
Malone, NY 12953

Dear Mr. Trang:

I have received your letter of March 2, which reached this office on March 20. The letter is characterized as an appeal to this office.

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

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

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

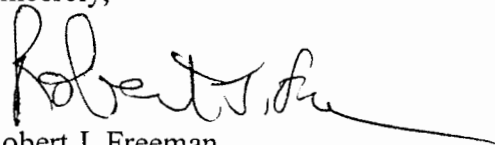
As you may be aware, the person designated by the Department of Correctional Services to determine appeals is Anthony J. Annucci, Counsel to the Department.

There is no additional administrative appeal, but if you disagree with Mr. Annucci's determination, you may seek judicial review under Article 78 of the Civil Practice Law and Rules. In addition, 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)].

Mr. Lam Trang
March 21, 2000
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

FOIL-AO - 12007

From: Robert Freeman
To: Internet:cbaum@nscsd.k12.ny.us
Date: 3/23/00 12:47PM
Subject: I have received your inquiry regarding the propriety of a requirement that a certain amount of money

I have received your inquiry regarding the propriety of a requirement that a certain amount of money, 5\$ in this instance, be given as "escrow" to an agency before it begins a search for records under the Freedom of Information Law.

From my perspective, the issue involves whether the agency's requirement is reasonable. It has been advised that an agency may require payment in advance when copies of records have been requested, and that an agency should "estimate" the number of pages to be copied. If, for instance, an agency charges 25 cents per photocopy and it is clear that the number of pages requested is only 2 or 4, it would be unreasonable, in my view, to require escrow in the amount of \$5; only if the number of pages and, therefore, the eventual fee to be charged would approach or exceed the escrow amount would such a practice be valid or reasonable.

If you would like to discuss the matter, 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
Website - www.dos.state.ny.us/coog/coogwww.html

REC-110

MAR 23 2000
NEW YORK STATE
COMMITTEE ON
OPEN GOVERNMENT

FOIL-A0-12008

From: Robert Freeman
To: [REDACTED]
Date: 3/24/00 12:30PM
Subject: Dear Taxpayers:

Dear Taxpayers:

If a private company has submitted records to an agency, a unit of state or local government in New York, those records would fall within the coverage of the Freedom of Information Law.

To attempt to obtain them, a request may be made to the "records access officer" at the agency that maintains the records. The records access officer has the duty of coordinating the agency's response to requests.

As a general matter, the Freedom of Information Law is based on a presumption of access. Stated differently, all agency records are available, except those records or portions of records that fall within the grounds for denial appearing in §87(2) of that statute.

I am unaware of the nature of the records in which you are interested. However, it is possible that §87(2)(d) may be pertinent. That provision permits an agency to withhold records to the extent that disclosure would cause "substantial to the competitive position" of a commercial enterprise.

Additional information can be acquired on the Committee's website.

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
COMMITTEE ON OPEN GOVERNMENT

FOIL-A-12009

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

March 27, 2000

Executive Director

Robert J. Freeman

Ms. Nancy W. Foster

[REDACTED]

The staff of the Committee 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. Foster:

As you are aware, I have received your letter of February 7 and spoke recently to your husband concerning your efforts in obtaining records from the New York Power Authority. For the purpose of offering clarification and guidance, I offer the following comments.

First, the Freedom of Information Law pertains to existing records. Therefore, insofar as the records of your interest no longer exist, that statute would not apply.

Second, from my perspective, a significant consideration involves the extent to which a request "reasonably describes" the records sought as required by §89(3) of the Freedom of Information Law. I point out that it has been held by the Court of Appeals, 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

(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 Power Authority, 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 Authority 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 at a number of locations, and that those units maintain their records by means of different filing and retrieval methods. If an office maintains all of its records regarding a particular matter, 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 by the name of the author, for example, 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.

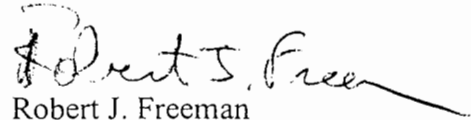
Lastly, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not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

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

Ms. Nancy W. Foster
March 27, 2000
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 underline that extends to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Laura Badamo



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AU-12010

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Carole E. Stone
Alexander F. Treadwell

March 28, 2000

Executive Director

Robert J. Freeman

Mr. Bernard Corcoran
Cayuga County CO-Coordinator
NYGenWeb Project
102 Mary 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. Corcoran:

I have received your letter of February 11 in which you questioned the practices of certain state agencies in relation to genealogical records.

In this regard, first, the Committee on Open Government, a unit of the Department of State, is authorized to offer advice and opinions concerning the Freedom of Information Law. The Committee is not empowered to compel agencies to follow certain courses of action in carrying out their duties or to compel an agency to grant or deny access to records.

Second, although the Freedom of Information Law pertains generally to access to government records and the fees that may be charged for copies of records, the provisions of the Public Health Law deal with birth and death records and fees for services rendered concerning searches for and copies of those records. Specifically, subdivision (3) of §4174 refers to searches for and the fees for records sought for genealogical or research purposes that may be imposed by "any person authorized" by the State Commissioner of Health, i.e., municipal clerks. That provision states that:

"For any search of the files and records conducted for authorized genealogical or research purposes, the commissioner or any person authorized by him shall be entitled to, and the applicant shall pay, a fee of ten dollars for each hour or fractional part of an hour of time for search, together with a fee of one dollar for each uncertified copy or abstract of such records requested by the applicant or for a certification that a search discloses no record."

Mr. Bernard Corcoran

March 28, 2000

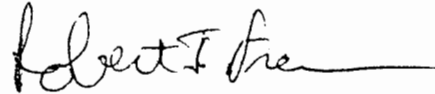
Page - 2 -

It is noted that the Commissioner of Health has promulgated "Administrative Rules and Regulations" pertaining to genealogical research, and enclosed is a summary of those provisions. According to the summary, birth records need not be disclosed unless the subject of the birth record is known to have been deceased prior to 1924; death records need not be disclosed regarding deaths occurring after 1949.

Since the Department of Health and its Commissioner have primary responsibility in relation to vital records and genealogical searches, it is suggested that it may be appropriate to express your views and concerns to the Department's Bureau of Vital Records.

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-12011

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

March 28, 2000

Executive Director

Robert J. Freeman

Mr. Burton R. Laux

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

Dear Mr. Laux:

I have received your note of February 14 in which you appear to have questioned a requirement that an applicant complete a prescribed form as a condition precedent to seeking records from Putnam County under the Freedom of Information Law.

In this regard, I do not believe that an agency can require that a request be made on a prescribed form. The Freedom of Information Law, §89(3), as well as the regulations promulgated by the Committee (§1401.5), require that an agency respond to a request that reasonably describes the record sought within five business days of the receipt of a request. Further, the regulations indicate that "an agency may require that a request be made in writing or may make records available upon oral request" [§1401.5(a)]. As such, neither the Law nor the regulations refer to, require or authorize the use of standard forms. Accordingly, it has consistently been advised that any written request that reasonably describes the records sought should suffice.

It has also been advised that a failure to complete a form prescribed by an agency cannot serve to delay a response or deny a request for records. A delay due to a failure to use a prescribed form might result in an inconsistency with the time limitations imposed by the Freedom of Information Law. For example, assume that an individual requests a record in writing from an agency and that the agency responds by directing that a standard form must be submitted. By the time the individual submits the form, and the agency processes and responds to the request, it is probable that more than five business days would have elapsed, particularly if a form is sent by mail and returned to the agency by mail. Therefore, to the extent that an agency's response granting, denying or acknowledging the receipt of a request is given more than five business days following the initial receipt of the written request, the agency, in my opinion, would have failed to comply with the provisions of the Freedom of Information Law.

Mr. Burton R. Laux

March 28, 2000

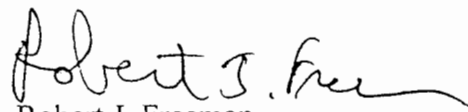
Page - 2 -

While the Law does not preclude an agency from developing a standard form, as suggested earlier, I do not believe that a failure to use such a form can be used to delay a response to a written request for records reasonably described beyond the statutory period. However, a standard form may, in my opinion, be utilized so long as it does not prolong the time limitations discussed above. For instance, a standard form could be completed by a requester while his or her written request is timely processed by the agency. In addition, an individual who appears at a government office and makes an oral request for records could be asked to complete the standard form as his or her written request.

In sum, it is my opinion that the use of standard forms is inappropriate to the extent that is unnecessarily serves to delay a response to or deny a request for records.

I hope that 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: Hon. Joseph L. Peloso, Jr., County Clerk



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12012

Committee Members

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

March 28, 2000

Executive Director

Robert J. Freeman

Dr. Ellenmorris Tiegerman
School for Language and Communication
Development
100 Glen Cove Avenue
Glen Cove, NY 11542

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

Dear Dr. Tiegerman:

As you are aware, I have received your letter of February 16 and the materials attached to it. In short, it is your view that you have not received an appropriate response to a request for records from the State Education Department.

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

First, it is emphasized that the Freedom of Information Law pertains to existing records and that §89(3) of that statute provides in relevant part that an agency is not required to create a record in response to a request. As I understand your correspondence, in several instances, you might have sought records or information that may not exist. For instance, you requested "lists of documents" transmitted between agencies. If no such lists exist, the Department would not be obliged to prepare lists on your behalf. You also sought "a description of the evaluation process." Again, if no such record exists, the Department would not be required to prepare a description on your behalf.

In a related vein, you requested "documentation utilized by SED to evaluate" certain needs, actions and functions. From my perspective, that kind of request might not be a request for records as envisioned by the Freedom of Information Law, for a response might involve making a series of judgments based on opinions, some of which would be subjective, mental impressions, the strength of one's memory, and perhaps legal research. For instance, in a situation in which an individual sought provisions of law that might have been "applicable" in governing certain activity, it was advised that the request was inappropriate. Specifically, the request involved "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 added). In response, it was suggested that:

“...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.”

In like manner, ascertaining which records were “used to evaluate” might involve an attempt to render a judgment regarding the use, utility, accuracy or value of records. As in the case of locating “applicable law”, equally reasonable people, even those within the same agency, may reach different conclusions regarding which records may have been used or which tend to support certain needs, actions or functions.

Further, there may be a variety of records from an array of sources used in and outside the scope of one’s governmental duties that might have been used, including curricular materials used in undergraduate, graduate or post graduate studies, library materials, magazine articles, documentaries, films (i.e., for training), professional journals and similar documentation read or seen over the course of years. Those kinds of materials may contribute to one’s breadth of knowledge and may, consciously or otherwise, tend to support a position on a given subject. However, identifying or recalling those kinds of materials that may have resulted in the acquisition of knowledge and which even may tend to support a statement or position would, in my opinion, frequently involve an impossibility. Moreover, for purposes of the Freedom of Information Law, a request for such materials might not meet the standard of “reasonably describing” the records sought, for such a request would not enable the Department to locate and identify the records in the manner envisioned by that statute [see Konigsberg v. Coughlin, 68 NY2d 245 (1986)].

Second, insofar as a request for records is consistent with the Freedom of Information Law, that statute 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

Dr. Ellenmorris Tiegerman

March 28, 2000

Page - 3 -

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

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

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

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

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

Sincerely,

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: Leslie Templeman



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12013

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

March 28, 2000

Executive Director

Robert J. Freeman

Maxwell D. Weinstein, 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. Weinstein:

I have received your letter of February 16 in which you complained with respect to delays by the Village of Ocean Beach in responding to a request made under the Freedom of Information Law. The request involves:

“...any and all records for the commercial dist. restaurant & bars only for the third day pick up listing excess container pick ups from 1997 to present as recorded by or for the Village of Ocean Beach or its contractor carting services.”

In this regard, I offer the following comments.

First, it is possible that an issue involves the extent to which the request "reasonably describes" the records sought as required by §89(3) of the Freedom of Information Law. I point out that it has been held by the Court of Appeals that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

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

"respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the

identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency']" (id. at 250).

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

While I am unfamiliar with the recordkeeping systems of the Village, to extent that the records sought can be located with reasonable effort, I believe that the request would have met the requirement of reasonably describing the records. On the other hand, if the records are not maintained in a manner that permits their retrieval except by reviewing perhaps hundreds 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.

Second, 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 that statute states in part that:

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

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

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

Maxwell D. Weinstein, Esq.

March 28, 2000

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

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

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

In sum, 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.

As you requested, copies of this opinion will be forwarded to Village officials.

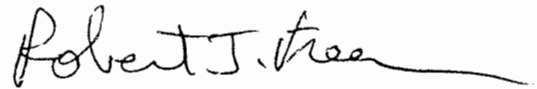
Maxwell D. Weinstein, Esq.

March 28, 2000

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 has a long, sweeping horizontal line extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees
Records Access Officer



STATE OF NEW YORK
DEPARTMENT OF STATE
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FOIL-A-12014

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Alexander F. Treadwell

March 28, 2000

Executive Director

Robert J. Freeman

Mr. Gerard Mileo



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

Dear Mr. Mileo:

I have received your letter of February 10 in which you asked "what [you] can do" to obtain information indicating whether attorneys have been censured or disciplined.

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

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

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

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

As such, the Freedom of Information Law excludes the courts and court records from its coverage.

Second, with respect to the discipline of attorneys, §90(10) of the Judiciary Law states that:

"Any statute or rule to the contrary notwithstanding, all papers, records and documents upon the application or examination of any person for admission as an attorney or counsellor at law and upon any

Mr. Gerard Mileo

March 28, 2000

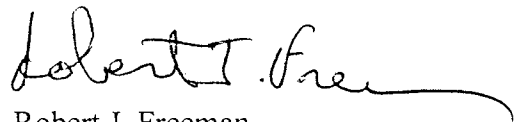
Page - 2 -

complaint, inquiry, investigation or proceeding relating to the conduct or discipline of an attorney or attorneys, shall be sealed and be deemed private and confidential. However, upon good cause being shown, the justices of the appellate division having jurisdiction are empowered, in their discretion, by written order, to permit to be divulged all or any part of such papers, records and documents. In the discretion of the presiding or acting presiding justice of said appellate division, such order may be made without notice to the persons or attorneys to be affected thereby or upon such notice to them as he may direct. In furtherance of the purpose of this subdivision, said justices are also empowered, in their discretion, from time to time to make such rules as they may deem necessary. Without regard to the foregoing, in the event that charges are sustained by the justices of the appellate division having jurisdiction in any complaint, investigation or proceeding relating to the conduct or discipline of any attorney, the records and documents in relation thereto shall be deemed public records."

Therefore, when records are subject to §90(10) of the Judiciary Law, I believe that they may be disclosed only in conjunction with that statute, and that the Freedom of Information Law would be inapplicable.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Mark S. Ochs



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March 28, 2000

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 letters of January 28 and February 12, both of which pertain to access to evaluations of public employees and records relating to the evaluation process.

From my perspective, the focus of the inquiry and the materials largely involve issues that have been the subject of numerous opinions prepared in the past at your request. As in those instances, the provision of greatest significance is §87(2)(g). In short, pursuant to that provision, those portions of intra-agency materials consisting of opinions, recommendations, suggestions, advice and the like may be withheld. For instance, on several pages of a principal's evaluation form, the reviewer would circle a term describing an individual's performance in relation to various functions. Specifically, the reviewer circles one of the following: "Does not meet", "Partially meets", "Meets", "Exceeds" and "Substantially Exceeds." As I understand the process, circling a description represents the reviewer's opinion regarding a principal's performance. If that is so, those pages, as well as others consisting of similar matters, may be withheld.

Again, the issue has been considered exhaustively in a variety of permutations, and I hope that your understanding of the Freedom of Information Law and the views of this office regarding its interpretations are clear.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm



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COMMITTEE ON OPEN GOVERNMENT

FOIL - AD - 12016

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March 28, 2000

Executive Director

Robert J. Freeman

Mr. Curt R. Dunnam

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

Dear Mr. Dunnam:

As you are aware, I have received your letter of February 19 and the correspondence relating to it.

In short, as I understand the matter, there was "disruption" at a fireworks festival held in Weedsport on July 27, 1998. You requested records pertaining to the incident from the Division of State Police, which denied the request in its entirety on the basis of §50-a of the Civil Rights Law.

While some of the records or portions of the records might justifiably have been withheld, it appears unlikely that a blanket denial of your request was proper. 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." 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

Mr. Curt R. Dunnam

March 28, 2000

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(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 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)].

Third, assuming that the records relate to what you characterized as a “disruption”, some might have involved the conduct of police officers; others, however, would likely focus on the event itself. If that is so, §50-a would not be pertinent, and the Freedom of Information Law would govern rights of access. This is not to suggest that all such records would be available, for several grounds for denial may be relevant to an analysis of rights of access.

For example, members of the public involved, or witnesses to the event, might be identified, and identifying details might properly be withheld pursuant to §87(2)(b) on the ground that disclosure would constitute “an unwarranted invasion of personal privacy.” Similarly, insofar as there may have been injuries and the records include information of a medical nature, personally identifiable information could in my view be withheld.

Also of possible 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;

Mr. Curt R. Dunnam

March 28, 2000

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.

Often most pertinent in relation to an incident is §87(2)(e), which authorizes an agency to withhold records that:

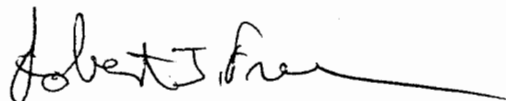
"are compiled for law enforcement purposes and which, if disclosed, would:

- i. interfere with law enforcement investigations or judicial proceedings;
- ii. deprive a person of a right to a fair trial or impartial adjudication;
- iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
- iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

It is emphasized that §87(2)(e) may be asserted only to the extent that the harmful effects described in subparagraphs (i) through (iv) would arise by means of disclosure.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: William J. Callahan
Lt. Laurie Wagner



STATE OF NEW YORK
DEPARTMENT OF STATE
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FOIL-AO-12017

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March 28, 2000

Executive Director

Robert J. Freeman

Mr. Ernest Tanzer

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

Dear Mr. Tanzer:

I have received your undated letter, which reached this office on February 18.

You have requested an opinion concerning a denial of your request for records "that would contain the 'detailed calculations' that were the basis for the [West Irondequoit Central School District] administration arriving at certain tax increase figures for a house assessed at the average rate publicized in district-wide mailings and presentations." In response to the request, you were given "a two paragraph letter obviously created by the administration *after* [your] request." You later sought "detailed worksheets", and you were informed that they are not "maintained by the District", but rather are "in the sole possession of the district's financial adviser."

In this regard, I offer the following comments.

First, I believe that the records prepared by the financial adviser are District property and that they fall within the coverage of the Freedom of Information Law. It is emphasized that §86(4) of the Freedom of Information Law defines the term "record" expansively to include:

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

Mr. Ernest Tanzer

March 28, 2000

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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, with or for an agency'" [see Encore College Bookstores, Inc. v. Auxiliary Services Corporation of the State University of New York at Farmingdale, 87 NY 2d 410, 417 (1995)].

In short, insofar as the records are maintained for the District, I believe that the District 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.

Second, in a related vein, it has been held by the Court of Appeals, the state's highest court, that records prepared for an agency by a consultant are agency records that should be treated as if they were prepared by agency staff.

In brief, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Records prepared by agency staff for internal agency use would constitute "intra-agency materials" that fall within the scope of §87(2)(g). That provision permits an agency to withhold records that:

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

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

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

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

In a discussion of the issue of records prepared by consultants for agencies, the Court of Appeals stated that:

"Opinions and recommendations prepared by agency personnel may be exempt from disclosure under FOIL as 'predecisional materials, prepared to assist an agency decision maker***in arriving at his decision' (McAulay v. Board of Educ., 61 AD 2d 1048, aff'd 48 NY 2d 659). Such material is exempt 'to protect the deliberative process of government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers (Matter of Sea Crest Const. Corp. v. Stubing, 82 AD 2d 546, 549).

"In connection with their deliberative process, agencies may at times require opinions and recommendations from outside consultants. It would make little sense to protect the deliberative process when such reports are prepared by agency employees yet deny this protection when reports are prepared for the same purpose by outside consultants retained by agencies. Accordingly, we hold that records may be considered 'intra-agency material' even though prepared by an outside consultant at the behest of an agency as part of the agency's deliberative process (see, Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD 2d 546, 549, supra; Matter of 124 Ferry St. Realty Corp. v. Hennessy, 82 AD 2d 981, 983)" [Xerox Corporation v. Town of Webster, 65 NY 2d 131, 132-133 (1985)].

Based upon the foregoing, records prepared by a consultant for an agency may be withheld or must be disclosed based upon the same standards as in cases in which records are prepared by the staff of an agency. It is emphasized that the Court in Xerox specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

"While the reports in principle may be exempt from disclosure, on this record - which contains only the barest description of them - we cannot determine whether the documents in fact fall wholly within the scope of FOIL's exemption for 'intra-agency materials,' as claimed by

Mr. Ernest Tanzer

March 28, 2000

Page - 4 -

respondents. To the extent the reports contain 'statistical or factual tabulations or data' (Public Officers Law section 87[2][g][i], or other material subject to production, they should be redacted and made available to the appellant" (id. at 133).

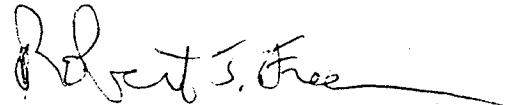
Therefore, a record prepared by a consultant for an agency would be accessible or deniable, in whole or in part, depending on its contents.

I note that it has been held that numbers appearing in budget worksheets constitute "statistical tabulations" that must be disclosed, even though they are not final and may not reflect "objective reality" [see Dunlea v. Goldmark, 380 NYS2d 496, aff'd 54 AD2d 446, aff'd 43 NY2d 754 (1977)].

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 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
Glenn Wachter, Superintendent



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AJ-12018

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March 28, 2000

Executive Director

Robert J. Freeman

E-Mail

TO: Wallace Nolen [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. Nolen:

I have received your letter of February 17 in which you sought an opinion concerning the extent to which agencies must explain the reason for denying access to records.

In this regard, as you are aware, both §89(3) of the Freedom of Information Law and the regulations promulgated by the Committee on Open Government (32 NYCRR Part 1401) require that a denial of an initial request be made in writing. If any aspect of a request is denied, an applicant has the right to appeal pursuant to §89(4)(a) of the statute. The provision states in relevant part that:

"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."

While the foregoing requires that a denial of an appeal must "fully explain" the reasons in writing, neither the law nor any judicial decision of which I am aware specifies the degree of detail required. It is clear in my view that the explanation of a denial following an appeal must be at least as expansive and, if an initial denial was brief, more detailed than the basis for denial initially given. From my perspective, the denial of an appeal should be sufficiently detailed so that it provides a reasonable rationale for the denial.

Mr. Wallace Nolen

March 28, 2000

Page - 2 -

I note, too, that I know of no provision of the Freedom of Information Law or any judicial decision that would require that a denial at the agency level identify every record withheld or include a description of the reason for withholding each document. Such a requirement has been imposed under the federal Freedom of Information Act, which may involve the preparation of a so-called "Vaughn index" [see Vaughn v. Rosen, 484 F.2D 820 (1973)]. Such an index provides an analysis of documents withheld by an agency as a means of justifying a denial and insuring that the burden of proof remains on the agency. Again, I am unaware of any decision involving the New York Freedom of Information Law that requires the preparation of a similar index. Further, one decision suggests the preparation of that kind of analysis might in some instances subvert the purpose for which exemptions are claimed. In that decision, an inmate requested records referring to him as a member of organized crime or an escape risk. In affirming a denial by a lower court, the Appellate Division found that:

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

I hope that I have been of assistance.

RJF:jm

cc: Anthony J. Annucci



STATE OF NEW YORK
DEPARTMENT OF STATE
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FOIL-AU v 12019

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Alexander F. Treadwell

March 28, 2000

Executive Director

Robert J. Freeman

E-Mail

TO: Sallie Sypher [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. Sypher:

As you are aware, I have received your inquiry of February 23.

You wrote that the Putnam County Archives maintains coroners' records "going back to around 1812", and you asked whether they may be disclosed.

In this regard, the statute that currently deals with the disclosure of the kind of records at issue became effective in 1965. Specifically, §677(3)(b) of the County Law, which pertains to autopsy reports and related records prepared by a coroner or medical examiner, 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."

Ms. Sallie Sypher

March 28, 2000

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 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 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 short, even if §677 of the County Law applies, and in my view it does not, nowhere does that statute specify that disclosures are prohibited.

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

RJF:jm

FOIL-AO-12020

From: Robert Freeman
To: [REDACTED]
Date: 3/28/00 5:16PM
Subject: Dear Dee:

Dear Dee:

Assuming the records sought involve transactions that have been completed, I believe that they would be available.

If, for example, an appraisal or similar document is requested prior to the completion of a transaction, it is possible that premature disclosure could preclude a unit of government from making the best deal on behalf of the taxpayer. In that event, the record may likely be withheld under §87(2)(c) of the FOIL, which permits an agency to deny access to records insofar as disclosure would "impair present or imminent contract awards..." However, after the transaction has been consummated, the "impairment" disappears and the records ordinarily should be made available.

If you have additional questions or would like to discuss the matter, 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
Website - www.dos.state.ny.us/coog/coogwww.html

FOIL-A0-12008

From: Robert Freeman
To: [REDACTED]
Date: 3/24/00 12:30PM
Subject: Dear Taxpayers:

Dear Taxpayers:

If a private company has submitted records to an agency, a unit of state or local government in New York, those records would fall within the coverage of the Freedom of Information Law.

To attempt to obtain them, a request may be made to the "records access officer" at the agency that maintains the records. The records access officer has the duty of coordinating the agency's response to requests.

As a general matter, the Freedom of Information Law is based on a presumption of access. Stated differently, all agency records are available, except those records or portions of records that fall within the grounds for denial appearing in §87(2) of that statute.

I am unaware of the nature of the records in which you are interested. However, it is possible that §87(2)(d) may be pertinent. That provision permits an agency to withhold records to the extent that disclosure would cause "substantial to the competitive position" of a commercial enterprise.

Additional information can be acquired on the Committee's website.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
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(518) 474-1927 - Fax
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-A0-12009

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

March 27, 2000

Executive Director

Robert J. Freeman

Ms. Nancy W. Foster

[REDACTED]

The staff of the Committee 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. Foster:

As you are aware, I have received your letter of February 7 and spoke recently to your husband concerning your efforts in obtaining records from the New York Power Authority. For the purpose of offering clarification and guidance, I offer the following comments.

First, the Freedom of Information Law pertains to existing records. Therefore, insofar as the records of your interest no longer exist, that statute would not apply.

Second, from my perspective, a significant consideration involves the extent to which a request "reasonably describes" the records sought as required by §89(3) of the Freedom of Information Law. I point out that it has been held by the Court of Appeals, 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

(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 Power Authority, 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 Authority 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 at a number of locations, and that those units maintain their records by means of different filing and retrieval methods. If an office maintains all of its records regarding a particular matter, 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 by the name of the author, for example, 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.

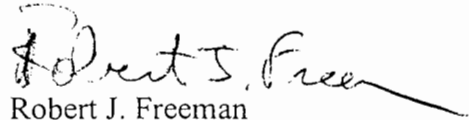
Lastly, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not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

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

Ms. Nancy W. Foster
March 27, 2000
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 underline that extends to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Laura Badamo



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AU-12010

Committee Members

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Joseph J. Seymour
Carole E. Stone
Alexander F. Treadwell

March 28, 2000

Executive Director

Robert J. Freeman

Mr. Bernard Corcoran
Cayuga County CO-Coordinator
NYGenWeb Project
102 Mary 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. Corcoran:

I have received your letter of February 11 in which you questioned the practices of certain state agencies in relation to genealogical records.

In this regard, first, the Committee on Open Government, a unit of the Department of State, is authorized to offer advice and opinions concerning the Freedom of Information Law. The Committee is not empowered to compel agencies to follow certain courses of action in carrying out their duties or to compel an agency to grant or deny access to records.

Second, although the Freedom of Information Law pertains generally to access to government records and the fees that may be charged for copies of records, the provisions of the Public Health Law deal with birth and death records and fees for services rendered concerning searches for and copies of those records. Specifically, subdivision (3) of §4174 refers to searches for and the fees for records sought for genealogical or research purposes that may be imposed by "any person authorized" by the State Commissioner of Health, i.e., municipal clerks. That provision states that:

"For any search of the files and records conducted for authorized genealogical or research purposes, the commissioner or any person authorized by him shall be entitled to, and the applicant shall pay, a fee of ten dollars for each hour or fractional part of an hour of time for search, together with a fee of one dollar for each uncertified copy or abstract of such records requested by the applicant or for a certification that a search discloses no record."

Mr. Bernard Corcoran

March 28, 2000

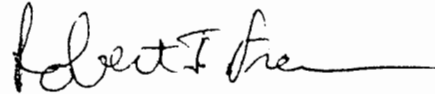
Page - 2 -

It is noted that the Commissioner of Health has promulgated "Administrative Rules and Regulations" pertaining to genealogical research, and enclosed is a summary of those provisions. According to the summary, birth records need not be disclosed unless the subject of the birth record is known to have been deceased prior to 1924; death records need not be disclosed regarding deaths occurring after 1949.

Since the Department of Health and its Commissioner have primary responsibility in relation to vital records and genealogical searches, it is suggested that it may be appropriate to express your views and concerns to the Department's Bureau of Vital Records.

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-12011

Committee Members

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Joseph J. Seymour
Carole E. Stone
Alexander F. Treadwell

March 28, 2000

Executive Director

Robert J. Freeman

Mr. Burton R. Laux

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

Dear Mr. Laux:

I have received your note of February 14 in which you appear to have questioned a requirement that an applicant complete a prescribed form as a condition precedent to seeking records from Putnam County under the Freedom of Information Law.

In this regard, I do not believe that an agency can require that a request be made on a prescribed form. The Freedom of Information Law, §89(3), as well as the regulations promulgated by the Committee (§1401.5), require that an agency respond to a request that reasonably describes the record sought within five business days of the receipt of a request. Further, the regulations indicate that "an agency may require that a request be made in writing or may make records available upon oral request" [§1401.5(a)]. As such, neither the Law nor the regulations refer to, require or authorize the use of standard forms. Accordingly, it has consistently been advised that any written request that reasonably describes the records sought should suffice.

It has also been advised that a failure to complete a form prescribed by an agency cannot serve to delay a response or deny a request for records. A delay due to a failure to use a prescribed form might result in an inconsistency with the time limitations imposed by the Freedom of Information Law. For example, assume that an individual requests a record in writing from an agency and that the agency responds by directing that a standard form must be submitted. By the time the individual submits the form, and the agency processes and responds to the request, it is probable that more than five business days would have elapsed, particularly if a form is sent by mail and returned to the agency by mail. Therefore, to the extent that an agency's response granting, denying or acknowledging the receipt of a request is given more than five business days following the initial receipt of the written request, the agency, in my opinion, would have failed to comply with the provisions of the Freedom of Information Law.

Mr. Burton R. Laux

March 28, 2000

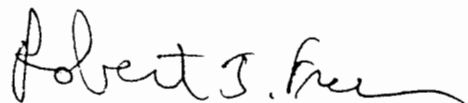
Page - 2 -

While the Law does not preclude an agency from developing a standard form, as suggested earlier, I do not believe that a failure to use such a form can be used to delay a response to a written request for records reasonably described beyond the statutory period. However, a standard form may, in my opinion, be utilized so long as it does not prolong the time limitations discussed above. For instance, a standard form could be completed by a requester while his or her written request is timely processed by the agency. In addition, an individual who appears at a government office and makes an oral request for records could be asked to complete the standard form as his or her written request.

In sum, it is my opinion that the use of standard forms is inappropriate to the extent that is unnecessarily serves to delay a response to or deny a request for records.

I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Joseph L. Peloso, Jr., County Clerk



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12012

Committee Members

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Alexander F. Treadwell

March 28, 2000

Executive Director

Robert J. Freeman

Dr. Ellenmorris Tiegerman
School for Language and Communication
Development
100 Glen Cove Avenue
Glen Cove, NY 11542

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

Dear Dr. Tiegerman:

As you are aware, I have received your letter of February 16 and the materials attached to it. In short, it is your view that you have not received an appropriate response to a request for records from the State Education Department.

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

First, it is emphasized that the Freedom of Information Law pertains to existing records and that §89(3) of that statute provides in relevant part that an agency is not required to create a record in response to a request. As I understand your correspondence, in several instances, you might have sought records or information that may not exist. For instance, you requested "lists of documents" transmitted between agencies. If no such lists exist, the Department would not be obliged to prepare lists on your behalf. You also sought "a description of the evaluation process." Again, if no such record exists, the Department would not be required to prepare a description on your behalf.

In a related vein, you requested "documentation utilized by SED to evaluate" certain needs, actions and functions. From my perspective, that kind of request might not be a request for records as envisioned by the Freedom of Information Law, for a response might involve making a series of judgments based on opinions, some of which would be subjective, mental impressions, the strength of one's memory, and perhaps legal research. For instance, in a situation in which an individual sought provisions of law that might have been "applicable" in governing certain activity, it was advised that the request was inappropriate. Specifically, the request involved "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 added). In response, it was suggested that:

“...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.”

In like manner, ascertaining which records were “used to evaluate” might involve an attempt to render a judgment regarding the use, utility, accuracy or value of records. As in the case of locating “applicable law”, equally reasonable people, even those within the same agency, may reach different conclusions regarding which records may have been used or which tend to support certain needs, actions or functions.

Further, there may be a variety of records from an array of sources used in and outside the scope of one’s governmental duties that might have been used, including curricular materials used in undergraduate, graduate or post graduate studies, library materials, magazine articles, documentaries, films (i.e., for training), professional journals and similar documentation read or seen over the course of years. Those kinds of materials may contribute to one’s breadth of knowledge and may, consciously or otherwise, tend to support a position on a given subject. However, identifying or recalling those kinds of materials that may have resulted in the acquisition of knowledge and which even may tend to support a statement or position would, in my opinion, frequently involve an impossibility. Moreover, for purposes of the Freedom of Information Law, a request for such materials might not meet the standard of “reasonably describing” the records sought, for such a request would not enable the Department to locate and identify the records in the manner envisioned by that statute [see Konigsberg v. Coughlin, 68 NY2d 245 (1986)].

Second, insofar as a request for records is consistent with the Freedom of Information Law, that statute 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

Dr. Ellenmorris Tiegerman

March 28, 2000

Page - 3 -

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

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

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

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

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

Sincerely,

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: Leslie Templeman



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12013

Committee Members

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Alexander F. Treadwell

March 28, 2000

Executive Director

Robert J. Freeman

Maxwell D. Weinstein, 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. Weinstein:

I have received your letter of February 16 in which you complained with respect to delays by the Village of Ocean Beach in responding to a request made under the Freedom of Information Law. The request involves:

“...any and all records for the commercial dist. restaurant & bars only for the third day pick up listing excess container pick ups from 1997 to present as recorded by or for the Village of Ocean Beach or its contractor carting services.”

In this regard, I offer the following comments.

First, it is possible that an issue involves the extent to which the request "reasonably describes" the records sought as required by §89(3) of the Freedom of Information Law. I point out that it has been held by the Court of Appeals that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

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

"respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the

identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency']" (id. at 250).

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

While I am unfamiliar with the recordkeeping systems of the Village, to extent that the records sought can be located with reasonable effort, I believe that the request would have met the requirement of reasonably describing the records. On the other hand, if the records are not maintained in a manner that permits their retrieval except by reviewing perhaps hundreds 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.

Second, 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 that statute states in part that:

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

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

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

Maxwell D. Weinstein, Esq.

March 28, 2000

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

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

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

In sum, 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.

As you requested, copies of this opinion will be forwarded to Village officials.

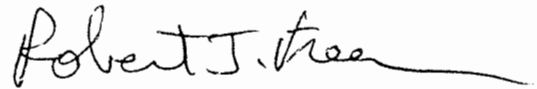
Maxwell D. Weinstein, Esq.

March 28, 2000

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 has a long, sweeping horizontal line extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees
Records Access Officer



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-A-12014

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

March 28, 2000

Executive Director

Robert J. Freeman

Mr. Gerard Mileo



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

Dear Mr. Mileo:

I have received your letter of February 10 in which you asked "what [you] can do" to obtain information indicating whether attorneys have been censured or disciplined.

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

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

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

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

As such, the Freedom of Information Law excludes the courts and court records from its coverage.

Second, with respect to the discipline of attorneys, §90(10) of the Judiciary Law states that:

"Any statute or rule to the contrary notwithstanding, all papers, records and documents upon the application or examination of any person for admission as an attorney or counsellor at law and upon any

Mr. Gerard Mileo

March 28, 2000

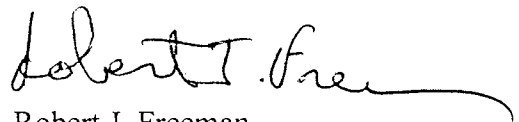
Page - 2 -

complaint, inquiry, investigation or proceeding relating to the conduct or discipline of an attorney or attorneys, shall be sealed and be deemed private and confidential. However, upon good cause being shown, the justices of the appellate division having jurisdiction are empowered, in their discretion, by written order, to permit to be divulged all or any part of such papers, records and documents. In the discretion of the presiding or acting presiding justice of said appellate division, such order may be made without notice to the persons or attorneys to be affected thereby or upon such notice to them as he may direct. In furtherance of the purpose of this subdivision, said justices are also empowered, in their discretion, from time to time to make such rules as they may deem necessary. Without regard to the foregoing, in the event that charges are sustained by the justices of the appellate division having jurisdiction in any complaint, investigation or proceeding relating to the conduct or discipline of any attorney, the records and documents in relation thereto shall be deemed public records."

Therefore, when records are subject to §90(10) of the Judiciary Law, I believe that they may be disclosed only in conjunction with that statute, and that the Freedom of Information Law would be inapplicable.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Mark S. Ochs



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FOIL-AO-12015

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March 28, 2000

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 letters of January 28 and February 12, both of which pertain to access to evaluations of public employees and records relating to the evaluation process.

From my perspective, the focus of the inquiry and the materials largely involve issues that have been the subject of numerous opinions prepared in the past at your request. As in those instances, the provision of greatest significance is §87(2)(g). In short, pursuant to that provision, those portions of intra-agency materials consisting of opinions, recommendations, suggestions, advice and the like may be withheld. For instance, on several pages of a principal's evaluation form, the reviewer would circle a term describing an individual's performance in relation to various functions. Specifically, the reviewer circles one of the following: "Does not meet", "Partially meets", "Meets", "Exceeds" and "Substantially Exceeds." As I understand the process, circling a description represents the reviewer's opinion regarding a principal's performance. If that is so, those pages, as well as others consisting of similar matters, may be withheld.

Again, the issue has been considered exhaustively in a variety of permutations, and I hope that your understanding of the Freedom of Information Law and the views of this office regarding its interpretations are clear.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

FOIL - AD - 12016

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March 28, 2000

Executive Director

Robert J. Freeman

Mr. Curt R. Dunnam

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

Dear Mr. Dunnam:

As you are aware, I have received your letter of February 19 and the correspondence relating to it.

In short, as I understand the matter, there was "disruption" at a fireworks festival held in Weedsport on July 27, 1998. You requested records pertaining to the incident from the Division of State Police, which denied the request in its entirety on the basis of §50-a of the Civil Rights Law.

While some of the records or portions of the records might justifiably have been withheld, it appears unlikely that a blanket denial of your request was proper. 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." 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

Mr. Curt R. Dunnam

March 28, 2000

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(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 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)].

Third, assuming that the records relate to what you characterized as a "disruption", some might have involved the conduct of police officers; others, however, would likely focus on the event itself. If that is so, §50-a would not be pertinent, and the Freedom of Information Law would govern rights of access. This is not to suggest that all such records would be available, for several grounds for denial may be relevant to an analysis of rights of access.

For example, members of the public involved, or witnesses to the event, might be identified, and identifying details might properly be withheld pursuant to §87(2)(b) on the ground that disclosure would constitute "an unwarranted invasion of personal privacy." Similarly, insofar as there may have been injuries and the records include information of a medical nature, personally identifiable information could in my view be withheld.

Also of possible 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;

Mr. Curt R. Dunnam

March 28, 2000

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.

Often most pertinent in relation to an incident is §87(2)(e), which authorizes an agency to withhold records that:

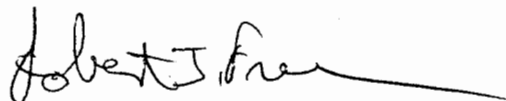
"are compiled for law enforcement purposes and which, if disclosed, would:

- i. interfere with law enforcement investigations or judicial proceedings;
- ii. deprive a person of a right to a fair trial or impartial adjudication;
- iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
- iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

It is emphasized that §87(2)(e) may be asserted only to the extent that the harmful effects described in subparagraphs (i) through (iv) would arise by means of disclosure.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: William J. Callahan
Lt. Laurie Wagner



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12017

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March 28, 2000

Executive Director

Robert J. Freeman

Mr. Ernest Tanzer

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

Dear Mr. Tanzer:

I have received your undated letter, which reached this office on February 18.

You have requested an opinion concerning a denial of your request for records "that would contain the 'detailed calculations' that were the basis for the [West Irondequoit Central School District] administration arriving at certain tax increase figures for a house assessed at the average rate publicized in district-wide mailings and presentations." In response to the request, you were given "a two paragraph letter obviously created by the administration *after* [your] request." You later sought "detailed worksheets", and you were informed that they are not "maintained by the District", but rather are "in the sole possession of the district's financial adviser."

In this regard, I offer the following comments.

First, I believe that the records prepared by the financial adviser are District property and that they fall within the coverage of the Freedom of Information Law. It is emphasized that §86(4) of the Freedom of Information Law defines the term "record" expansively to include:

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

Mr. Ernest Tanzer

March 28, 2000

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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, with or for an agency'" [see Encore College Bookstores, Inc. v. Auxiliary Services Corporation of the State University of New York at Farmingdale, 87 NY 2d 410, 417 (1995)].

In short, insofar as the records are maintained for the District, I believe that the District 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.

Second, in a related vein, it has been held by the Court of Appeals, the state's highest court, that records prepared for an agency by a consultant are agency records that should be treated as if they were prepared by agency staff.

In brief, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Records prepared by agency staff for internal agency use would constitute "intra-agency materials" that fall within the scope of §87(2)(g). That provision permits an agency to withhold records that:

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

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

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

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

In a discussion of the issue of records prepared by consultants for agencies, the Court of Appeals stated that:

"Opinions and recommendations prepared by agency personnel may be exempt from disclosure under FOIL as 'predecisional materials, prepared to assist an agency decision maker***in arriving at his decision' (McAulay v. Board of Educ., 61 AD 2d 1048, aff'd 48 NY 2d 659). Such material is exempt 'to protect the deliberative process of government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers (Matter of Sea Crest Const. Corp. v. Stubing, 82 AD 2d 546, 549).

"In connection with their deliberative process, agencies may at times require opinions and recommendations from outside consultants. It would make little sense to protect the deliberative process when such reports are prepared by agency employees yet deny this protection when reports are prepared for the same purpose by outside consultants retained by agencies. Accordingly, we hold that records may be considered 'intra-agency material' even though prepared by an outside consultant at the behest of an agency as part of the agency's deliberative process (see, Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD 2d 546, 549, supra; Matter of 124 Ferry St. Realty Corp. v. Hennessy, 82 AD 2d 981, 983)" [Xerox Corporation v. Town of Webster, 65 NY 2d 131, 132-133 (1985)].

Based upon the foregoing, records prepared by a consultant for an agency may be withheld or must be disclosed based upon the same standards as in cases in which records are prepared by the staff of an agency. It is emphasized that the Court in Xerox specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

"While the reports in principle may be exempt from disclosure, on this record - which contains only the barest description of them - we cannot determine whether the documents in fact fall wholly within the scope of FOIL's exemption for 'intra-agency materials,' as claimed by

Mr. Ernest Tanzer

March 28, 2000

Page - 4 -

respondents. To the extent the reports contain 'statistical or factual tabulations or data' (Public Officers Law section 87[2][g][i], or other material subject to production, they should be redacted and made available to the appellant" (id. at 133).

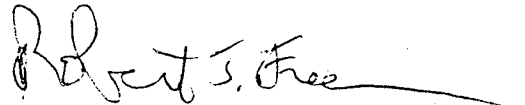
Therefore, a record prepared by a consultant for an agency would be accessible or deniable, in whole or in part, depending on its contents.

I note that it has been held that numbers appearing in budget worksheets constitute "statistical tabulations" that must be disclosed, even though they are not final and may not reflect "objective reality" [see Dunlea v. Goldmark, 380 NYS2d 496, aff'd 54 AD2d 446, aff'd 43 NY2d 754 (1977)].

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 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
Glenn Wachter, Superintendent



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AJ-12018

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March 28, 2000

Executive Director

Robert J. Freeman

E-Mail

TO: Wallace Nolen [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. Nolen:

I have received your letter of February 17 in which you sought an opinion concerning the extent to which agencies must explain the reason for denying access to records.

In this regard, as you are aware, both §89(3) of the Freedom of Information Law and the regulations promulgated by the Committee on Open Government (32 NYCRR Part 1401) require that a denial of an initial request be made in writing. If any aspect of a request is denied, an applicant has the right to appeal pursuant to §89(4)(a) of the statute. The provision states in relevant part that:

"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."

While the foregoing requires that a denial of an appeal must "fully explain" the reasons in writing, neither the law nor any judicial decision of which I am aware specifies the degree of detail required. It is clear in my view that the explanation of a denial following an appeal must be at least as expansive and, if an initial denial was brief, more detailed than the basis for denial initially given. From my perspective, the denial of an appeal should be sufficiently detailed so that it provides a reasonable rationale for the denial.

Mr. Wallace Nolen

March 28, 2000

Page - 2 -

I note, too, that I know of no provision of the Freedom of Information Law or any judicial decision that would require that a denial at the agency level identify every record withheld or include a description of the reason for withholding each document. Such a requirement has been imposed under the federal Freedom of Information Act, which may involve the preparation of a so-called "Vaughn index" [see Vaughn v. Rosen, 484 F.2D 820 (1973)]. Such an index provides an analysis of documents withheld by an agency as a means of justifying a denial and insuring that the burden of proof remains on the agency. Again, I am unaware of any decision involving the New York Freedom of Information Law that requires the preparation of a similar index. Further, one decision suggests the preparation of that kind of analysis might in some instances subvert the purpose for which exemptions are claimed. In that decision, an inmate requested records referring to him as a member of organized crime or an escape risk. In affirming a denial by a lower court, the Appellate Division found that:

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

I hope that I have been of assistance.

RJF:jm

cc: Anthony J. Annucci



STATE OF NEW YORK
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FOIL-AJ v 12019

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March 28, 2000

Executive Director

Robert J. Freeman

E-Mail

TO: Sallie Sypher [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. Sypher:

As you are aware, I have received your inquiry of February 23.

You wrote that the Putnam County Archives maintains coroners' records "going back to around 1812", and you asked whether they may be disclosed.

In this regard, the statute that currently deals with the disclosure of the kind of records at issue became effective in 1965. Specifically, §677(3)(b) of the County Law, which pertains to autopsy reports and related records prepared by a coroner or medical examiner, 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."

Ms. Sallie Sypher

March 28, 2000

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 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 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 short, even if §677 of the County Law applies, and in my view it does not, nowhere does that statute specify that disclosures are prohibited.

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

RJF:jm

FOIL-AO-12020

From: Robert Freeman
To: [REDACTED]
Date: 3/28/00 5:16PM
Subject: Dear Dee:

Dear Dee:

Assuming the records sought involve transactions that have been completed, I believe that they would be available.

If, for example, an appraisal or similar document is requested prior to the completion of a transaction, it is possible that premature disclosure could preclude a unit of government from making the best deal on behalf of the taxpayer. In that event, the record may likely be withheld under §87(2)(c) of the FOIL, which permits an agency to deny access to records insofar as disclosure would "impair present or imminent contract awards..." However, after the transaction has been consummated, the "impairment" disappears and the records ordinarily should be made available.

If you have additional questions or would like to discuss the matter, please feel free to contact me.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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FOIL - AD - 12016

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March 28, 2000

Executive Director

Robert J. Freeman

Mr. Curt R. Dunnam

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

Dear Mr. Dunnam:

As you are aware, I have received your letter of February 19 and the correspondence relating to it.

In short, as I understand the matter, there was "disruption" at a fireworks festival held in Weedsport on July 27, 1998. You requested records pertaining to the incident from the Division of State Police, which denied the request in its entirety on the basis of §50-a of the Civil Rights Law.

While some of the records or portions of the records might justifiably have been withheld, it appears unlikely that a blanket denial of your request was proper. 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." 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

Mr. Curt R. Dunnam

March 28, 2000

Page - 2 -

(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 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)].

Third, assuming that the records relate to what you characterized as a “disruption”, some might have involved the conduct of police officers; others, however, would likely focus on the event itself. If that is so, §50-a would not be pertinent, and the Freedom of Information Law would govern rights of access. This is not to suggest that all such records would be available, for several grounds for denial may be relevant to an analysis of rights of access.

For example, members of the public involved, or witnesses to the event, might be identified, and identifying details might properly be withheld pursuant to §87(2)(b) on the ground that disclosure would constitute “an unwarranted invasion of personal privacy.” Similarly, insofar as there may have been injuries and the records include information of a medical nature, personally identifiable information could in my view be withheld.

Also of possible 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;

Mr. Curt R. Dunnam

March 28, 2000

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.

Often most pertinent in relation to an incident is §87(2)(e), which authorizes an agency to withhold records that:

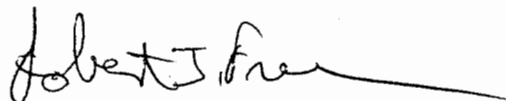
"are compiled for law enforcement purposes and which, if disclosed, would:

- i. interfere with law enforcement investigations or judicial proceedings;
- ii. deprive a person of a right to a fair trial or impartial adjudication;
- iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
- iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

It is emphasized that §87(2)(e) may be asserted only to the extent that the harmful effects described in subparagraphs (i) through (iv) would arise by means of disclosure.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: William J. Callahan
Lt. Laurie Wagner



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12017

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March 28, 2000

Executive Director

Robert J. Freeman

Mr. Ernest Tanzer

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

Dear Mr. Tanzer:

I have received your undated letter, which reached this office on February 18.

You have requested an opinion concerning a denial of your request for records "that would contain the 'detailed calculations' that were the basis for the [West Irondequoit Central School District] administration arriving at certain tax increase figures for a house assessed at the average rate publicized in district-wide mailings and presentations." In response to the request, you were given "a two paragraph letter obviously created by the administration *after* [your] request." You later sought "detailed worksheets", and you were informed that they are not "maintained by the District", but rather are "in the sole possession of the district's financial adviser."

In this regard, I offer the following comments.

First, I believe that the records prepared by the financial adviser are District property and that they fall within the coverage of the Freedom of Information Law. It is emphasized that §86(4) of the Freedom of Information Law defines the term "record" expansively to include:

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

Mr. Ernest Tanzer

March 28, 2000

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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, with or for an agency'" [see Encore College Bookstores, Inc. v. Auxiliary Services Corporation of the State University of New York at Farmingdale, 87 NY 2d 410, 417 (1995)].

In short, insofar as the records are maintained for the District, I believe that the District 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.

Second, in a related vein, it has been held by the Court of Appeals, the state's highest court, that records prepared for an agency by a consultant are agency records that should be treated as if they were prepared by agency staff.

In brief, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Records prepared by agency staff for internal agency use would constitute "intra-agency materials" that fall within the scope of §87(2)(g). That provision permits an agency to withhold records that:

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

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

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

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

In a discussion of the issue of records prepared by consultants for agencies, the Court of Appeals stated that:

"Opinions and recommendations prepared by agency personnel may be exempt from disclosure under FOIL as 'predecisional materials, prepared to assist an agency decision maker***in arriving at his decision' (McAulay v. Board of Educ., 61 AD 2d 1048, aff'd 48 NY 2d 659). Such material is exempt 'to protect the deliberative process of government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers (Matter of Sea Crest Const. Corp. v. Stubing, 82 AD 2d 546, 549).

"In connection with their deliberative process, agencies may at times require opinions and recommendations from outside consultants. It would make little sense to protect the deliberative process when such reports are prepared by agency employees yet deny this protection when reports are prepared for the same purpose by outside consultants retained by agencies. Accordingly, we hold that records may be considered 'intra-agency material' even though prepared by an outside consultant at the behest of an agency as part of the agency's deliberative process (see, Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD 2d 546, 549, supra; Matter of 124 Ferry St. Realty Corp. v. Hennessy, 82 AD 2d 981, 983)" [Xerox Corporation v. Town of Webster, 65 NY 2d 131, 132-133 (1985)].

Based upon the foregoing, records prepared by a consultant for an agency may be withheld or must be disclosed based upon the same standards as in cases in which records are prepared by the staff of an agency. It is emphasized that the Court in Xerox specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

"While the reports in principle may be exempt from disclosure, on this record - which contains only the barest description of them - we cannot determine whether the documents in fact fall wholly within the scope of FOIL's exemption for 'intra-agency materials,' as claimed by

Mr. Ernest Tanzer

March 28, 2000

Page - 4 -

respondents. To the extent the reports contain 'statistical or factual tabulations or data' (Public Officers Law section 87[2][g][i], or other material subject to production, they should be redacted and made available to the appellant" (id. at 133).

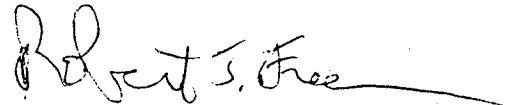
Therefore, a record prepared by a consultant for an agency would be accessible or deniable, in whole or in part, depending on its contents.

I note that it has been held that numbers appearing in budget worksheets constitute "statistical tabulations" that must be disclosed, even though they are not final and may not reflect "objective reality" [see Dunlea v. Goldmark, 380 NYS2d 496, aff'd 54 AD2d 446, aff'd 43 NY2d 754 (1977)].

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 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
Glenn Wachter, Superintendent



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AJ-12018

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Alexander F. Treadwell

March 28, 2000

Executive Director

Robert J. Freeman

E-Mail

TO: Wallace Nolen [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. Nolen:

I have received your letter of February 17 in which you sought an opinion concerning the extent to which agencies must explain the reason for denying access to records.

In this regard, as you are aware, both §89(3) of the Freedom of Information Law and the regulations promulgated by the Committee on Open Government (32 NYCRR Part 1401) require that a denial of an initial request be made in writing. If any aspect of a request is denied, an applicant has the right to appeal pursuant to §89(4)(a) of the statute. The provision states in relevant part that:

"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."

While the foregoing requires that a denial of an appeal must "fully explain" the reasons in writing, neither the law nor any judicial decision of which I am aware specifies the degree of detail required. It is clear in my view that the explanation of a denial following an appeal must be at least as expansive and, if an initial denial was brief, more detailed than the basis for denial initially given. From my perspective, the denial of an appeal should be sufficiently detailed so that it provides a reasonable rationale for the denial.

Mr. Wallace Nolen

March 28, 2000

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I note, too, that I know of no provision of the Freedom of Information Law or any judicial decision that would require that a denial at the agency level identify every record withheld or include a description of the reason for withholding each document. Such a requirement has been imposed under the federal Freedom of Information Act, which may involve the preparation of a so-called "Vaughn index" [see Vaughn v. Rosen, 484 F.2D 820 (1973)]. Such an index provides an analysis of documents withheld by an agency as a means of justifying a denial and insuring that the burden of proof remains on the agency. Again, I am unaware of any decision involving the New York Freedom of Information Law that requires the preparation of a similar index. Further, one decision suggests the preparation of that kind of analysis might in some instances subvert the purpose for which exemptions are claimed. In that decision, an inmate requested records referring to him as a member of organized crime or an escape risk. In affirming a denial by a lower court, the Appellate Division found that:

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

I hope that I have been of assistance.

RJF:jm

cc: Anthony J. Annucci



STATE OF NEW YORK
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FOIL-AJ v 12019

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March 28, 2000

Executive Director

Robert J. Freeman

E-Mail

TO: Sallie Sypher [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. Sypher:

As you are aware, I have received your inquiry of February 23.

You wrote that the Putnam County Archives maintains coroners' records "going back to around 1812", and you asked whether they may be disclosed.

In this regard, the statute that currently deals with the disclosure of the kind of records at issue became effective in 1965. Specifically, §677(3)(b) of the County Law, which pertains to autopsy reports and related records prepared by a coroner or medical examiner, 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."

Ms. Sallie Sypher

March 28, 2000

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 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 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 short, even if §677 of the County Law applies, and in my view it does not, nowhere does that statute specify that disclosures are prohibited.

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

RJF:jm

FOIL-AO-12020

From: Robert Freeman
To: [REDACTED]
Date: 3/28/00 5:16PM
Subject: Dear Dee:

Dear Dee:

Assuming the records sought involve transactions that have been completed, I believe that they would be available.

If, for example, an appraisal or similar document is requested prior to the completion of a transaction, it is possible that premature disclosure could preclude a unit of government from making the best deal on behalf of the taxpayer. In that event, the record may likely be withheld under §87(2)(c) of the FOIL, which permits an agency to deny access to records insofar as disclosure would "impair present or imminent contract awards..." However, after the transaction has been consummated, the "impairment" disappears and the records ordinarily should be made available.

If you have additional questions or would like to discuss the matter, please feel free to contact me.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
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COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12021

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David A. Schulz
Joseph J. Seymour
Carole E. Stone
Alexander F. Treadwell

March 29, 2000

Executive Director

Robert J. Freeman

Hon. David L. Bouck
Councilmember
City of Schenectady
City Hall
Jay Street
Schenectady, NY 12305

Dear Councilmember Bouck:

As you may be aware, the Office of the Attorney General has forwarded your letter of February 8 to the Committee on Open Government. The Committee, a unit of the Department of State, is authorized to offer advice and opinions concerning the Freedom of Information Law. In your letter to the Attorney General, you sought a review of certain requests directed to the City of Schenectady and the City of Schenectady Industrial Development Agency (IDA). The applicant, Mr. Elmer Bertsch, has requested "all records" relating to "any and all properties involved in the proposed Broadway and State Street site for the Department of Transportation Building..."

Having reviewed the correspondence, I offer the following comments.

First, in a letter addressed to the President of the City Council, Mr. Bertsch referred to the City Council as the "governing body" of the City's IDA. From my perspective, that reference is not entirely accurate. Industrial development agencies are established pursuant to Article 18-A of the General Municipal Law, §856, "by special act of the legislature", and each such agency "shall be a corporate governmental agency, constituting a public benefit corporation." Although the members of the board of an IDA are appointed by the governing body of the municipality for whose benefit the IDA was created, the IDA is a public corporation separate from the City of Schenectady. I note that §66 of the General Construction Law defines the phrase "public corporation" to include "a municipal corporation, a district corporation, or a public benefit corporation." The phrase "municipal corporation" is defined to include "a county, city, town, village and school district." The City of Schenectady IDA was created by a special act of the State Legislature and is referenced in §903-e of the General Municipal Law.

In short, although the members of the IDA may be appointed by the City Council, the governing body of the IDA is, in my view, its board. Again, the City of Schenectady and the IDA are distinct public corporations.

Disclosure of an appraisal, for example, would provide knowledge to the recipient that might effectively prevent an agency from engaging in an agreement that is most beneficial to taxpayers.

When there is no inequality of knowledge between or among the parties to negotiations, or if records have been shared or exchanged by the parties, it is questionable and difficult to envision how disclosure would "impair present or imminent contract awards", (see Community Board 7 of Borough of Manhattan v. Schaffer, Supreme Court, New York County, NYLJ, March 20, 1991). Further, if an agreement has been reached or a lease or contract has been signed, presumably negotiations have ended, and any impairment that might have existed prior to the consummation of an agreement would essentially have disappeared.

The other provision of relevance is §87(2)(g), which pertains to the authority to withhold "inter-agency or intra-agency materials." If an appraisal or survey is prepared by agency officials, it could be characterized as "intra-agency material." Further, the Court of Appeals has held that appraisals and other reports prepared by consultants retained by agencies may also be considered as intra-agency materials subject to the provisions of §87(2)(g) [see Xerox Corporation v. Town of Webster, 65 NY 2d 131 (1985)].

More specifically, §87(2)(g) states that an agency may withhold records that:

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

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

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

It has been held that factual information appearing in narrative form, as well as those portions appearing in numerical or tabular form, is available under §87(2)(g)(i). For instance, in Ingram v. Axelrod, the Appellate Division held that:

"Respondent, while admitting that the report contains factual data, contends that such data is so intertwined with subject analysis and opinion as to make the entire report exempt. After reviewing the

report in camera and applying to it the above statutory and regulatory criteria, we find that Special Term correctly held pages 3-5 ('Chronology of Events' and 'Analysis of the Records') to be disclosable. These pages are clearly a 'collection of statements of objective information logically arranged and reflecting objective reality'. (10 NYCRR 50.2[b]). Additionally, pages 7-11 (ambulance records, list of interviews) should be disclosed as 'factual data'. They also contain factual information upon which the agency relies (Matter of Miracle Mile Assoc. v. Yudelson, 68 A2d 176, 181 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 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.

Next, a matter of possible significance 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:

Mr. David L. Bouck

March 29, 2000

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

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

While I am unfamiliar with the recordkeeping systems of the City or the IDA, 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, insofar as the records are not maintained in a manner that permits their retrieval except by reviewing perhaps hundred 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.

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

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

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

Mr. David L. Bouck

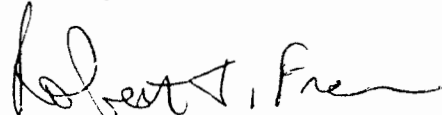
March 29, 2000

Page - 6 -

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 black ink, appearing to read "Robert J. Freeman". The signature is fluid and cursive, with the first name "Robert" being the most prominent.

Robert J. Freeman
Executive Director

RJF:jm

cc: Elmer Bertsch
George Robertson
Joseph Allen

FOIL-AO-12022

From: Robert Freeman
To: Internet:mproctor@stny.lrun.com
Date: 3/30/00 8:44AM
Subject: Dear Ms. Proctor:

Dear Ms. Proctor:

I have received your letter concerning access to a draft environmental impact statement (DEIS).

In this regard, the regulations promulgated by the Department of Environmental Conservation, 6 NYCRR §617.10(e) require that a DEIS be made available from a variety of sources, including the Commissioner of the Department, the appropriate regional office of the Department, "the chief executive officer of the political subdivision in which the action will be principally located" (i.e., the Village of Johnson City) and "if other agencies are involved in the approval of the action, with each such agency."

Therefore, if the school district has a copy of the DEIS, I believe that it would be required to disclose it to you. Alternatively, again, I believe that you can obtain it from the Village.

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-AJ-12023

Committee Members

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Alan Jay Gerson
Walter Grunfeld
Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Carole E. Stone
Alexander F. Treadwell

March 31, 2000

Executive Director

Robert J. Freeman

Mr. Matthew Schramm
96-A-7794
Eastern Correctional Facility
box 338
Napanoch, NY 12458-0338

Dear Mr. Schramm:

I have received your letter of March 21. Having searched our files, we were unable locate materials relating to your requests to Suffolk County.

With respect to your "next step", 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. Matthew Schramm

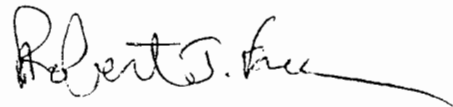
March 31, 2000

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 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

FOIL-A0-12024

Committee Members

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Carole E. Stone
Alexander F. Treadwell

March 31, 2000

Executive Director

Robert J. Freeman

Mr. Henry G. McComb
The Target Exchange Inc.
1400 Kennedy Drive, Suite 111
Key West, FL 33040-4055

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

Dear Mr. McComb:

I have received your letter of February 25 in which you described difficulties in obtaining records under the Freedom of Information Law and asked whether you may send an opinion addressed to you to municipalities.

In this regard, opinions rendered by the Committee on Open Government are public, and you may use or distribute an opinion as you see fit. With respect to the issues that you raised, I offer the following comments.

You indicated that in your attempts to obtain the names, titles, business addresses and salaries of public employees from agencies, it has been suggested that those items are kept by agencies but are "buried" among a variety of records. It is emphasized that the information of your interest must be kept as a discrete record. As stated in §87(3)(b), "Each agency *shall maintain...a record* setting forth the name, public office address, title and salary of every officer or employee of the agency." In my view, the items in question should not be acquired by agencies by extracting them from various sources, for a "record" must exist that contains those items to comply with law.

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

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

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

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

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

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

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

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

- (a) There shall be no fee charged for the following:
- (1) inspection of records;
 - (2) search for records; or

Mr. Henry G. McComb
March 31, 2000
Page - 3 -

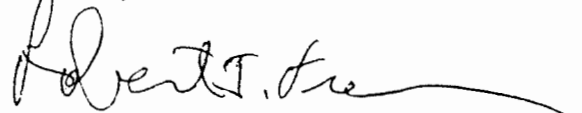
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NYCRR 1401.8)."

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

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

I hope that I 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-12023

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Alexander F. Treadwell

March 31, 2000

Executive Director

Robert J. Freeman

Mr. Matthew Schramm
96-A-7794
Eastern Correctional Facility
box 338
Napanoch, NY 12458-0338

Dear Mr. Schramm:

I have received your letter of March 21. Having searched our files, we were unable locate materials relating to your requests to Suffolk County.

With respect to your "next step", 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..."

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Mr. Matthew Schramm

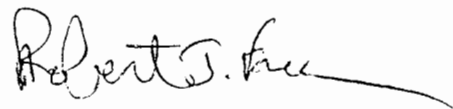
March 31, 2000

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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

FOIL-A0-12024

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Carole E. Stone
Alexander F. Treadwell

March 31, 2000

Executive Director

Robert J. Freeman

Mr. Henry G. McComb
The Target Exchange Inc.
1400 Kennedy Drive, Suite 111
Key West, FL 33040-4055

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

Dear Mr. McComb:

I have received your letter of February 25 in which you described difficulties in obtaining records under the Freedom of Information Law and asked whether you may send an opinion addressed to you to municipalities.

In this regard, opinions rendered by the Committee on Open Government are public, and you may use or distribute an opinion as you see fit. With respect to the issues that you raised, I offer the following comments.

You indicated that in your attempts to obtain the names, titles, business addresses and salaries of public employees from agencies, it has been suggested that those items are kept by agencies but are "buried" among a variety of records. It is emphasized that the information of your interest must be kept as a discrete record. As stated in §87(3)(b), "Each agency *shall maintain...a record* setting forth the name, public office address, title and salary of every officer or employee of the agency." In my view, the items in question should not be acquired by agencies by extracting them from various sources, for a "record" must exist that contains those items to comply with law.

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"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."

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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

Mr. Henry G. McComb
March 31, 2000
Page - 3 -

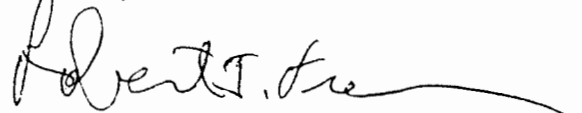
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Lastly, although compliance with the Freedom of Information Law involves the use of public employees' time and perhaps other costs, the Court of Appeals has found that the Law is not intended to be given effect "on a cost-accounting basis", but rather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

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 - 12025

Committee Members

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

April 3, 2000

Executive Director

Robert J. Freeman

Ms. Karen Gugino
Bureau Manager
Central Credit Bureau
313 Ushers Road
Ballston Lake, NY 12019

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

Dear Ms. Gugino:

I have received your letter of February 25 in which you wrote that you are "building a database with eviction record information." Although several courts have disclosed the records sought, you wrote that "Albany City Court states they are unable to give [you] any information."

In this regard, the Freedom of Information Law, the statute within the Committee's advisory jurisdiction, 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

Ms. Karen Gugino

April 3, 2000

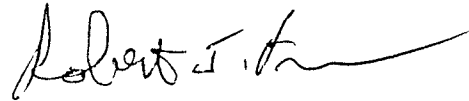
Page - 2 -

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.

To seek court records, 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. If you continue to meet with resistance, it is recommended that you contact the Office of Court Administration.

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 12026

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Alexander F. Treadwell

April 3, 2000

Executive Director

Robert J. Freeman

Mr. Jerry Brixner
14 Hartom Road
Rochester, NY 14624

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

Dear Mr. Brixner:

I have received your letter of February 24. You asked whether "a Freedom of Information Officer [may] set up specific time restrictions or 'Appointments' as a part of the Freedom of Information Process."

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 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

Mr. Jerry Brixner

April 3, 2000

Page - 3 -

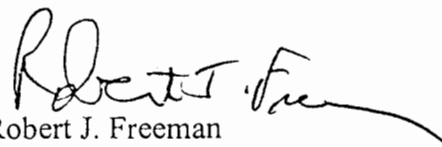
business hours of the Clerk's office, it is violative of the Freedom of Information Law..." [Murtha v. Leonard, 620 NYS 2e 101 (1994), 210 AD 2d 411].

Based on the foregoing, 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.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Richard J. Brongo



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12027

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April 4, 2000

Executive Director

Robert J. Freeman

Ms. Carolyn Schurr Levin
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, unless otherwise indicated.

Dear Ms. Levin:

I have received your letter of February 28, as well as the materials attached to it. You have sought an advisory opinion concerning a request by Newsday reporter John E. Riley for various records of the Empire State Development Corporation.

One element of the request involves materials that the Corporation provided to the Office of the New York County District Attorney in response to subpoenas. The Corporation indicated initially that the request was "overly burdensome" and denied the request on that basis. Having spoken recently to Lawrence Gerson, the Corporation's records access officer, I was informed that the Corporation has reconsidered its position and has determined that the materials subpoenaed will be disclosed, except to the extent that the Freedom of Information Law authorizes a denial of access in accordance with the grounds for denial appearing in §87(2) of that statute. Consequently, it appears that that aspect of the request is being resolved in a manner consistent with law.

The other involves access to subpoenas served upon the Corporation, which has denied access on the ground that subpoenas issued by a district attorney "are not agency documents", but rather "are court documents." In reaching that conclusion, the Corporation cited §§610.10(2) and 610.20(2) of the Criminal Procedure Law. The former defines the term "subpoena" to mean "a process of a court" directing a person to appear as a witness in an action or proceeding or to produce and bring specified physical evidence. The latter refers to a district attorney "as an officer of a criminal court" and states that in his or her capacity as a prosecutor in a criminal court, he or she may issue subpoenas.

Ms. Carolyn Schurr Levin

April 4, 2000

Page - 2 -

From my perspective, subpoenas issued by the office of a district attorney are agency records that fall within the coverage of the Freedom of Information Law, rather than court records that fall beyond the scope of that statute.

As you are aware, the Freedom of Information Law pertains to agency records, and the term "agency" is defined in §86(3) to include:

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

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

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

While the courts are beyond the requirements of the Freedom of Information Law, since an office of a district attorney is a "governmental entity" that performs a "governmental function" for the state and a public corporation (i.e., a county), it is, in my opinion, an "agency" required to comply with that statute. It is noted that one of the first decisions rendered under the Freedom of Information Law indicated that certain records of a district attorney are available [see Dillon v. Cahn, 79 Misc. 2d 300, 259 NYS2d 981 (1974)], and that several later decisions confirm that records of district attorneys are agency records subject to rights granted by the Freedom of Information Law in the same manner as records of agencies generally [see e.g., Barrett v. Morgenthau, 74 NY2d 907; Moore v. Santucci, 543 NYS2d 103, 151 AD2d 677 (1989); New York Public Interest Research Group, Inc. v. Greenberg, Sup. Ct., Albany Cty., April 27, 1979; Westchester Rockland Newspaper v. Vergari, 98 AD2d 12 (1983)].

I recognize that certain records maintained by offices of district attorneys have been found to be court records beyond the coverage of the Freedom of Information Law. However, in those instances, the records were prepared to reflect and emanated from judicial proceedings [i.e., grand jury minutes in Harvey v. Hynes, 665 NYS2d 1000 (1997) and trial transcripts in Moore v. Santucci, supra]. There is no decision of which I am aware that suggests that records prepared by the office of a district attorney are not "agency records" subject to whatever rights exist under the Freedom of Information Law.

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. 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

Ms. Carolyn Schurr Levin

April 4, 2000

Page - 3 -

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 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 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), 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:

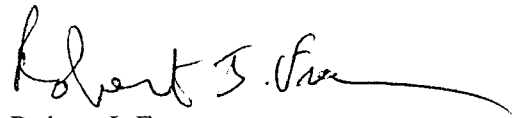
"...to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents (*Matter of Fink v. Lefkowitz, supra*, 47 N.Y.2d, at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). If the court is unable to determine whether 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 sum, I believe that the records in question are subject to rights conferred by the Freedom of Information Law. As such, the extent to which they may be withheld is limited to the grounds for denial appearing in §87(2).

Ms. Carolyn Schurr Levin
April 4, 2000
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: Anita W. Laremont
Lawrence Gerson



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12028

Committee Members

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Alexander F. Treadwell

April 4, 2000

Executive Director

Robert J. Freeman

Mr. Charles Seller
98-A-1983
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. Seller:

I have received your letter of January 18 in which you sought guidance concerning your efforts in obtaining "hepatitis C related statistics" from the Department of Correctional Services.

In this regard, first, it is emphasized that the Freedom of Information Law pertains to existing records. If the statistics of your interest do not exist or have not been prepared, Department staff would not be required to create new records on your behalf containing the information sought. Insofar as such statistics do exist, it is likely, in my view, that they would be accessible. In brief, to the extent that 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. Statistical or factual tabulations or data prepared by an agency are available under §87(2)(g)(i), unless a different ground for denial is applicable.

Second, according to the regulations promulgated by the Department, a request for records kept at a correctional facility may be made to the facility superintendent. With respect to records maintained at the Department's central offices, a request may be made to the Records Access Officer, Mr. Mark Shepard.

I hope that I 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-12029

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Carole E. Stone
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April 4, 2000

Executive Director

Robert J. Freeman

Mr. Gary L. Rhodes
P.O. Box 220
Belleville, NY 13611

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

Dear Mr. Rhodes:

I have received your letter of February 23, which reached this office on March 2. You described a series of difficulties in your relationship with officials of the Town of Henderson and asked questions concerning the Freedom of Information Law.

As I understand the initial question, you transmitted a request to the Town by means of a fax machine, and you asked whether it "is standard policy to charge for the paper the faxed FOI is on." In this regard, I am unaware of any situation in which an agency has charged a person for paper who has transmitted a request via fax machine. As such, I do not believe that so doing could be characterized as "standard policy." Nevertheless, since the Town would use its paper to receive a communication by fax, it is likely that it could choose to assess a reasonable fee for the use of its paper.

Second, you asked whether you may obtain copies of records for free "if [you] took [your] own generator and copier to the town office." From my perspective, as a general matter, a municipality has the ability to adopt rules to implement and govern the manner in which it carries out its duties. So long as those rules are reasonable and not inconsistent with law, I believe that they would be valid. In a decision concerning a situation in which a village adopted rules prohibiting requesters from using their own photocopiers, it was held that the rules "constitute a valid and rational exercise of the Village's authority under Public Officers Law §87(1)(b)" [Murtha v. Leonard, 620 NYS 2d 101,102; 210 AD2d 411 (1994)]. In my opinion, the decision was based upon the reasonableness of the rules in view of attendant facts and circumstances. In situations in which an agency does not have sufficient resources or cannot carry out its duties effectively due to the use or presence of a personal copier and a generator without disruption, it might be found, as indicated in Murtha that a prohibition against the use of personal photocopiers would be valid.

Mr. Gary L. Rhodes

April 4, 2000

Page - 2 -

In the context of your inquiry, I cannot offer an unequivocal response. There may be circumstances in which, due to the nature of the records sought, their volume, their location, the workload of the Town, its staff and similar factors, the use of one's own photocopier may be disruptive. In that instance, it is likely in my view that a municipality, could validly prohibit an individual from using his or her own photocopier. There may be other instances, however, in which the attendant facts suggest that the use of a personal photocopier might not be disruptive. In those cases, it may be unreasonable to prohibit the use of a personal photocopier.

I regret that I cannot offer more precise guidance.

Sincerely,

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: Town Board
Charlotte Richmond, Town Clerk



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AU-12030

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Carole E. Stone
Alexander F. Treadwell

April 4, 2000

Executive Director

Robert J. Freeman

Mitchel D. Grotch, Esq.
18-25 215th Street
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 Mr. Grotch:

I have received your letter of March 1, as well as the materials attached to it. You have asked whether an acknowledgement of the receipt of your request for records by the Office of the State Comptroller was "too ambiguous and open-ended." The acknowledgement indicated that your request would be processed "as soon as possible."

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..."

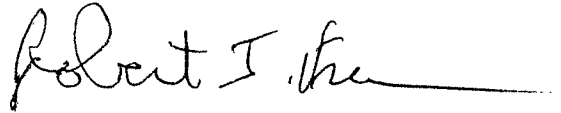
It has been held that agency officials "did not conform to the mandates" of the provision quoted above "when they did not...furnish a written acknowledgement of the receipt of...requests *along with a statement of the approximate date when action would be taken*" [Newton v. Police Department, 585 NYS2d 5, 8, 183 AD2d 621 (1992), emphasis added].

In short, if an agency acknowledges the receipt of a request for records because more than five business days may be needed to determine rights of access, the agency is required to include an approximate date indicating when it believes that a determination will be made.

Mitchel D. Grotch, Esq.
April 4, 2000
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

cc: Shelly Brown



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FODL-AO 12031

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Alexander F. Treadwell

April 4, 2000

Executive Director

Robert J. Freeman

Mr. Michael Melendez
91-A-9649
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. Melendez:

I have received your letter of January 10. In brief, you complained that your request for records made to the Department of Correctional Services had not been answered in a timely manner.

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

April 4, 2000

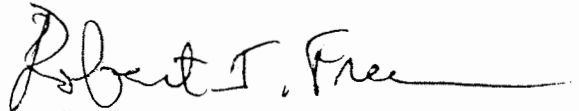
Page - 2 -

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 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

FODL-AJ-12032

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

April 4, 2000

Executive Director

Robert J. Freeman

Mr. Derwin Harrell
92-R-6603
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 Harrell:

I have received your letter of January 18, as well as the materials attached to it. You have sought my views concerning your right to obtain a copy of a directive issued by the Department of Correctional Services that was in effect at a certain time. Department officials have apparently indicated that the record sought may no longer exist.

In this regard, the Freedom of Information Law pertains to existing records, and §89(3) of that statute provides in part that an agency is not required to create a record in response to a request. Therefore, if the record of your interest no longer exists or cannot be found, the Freedom of Information Law would be inapplicable.

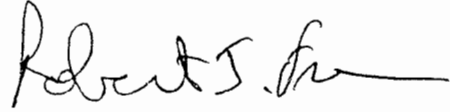
I note that when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does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

Mr. Derwin Harrell
April 4, 2000
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 extending to the right.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FODL-AJ-12033

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

April 4, 2000

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 18 in which you sought assistance in relation to a request made under the Freedom of Information Law 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."

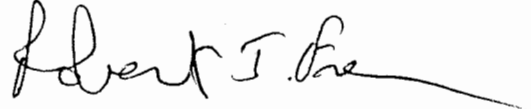
Based on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law (see e.g., Uniform Justice court Act, §2019-a; Judiciary Law, §255) may 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. James McCoy
April 4, 2000
Page - 2 -

Since it appears that you are seeking records from a justice court, it is suggested that a request for records be made to the clerk of the court, citing §2019-a of the Uniform Justice Court Act 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

cc: Rita M. Milmore



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FUJL-AO-12034

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

April 5, 2000

Executive Director

Robert J. Freeman

Mr. Michael S. Elder
Counsel
Northeast Midwest Region
General Electric Company
320 Great Oaks Office Park, Suite 323
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. Elder:

I have received your letter of March 1, as well as a variety of related documentation. You have sought an advisory opinion concerning the propriety of a denial of your request for records by the Department of Law.

By way of background, in October, your colleague submitted a request to the Department "for records relating to or reflecting (i) communications between NYSDOL and the office of the Attorney General of New Mexico regarding public nuisance, natural resource damage claims or other litigation against GE in New Mexico and/or New York; and (ii) communications between NYSDOL and EPA regarding PCBs in the Hudson River." Although some of the records sought were disclosed, others were withheld for several reasons offered as follows by the Department's Records Access Appeals Officer:

"The bulk of the records you seek are materials that the United States Environmental Protection Agency provided to the Office of the New York State Attorney General in connection with their joint investigation of PCB contamination in the Hudson River. These materials are specifically exempt from disclosure by Federal and State statutes. See Public Officers Law § 87(2)(a). These materials are not subject to disclosure because they were compiled for law enforcement purposes and disclosure would interfere with this ongoing investigation (Public Officers Law § 87(2)(e)(i); they are inter-agency

deliberative materials or communications exchanged for discussion purposes not constituting final policy decisions (Public Officers Law §87(2)(g); and/or they are privileged, pre-decisional draft documents (Public Officers Law § 87(2)(g), Fed. R. Civ. Proc. 26(b)(3); F.R.E. Rule 501, 40 CFR § 300.810 (c) and (d).

“The remainder of the records your appeal seeks were generated by the Office of the Attorney General. These records, including notes respecting telephone conversations and/or meetings, electronic communications, and letters regarding potential litigation, are specifically exempt from disclosure by State statutes. See Public Officers Law § 87(2)(a). These materials are not subject to disclosure because they constitute work product (CPLR § 3101(c); they are protected by the attorney-client privilege (CPLR § 4503(a)); and/or they were prepared in anticipation of litigation (CPLR § 3101(d)(2)). With regard to privilege, our work product is generated in the representation of the State; this privilege belongs to the State and its representatives.

“An additional record exists that is not being disclosed because it too was prepared in anticipation of litigation (Public Officers Law § 87(2)(a), CPLR § 3101(d)(2)).”

In conjunction with the foregoing, you have asked:

- “1. Whether materials/communications between the New York State Department of Law (NYDOL) and the United State Environmental Protection Agency (EPA) regarding PCBs in the Hudson River ‘in connection with their joint investigation,’ are exempt from disclosure because they were compiled for ‘law enforcement purposes’ in furtherance of an ‘ongoing investigation;’
2. Whether such materials/communications (described above) are exempt from disclosure because they are *inter-agency* documents exchanged for discussion purposes not final policy decisions; and
3. Whether such materials/communications (described above) are immune from disclosure because they are ‘privileged, pre-decisional draft documents.’”

Although several of the issues raised in your letter were considered in an opinion rendered in relation to a request made to a different agency, because a copy of this response will be forwarded to the Department’s Records Access Appeals Officer, I will reiterate some of the commentary included in that opinion.

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

The provision to which you initially alluded, §87(2)(e), states that an agency may withhold records that:

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

- i. interfere with law enforcement investigations or judicial proceedings;
- ii. deprive a person of a right to a fair trial or impartial adjudication;
- iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
- iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

Mr. Michael S. Elder

April 7, 2000

Page - 4 -

From my perspective, the exception quoted above is limited in its application. First, I believe that it pertains only to records that were "compiled for law enforcement purposes." There are many instances in which records are prepared in the ordinary course of business but later are used in or are relevant to a law enforcement investigation. In my view, the character of the records does not change due to their significance to an investigation. For instance, in a case in which minutes of meetings of a municipal board were subpoenaed by a district attorney for presentation before a grand jury and were later requested under the Freedom of Information Law, the court rejected the district attorney's contention that the records were compiled for law enforcement purposes. On the contrary, because the minutes were prepared in the ordinary course of business and had been accessible to the public prior to their use in an investigation, they were no less accessible thereafter merely because they were being used in conjunction with an investigation (King v. Dillon, Supreme Court, Nassau County, December 19, 1984). In short, insofar as the records sought were prepared in the ordinary course of business and not for use in an investigation, I do not believe that §87(2)(e) would be applicable.

Further, your letter indicates that your associate "contacted EPA, which has confirmed that it does not have a law enforcement investigation ongoing, including any type of joint investigation with NYSDOL." If that is so, again, it would appear that §87(2)(e) would be inapplicable.

Even when records have been compiled for law enforcement purposes, the ability to deny access is limited to those portions of the records which if disclosed would result in the harmful effects described in subparagraphs (i) through (iv) of §87(2)(e). I note, too, as you suggested, that not every investigation can necessarily be characterized as a "law enforcement investigation." For example, an audit might be considered an investigation, but it might not involve any law enforcement function.

If the information given to your associate by the EPA is accurate, the ability of the Department of Law to rely on its assertion that disclosure would interfere with a law enforcement investigation would in my view be questionable at best.

With respect to the ability of the Department to withhold communications between the Department of Law and the EPA on the ground that they are "inter-agency documents", as indicated in the earlier opinion addressed to you, §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."

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 or from 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, Supreme Court, Queens Cty., NYLJ, July 27, 1992; aff'd 613 NYS 2d 46, 205 AD2d 540 (1994)].

While the EPA is an agency for purposes of the federal Freedom of Information Act (5 USC §552) and its exceptions, it falls beyond the definition of "agency" as that term is defined by the state statute. The reverse would also be so: while the Department of Law is an agency under the state statute, it is not an agency for purposes of the federal Act (see 5 USC §551).

In related correspondence the contention appears to have been made that if a federal agency may withhold a record under the federal Freedom of Information Act, a state agency in possession of that record may claim that the records is "specifically exempted from disclosure by...statute" pursuant to §87(2)(a) of the New York Freedom of Information Law. In my opinion a claim of that nature cannot be validly be made.

The provision in the federal Act analogous to §87(2)(g), §552(b)(5), is the so-called "deliberative process" exemption. In my view, the Department cannot assert that provision as a basis for withholding its records, for several decisions indicate that only federal agencies subject to the federal Act may assert an exemption appearing in the federal Act [see Grand Central Partnership, Inc. v. Cuomo, 166 F.2d 473, 484 (1999); also Philip Morris, Inc. v. Harshbarger, 122 F.3d 58, 83 (1st Cir.1997); Day v. Shalala, 23 F.3d 1052, 1064 (9th Cir.1994); Brown v. Kelly, No. 93-5222, 1994 WL 36144, at *1 (D.C.Cir. January 27, 1994); St. Michael's Convalescent Hosp. v. State of California, 643 F.2d 1369, 1373 (9th Cir.1981); Johnson v. Wells, 566 F.2d 1016, 1018 (5th Cir.1978)].

More importantly, based on judicial decisions involving exceptions to rights of access in both the state and federal freedom of information statutes, the records at issue would not be "specifically exempted from disclosure by...statute pursuant to §87(2)(a) of the New York Freedom of Information Law or pursuant to its counterpart in the federal Act, the "(b)(3)" exception. Both the Court of Appeals and federal courts in construing access statutes have determined that the characterization of records as "confidential" or "exempted from disclosure by statute" must be based on statutory language that specifically confers or requires confidentiality. As stated by the Court of Appeals:

"Although we have never held that a State statute must expressly state it is intended to establish a FOIL exemption, we have required a showing of clear legislative intent to establish and preserve that confidentiality which one resisting disclosure claims as protection" [Capital Newspapers v. Burns, 67 NY2d 562, 567 (1986)].

An example of the proper assertion of a claim that records were "specifically exempted from disclosure by...statute" would involve a statute stating an agency "shall not provide" certain information. In that kind of situation, there would be clear direction in a statute prohibiting the disclosure of certain information, and it has been so advised that §87(2)(a) may properly be asserted.

Similarly, in construing the equivalent exception to rights of access in the federal Act, it has been found that:

“Exemption 3 excludes from its coverage only matters that are:

specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

“5 U.S.C. § 552(b)(3) (1982) (emphasis added). Records sought to be withheld under authority of another statute thus escape the release requirements of FOIA if – and only if – that statute meets the requirements of Exemption 3, including the threshold requirement that it specifically exempt matters from disclosure. The Supreme Court has equated ‘specifically’ with ‘explicitly.’ *Baldrige v. Shapiro*, 455 U.S. 345, 355, 102 S. Ct. 1103, 1109, 71 L.Ed.2d 199 (1982). ‘[O]nly *explicitly* non-disclosure statutes that evidence a congressional determination that certain materials ought to be kept in confidence will be sufficient to qualify under the exemption.’ *Irons & Sears v. Dann*, 606 F.2d 1215, 1220 (D.C.Cir.1979) (emphasis added). In other words, a statute that is claimed to qualify as an Exemption 3 withholding statute must, on its face, exempt matters from disclosure”[Reporters Committee for Freedom of the Press v. U.S. Department of Justice, 816 F.2d 730, 735 (1987); modified on other grounds, 831 F.2d 1184 (1987); reversed on other grounds, 489 U.S. 789 (1989); see also British Airports Authority v. C.A.B., D.C.D.C.1982, 531 F.Supp. 408; Inglesias v. Central Intelligence Agency, D.C.D.C.1981, 525 F.Supp. 547; Hunt v. Commodity Futures Trading Commission, D.C.D.C.1979, 484 F.Supp. 47; Florida Medical Ass’n, Inc. v. Department of Health, Ed. & Welfare, D.C.Fla.1979, 479 F.Supp. 1291].

In short, to be “exempted from disclosure by statute”, both state and federal courts have determined that a statute must leave no discretion to an agency: it must withhold such records.

In contrast, when records are not exempted from disclosure by a separate statute, both the Freedom of Information Law and its federal counterpart are permissive. Although an agency *may* withhold records in accordance with the grounds for denial appearing in §87(2), the Court of Appeals in a decision cited earlier held that the agency is not obliged to do so and may choose to disclose, stating that:

“...while an agency is permitted to restrict access to those records falling within the statutory exemptions, the language of the exemption provision contains permissible rather than mandatory language, and it is within the agency’s discretion to disclose such records...if it so chooses” (Capital Newspapers, *supra*, 567).

The only situations in which an agency cannot disclose would involve those instances in which a statute other than the Freedom of Information Law prohibits disclosure. The same is so under the federal Act. While a federal agency *may* withhold records in accordance with the grounds for denial, it has discretionary authority to disclose.

Even if the Department of Law or EPA had the authority to withhold records under either §87(2)(g) of the state statute or the (b)(5) exception in the federal Act, neither would be required to withhold the records; on the contrary, they would have the discretionary authority to disclose. That being so, I do not believe that the records at issue could be characterized as being exempted from disclosure by statute.

In a related vein, it was suggested by the Department that “executive privilege” or the common law “governmental privilege” may be asserted to withhold records, notwithstanding the requirements of the Freedom of Information Law. From my perspective, reliance on a claim of privilege would be misplaced. Reference to executive privilege and the Freedom of Information Law was made in a footnote in Cirale v. 80 Pine St. Corp. [35 NY2d 113 (1974)], which was decided after the enactment but before the effective date of the Freedom of Information Law in 1974. In 1977, the original enactment was repealed and replaced with the current version of that statute, which became effective in 1978. Soon after the change in the law, the Court of Appeals appears to have abolished the governmental privilege in the context of requests made under the Freedom of Information Law. As stated by the Court in 1979: “[T]he common-law interest privilege cannot protect from disclosure materials which that law requires to be disclosed” [Doolan v. BOCES, 48 NY2d 341, 347]. In short, either records or portions thereof fall within the grounds for denial appearing in §87(2) or they do not; if they do not, there would be no basis for denial, notwithstanding a claim based on an assertion of executive or governmental privilege.

Lastly, many of the records sought were denied on the ground that they are attorney work product, material prepared for litigation or are subject to the attorney-client privilege. Insofar as those claims are accurate, I believe that the records would be exempt from disclosure pursuant, respectively, to subdivisions (c) and (d) of §3101 and §4503 of the CPLR and, therefore, §87(2)(a) of the Freedom of Information Law. However, the ability to withhold records under those provisions is specific and limited.

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 to others. 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. Michael S. Elder

April 7, 2000

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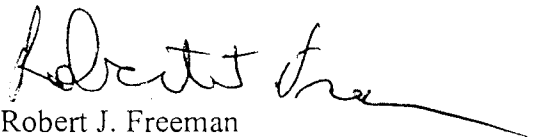
"In general, 'the privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication relates to a fact of which the 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.

It is also noted that it has been determined judicially that if records are prepared for multiple purposes, one of which includes eventual use in litigation, §3101(d) does not serve as a basis for withholding records; only when records are prepared solely for litigation can §3101(d) be properly asserted to deny access to records [see e.g., Westchester-Rockland Newspapers v. Moscydlowski, 58 AD 2d 234 (1977)].

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Thomas B. Litsky
Terry L. Brown
Harold Iselin

FOIL-AU-12035

From: Robert Freeman
To: "janon.fisher@apbnews.com".GWIA.DOS1
Date: 4/7/00 9:47AM
Subject: Re: New York City Office of the Chief Medical Examiner

Mr. Fisher:

There is case law indicating that autopsy reports and related records maintained by the Medical Examiner are exempted from disclosure pursuant to §557g of the New York City Charter. However, other records maintained by that office would, in my view, be subject to rights conferred by the Freedom of Information Law.

I will be on a panel at the NFOIC meeting on Saturday afternoon. Hope to see you there!



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12036

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April 14, 2000

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.

Dear Mr. Smith:

I have received your letter of March 9 in which you sought advice concerning rights of access to certain records. As I understand your inquiry, the matter involves rights of access to records presented by a district attorney to a grand jury.

In this regard, 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.

Often relevant with respect to grand jury related records is §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute". One such statute, §190.25(4) of the Criminal Procedure Law, deals with grand jury proceedings and provides in relevant part that:

"Grand jury proceedings are secret, and no grand juror, or other person specified in subdivision three of this section or section 215.70 of the penal law, may, except in the lawful discharge of his duties or upon written order of the court, disclose the nature or substance of any grand jury testimony, evidence, or any decision, result or other matter attending a grand jury proceeding."

As such, grand jury minutes, records of testimony and other information presented to a grand jury would, in my view, ordinarily be exempt from disclosure.

Mr. Charles B. Smith

April 14, 2000

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Also relevant in the context of criminal proceedings 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."

As I understand the nature of the records at issue, they were prepared in the ordinary course of business and not for any law enforcement or grand jury related purpose. If that is so, 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, why the grand jury secrecy statute does not apply, and why a broad construction of those provisions would give rise to an anomalous result. Specifically, in King v. Dillon (Supreme Court, Nassau County, December 19, 1984), the District Attorney 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 in his capacity as village clerk, 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."

Mr. Charles B. Smith

April 14, 2000

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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.

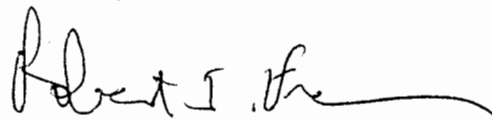
In my opinion, the kinds of records requested, by their nature, indicate that the exception concerning records "compiled for law enforcement purposes" is inapplicable. To contend that records prepared for purposes wholly unrelated to any law enforcement investigation may now be withheld due to their use in an investigation would, in my opinion, be unreasonable and subvert the purposes of the Freedom of Information Law [see also John Doe Corp. v. John Doe Agency, in which the United States Court of Appeals reached the same conclusion construing the federal Freedom of Information Act; 850 F2d 105 (1988)]. 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).

That decision, in fact, dealt with time and attendance records, which were found to be accessible, that are likely similar to those that are the subject of your inquiry.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Kenneth Bruno, District Attorney



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AJ-12037

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April 14, 2000

Executive Director

Robert J. Freeman

Mr. Douglas H. Jean Jr.

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

Dear Mr. Jean:

I have received your letter of February 28, which did not reach this office until March 7. You have sought an advisory opinion "on whether a town is in violation in its actions concerning [your] rights under the Freedom of Information Law."

In this regard, based on a review of your correspondence, I offer the following comments.

First, 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, insofar as records sought are not maintained by or for an agency, an agency would not be required to prepare new records, and the Freedom of Information Law would not apply. In a related vein, in one of your requests, you sought information by raising a series of questions. In my view, the Freedom of Information Law deals with requests for existing records. While agency officials may supply information in response to questions, I do not believe that they are required to do so.

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

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

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

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

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

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

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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 one of your requests involves a subject matter list of town records, I point out by way of background that §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

Mr. Douglas H. Jean Jr.

April 14, 2000

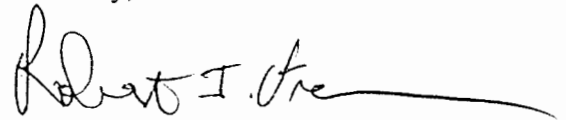
Page -3-

reasonable detail, to the kinds of records maintained by an agency. Further, the regulations promulgated by the Committee on Open Government state that such a list should be sufficiently detailed to enable an individual to identify a file category of the record or records in which that person may be interested [21 NYCRR 1401.6(b)]. I emphasize that §87(3)(c) does not require that an agency ascertain which among its records must be made available or may be withheld. Again, the Law states that the subject matter list must refer, in reasonable detail, to the kinds of records maintained by an agency, whether or not they are available.

It has been suggested that the records retention and disposal schedules developed by the State Archives and Records Administration at the State Education Department may be used as a substitute for the subject matter list. It is suggested that you ask to review the retention schedule applicable to the Town. Alternatively, you could request a copy of the schedule from the State Archives and Records Administration by calling (518)474-6926.

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-AU-12088

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April 14, 2000

Executive Director

Robert J. Freeman

Mr. John Neuschel

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

Dear Mr. Neuschel:

I have received your letter of March 6. You wrote that the village in which you live received a state grant "to help pay for improvement projects." You have asked whether you "have the right to see exactly where and how this money was used by the village government."

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to existing records kept by or for an agency, such as a village. Therefore, insofar as the village maintains records containing the information sought, that statute would be applicable.

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, with one exception, it is likely that the records in question must be disclosed. Historically, books of account, ledgers and similar documentation indicating the receipt and disbursement of public monies have been accessible to the public. The exception would involve the situation in which the receipt of a grant or loan, for example, is based on one's income. Relevant in that circumstance would be §87(2)(b), which enables an agency to withhold records or portions thereof the disclosure of which constitute "an unwarranted invasion of personal privacy".

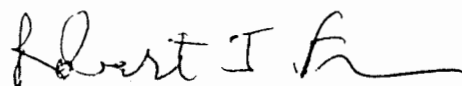
Mr. John Neuschel
April 14, 2000
Page - 2 -

While I believe that the Freedom of Information Law is intended to ensure that government is accountable, the privacy provisions of that statute enable government to prevent disclosures concerning the personal or intimate details of individuals' lives. As such, with respect to grant, loan or other programs in which income level is a factor in determining participation, often the question involves the extent to which disclosure would constitute an unwarranted invasion of personal privacy.

From my perspective, a disclosure that permits the public determine the general income level of a participant in such a program based upon income eligibility would likely constitute an unwarranted invasion of personal privacy, for such a disclosure would indicate that a particular individual has an income or economic means below a certain level. In some circumstances, individuals might be embarrassed by such a disclosure. Further, the New York State Tax Law contains provisions that require the confidentiality of records reflective of the particulars of a person's income or payment of taxes (see e.g., section 697, Tax Law). As such, it would appear that the Legislature felt that disclosure of records concerning income would constitute an improper or "unwarranted" invasion of personal privacy, and, therefore, that the information sought could be withheld from the public under the Freedom of Information Law. If a grant can be awarded only if a potential recipient has an income lower than a certain amount, I believe that the identity of the applicant or recipient could be withheld on the ground that disclosure would constitute an unwarranted invasion of privacy. On the other hand, if the grant for improvement projects do not involve personal information or any income qualification, for example, again, it is likely in my view that the records of your interest must be disclosed.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees, Village of Richfield Springs



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-A-12039

Committee Members

Mary O. Donohue
Alan Jay Gerson
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April 14, 2000

Executive Director

Robert J. Freeman

Mr. William Hecht

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

Dear Mr. Hecht:

I have received your letter of March 13. You indicated that Cayuga County has copyrighted its tax maps and is selling them on compact disks, and you asked whether the County can copyright other records, such as minutes of meetings of the County Legislature or departmental reports.

From my perspective, it is questionable whether a government agency may copyright the kinds of materials to which you referred or in any way infringe upon the ability of a member of the public to obtain copies of records available under that statute and thereafter use the records as he or she sees fit. 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. Further, when records are accessible under the Freedom of Information Law, it has been held that they should be made equally available to any person, regardless of one's status, interest or the intended use of the records [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Moreover, the Court of Appeals has held that:

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

Farbman pertained to a situation in which a person involved in litigation against an agency requested records from that agency under the Freedom of Information Law. In brief, it was found that one's status as a litigant had no effect upon that person's right as a member of the public when using the Freedom of Information Law, irrespective of the intended use of the records. Similarly, unless there is a basis for withholding records in accordance with the grounds for denial appearing in §87(2), the use of the records, including the potential for commercial use or the status of the applicant, is in my opinion irrelevant.

The only exception to the principles described above involves the protection of personal privacy. By way of background, §87(2)(b) of the Freedom of Information Law permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." Further, §89(2)(b) of the Law provides a series of examples of unwarranted invasions of personal privacy, one of which pertains to:

"sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes" [§89(2)(b)(iii)].

The provision quoted above represents what might be viewed as an internal conflict in the law. As indicated earlier, the status of an applicant or the purposes for which a request is made are irrelevant to rights of access, and an agency cannot inquire as to the intended use of records. However, due to the language of §89(2)(b)(iii), rights of access to a list of names and addresses, or equivalent records, may be contingent upon the purpose for which a request is made [see Scott, Sardano & Pomeranz v. Records Access Officer of Syracuse, 65 NY 2d 294, 491 NYS 2d 289 (1985); Goodstein v. Shaw, 463 NYS 2d 162 (1983)].

In a case involving a list of names and addresses in which the agency inquired as to the purpose of which the list was requested, it was found that an agency could make such an inquiry. Specifically, in Golbert v. Suffolk County Department of Consumer Affairs (Supreme Court, Suffolk County, September 5, 1980), the Court cited and apparently relied upon an opinion rendered by this office in which it was advised that an agency may appropriately require that an applicant for a list of names and addresses provide an indication of the purpose for which a list is sought. In that decision, it was stated that:

"The Court agrees with petitioner's attorney that nowhere in the record does it appear that petitioner intends to use the information sought for commercial or fund-raising purposes. However, the reason for that deficiency in the record is that all efforts by respondents to receive petitioner's assurance that the information sought would not be so used apparently were unsuccessful. Without that assurance the respondents could reasonably infer that petitioner did want to use the information for commercial or fund-raising purposes."

As such, there is precedent indicating that an agency may inquire with respect to the purpose of a request when the request involves a list of names and addresses. That situation, however, represents the only case under the Freedom of Information Law in which an agency may inquire as to the

purpose for which a request is made, or in which the intended use of the record has a bearing upon rights of access.

I note that every state has enacted a statute dealing with public access to records of state and local government. However, I know of no judicial decision that has focused squarely on the ability of an agency to limit, restrict or condition the use of records acquired as of right pursuant to a statute that requires the agency to disclose and copy its records. Further, federal agencies cannot copyright their works, and there is no precedent dealing with copyright by the federal government. It has been contended in the past that by making copies of records available, an agency is in no way infringing rights conferred by the Freedom of Information Law and that a restriction based on a copyright merely deals with a situation involving a separate set of rights to the ownership and possession of property which the agency enjoys under a separate set of federal laws.

Nevertheless, due to the inherent purpose of the Freedom of Information Law and a review of the constitutional and statutory underpinnings of copyright protection, I disagree with that contention.

In enacting the Freedom of Information Law, the State Legislature declared that:

“The more open a government is with its citizenry, the greater the understanding and participation of public in government.

“As state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible.”

“Extending” accountability through the Freedom of Information Law “wherever and whenever feasible” in my view evidences an intent that the public good is best served when records available under that statute are disclosed as widely as possible and without impediment. As suggested earlier, in construing the Freedom of Information Law, the courts have held that the status or interest of a person seeking records are irrelevant; the only question (unless the record is a list of names and addresses of natural persons) is whether there is a basis for a denial of access pursuant §87(2). “Interest” in my opinion relates to the intended use of records. That a record may not be used for a purpose relating to the accountability of government is of no moment (see Farbman, supra), and in general, I do not believe that it is the government’s business to know or even to inquire as to the intended use of records. Once the records have been found to be available, the applicant should be able to do with them as he or she sees fit. As stated by a renowned commentator, Professor Henry H. Perritt, Jr., Professor of Law at the Villanova University School of Law:

“...most state statutes, like the federal FOIA, do not allow for interest balancing or assessing the reason for access. The mere fact that an individual or entity may obtain income from an activity that serves a public purpose does not negate the public nature of the activity.

When a commercial publisher disseminates public information, it is serving a public purpose - the very purpose that is central justification for FOIAs" [Should Local Governments Sell Local Spatial Databases Through State Monopolies? 35 Jurimetrics Journal 449, 45, Summer, 1995).

Similarly, it has been asserted that "Our democratic American Tradition has historically supported policies and programs which foster the broad-based dissemination of public information, for the benefit of all who properly apply it" (Principles of Government Sourced Data, Commercial Dissemination and Responsible Information Handling, an Industry Whitepaper prepared by the Real Estate Information Providers Association (REIPA), January 11, 1997). From my perspective, the commentary quoted above is consistent with and supports the notion that an access statute, like the Freedom of Information Law, is intended to remove barriers to the dissemination of government records and encourage the widest possible distribution of those records.

In relating the foregoing to copyright, it is important, in my opinion, to review the history and intent of copyright protection.

The basis of copyright is Article I, §8 of the United States Constitution, which indicates the framer's intent:

"To promote the Progress of Science and Useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

In construing the "copyright clause", the United States Supreme Court has stated that its purpose is as follows:

"The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts'" [Mazer v. Stein, 347 U.S. 201, 219 (1954)].

At heart of copyright protection, therefore, is "personal gain", an economic incentive, and several decisions support that principle. For instance, in National Rifle Ass'n v. Hand Gun Control Federal, 15 F.3d 559, 561 (6th Cir. 1994), it was held that the use of mailing list was fair use and noted that the scope of *prima facie* copyright protection is limited to uses of a work that would undermine the incentive for creation [*see also Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984), which discussed the goals and incentives of copyright protection]. In Twentieth Century Music Corp. v. Akin, [422 U.S. 151, 156 (1975)] it was determined that the "ultimate aim is by this incentive [securing a fair return for author's creative labor] to stimulate artistic creativity for the general public good."

Unlike authors and creators, a county needs no similar incentives. On the contrary, it may be the statutory duty to prepare and preserve the kinds of records that you are seeking. As stated by Perritt:

“Such incentives are unnecessary for public agencies, since these entities have a statutory duty to collect, organize and disseminate information, such as that represented in spatial databases” (Perritt, supra, 460).

Pertinent to an analysis of the intent of copyright is consideration of the application of access law to records that come into the possession of government from private sources. In considering the issue, the United States Department of Justice referred to the federal Freedom of Information Act (5 U.S.C. §552) and its exemption analogous to §87(2)(d) of the Freedom of Information Law in conjunction with 17 U.S.C. §107, which codifies the doctrine of "fair use". Section 87(2)(d) permits an agency to withhold records that "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise." Under §107, copyrighted work may be reproduced "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research" without infringement of the copyright. Further, the provision describes the factors to be considered in determining whether a work may be reproduced for a fair use, including "the effect of the use upon the potential market for or value of the copyrighted work" [17 U.S.C. §107(4)].

According to the Department of Justice, the most common basis for the assertion of the federal Act's "trade secret" exception involves "a showing of competitive harm," and in the context of a request for a copyrighted work, the exception may be invoked "whenever it is determined that the copyright holder's market for his work would be adversely affected by FOIA disclosure" (FOIA Update, supra). As such, it was concluded that the trade secret exception:

"stands as a viable means of protecting commercially valuable copyrighted works where FOIA disclosure would have a substantial adverse effect on the copyright holder's potential market. Such use of Exemption 4 is fully consonant with its broad purpose of protecting the commercial interests of those who submit information to government... Moreover, as has been suggested, where FOIA disclosure would have an adverse impact on 'the potential market for or value of [a] copyrighted work,' 17 U.S.C. §107(4), Exemption 4 and the Copyright Act actually embody virtually congruent protection, because such an adverse economic effect will almost always preclude a 'fair use' copyright defense... Thus, Exemption 4 should protect such materials in the same instances in which copyright infringement would be found" (id.).

Conversely, it was suggested that when disclosure of a copyrighted work would not have a substantial adverse effect on the potential market of the copyright holder, the trade secret exemption

could not appropriately be asserted. Further, "[g]iven that the FOIA is designed to serve the public interest in access to information maintained by government," it was contended that "disclosure of nonexempt copyrighted documents under the Freedom of Information act should be considered a 'fair use'" (*id.*) (FOIA Update, published by the Office of Information and Privacy at the U.S. Department of Justice, (1983).

Again, a county does not prepare records for economic gain; it has no "commercial interest" in so doing; on the contrary, records are frequently prepared because it is the agency's statutory obligation to do so.

In short, it is questionable in my view whether an agency can claim copyright protection at all in the circumstance that you described.

In a related vein, Perritt and others have contended that the assertion of copyright protections is contrary to public policy:

"Public entities need not give away their data without recovering the cost of dissemination, but they must not set up monopolies to enable themselves or favored contractors to earn a profit from information collected and organized at taxpayer expense or to finance particular value-added elements at the expense of competitive access to those elements" (Perritt, supra, 449-450).

He referred to the "temptation" to generate revenue, stating that:

"...it is natural for public agencies to suppose that they can ease their budget pressures and serve their publics better by appropriating some of the potential revenue stream; they can sell their information. Beyond that, it is natural for them to suppose that the quality of results and perhaps also the size of revenue stream can be increased by 'partnerships' with private entities.

"Unfortunately, this is but a short step away from imposing restrictions on what other vendors and distribution channels can do. Most public agencies responsible for geographic information have either a natural or de jure monopoly on the information. Monopolists perceive that they can increase their total revenue stream by setting prices higher than they would be in a competitive market. Monopolists also are tempted to extend their monopolies into downstream markets. Thus, public agency decisionmakers, behaving like rational monopolists in private sector, implement their partnership aspiration by prohibiting private sector competition with their chosen partners. The result is a state monopoly that limits economic and technological benefits to a broad range of potential distributors of the public information. As, as the monopolies are

extended downstream by exclusive 'partnerships,' they block competition in a variety of rapidly changing and diverse markets for value-added information products" (id., 454).

Perritt added that:

"...it is important to distinguish between making information and value-added features already developed with taxpayer money for pursuit of agency missions available, and using new money to finance things of use only to particular private sector vendors. The former is not subsidization, it is allowing the public access to something it already has paid for" (id., 456).

He also argued that an assertion of copyright may violate the First Amendment:

"When a monopoly is granted or asserted with respect to public information through copyright or otherwise, the monopoly may be enforced by denying access to the information or by penalizing publication of the information. Punishing publication or dissemination directly collides with the First Amendment's protection of publishing and speaking, and denying access indirectly collides with the First Amendment's free speech and free press protections" (id., 463).

Further, restricting the use of data by means of a copyright claim may diminish the revenues that may be generated through commercial activity by private enterprises. In the REIPA Whitepaper cited earlier, reference was made to the dissemination of real property data, and it was suggested that:

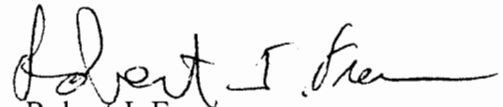
"Every dollar invested by the government in data sets that are shared with the public multiplies employment in the private sector and fosters economic growth and additional tax revenue. Providing easy access to real property data will generate significant new tax revenues as a natural by-product to the free market process. It is in the society's best interest for government to encourage and facilitate a vibrant and healthy information industry, where the private sector is investing in new information technologies and applications, and where no government agency or single private enterprise is allowed monopolistic advantage" (REIPA, supra).

In sum, the assertion of copyright claims in the context of your inquiry is, in my opinion, contrary to the intent of both the Freedom of Information Law and the Copyright Act.

Mr. Williams S. Hecht
April 14, 2000
Page - 8 -

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: Chairman, Cayuga County Legislature



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AU-12040

Committee Members

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April 14, 2000

Executive Director

Robert J. Freeman

E-Mail

TO: Alex MacFarlane [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. MacFarlane:

I have received your letter of March 7 in which you asked whether the Freedom of Information Law requires "an agency to keep a separate list of the voting records of each individual or is it merely sufficient that the records are available."

From my perspective, that statute does not require that a separate list or record indicating members' votes be maintained.

In this regard, by way of background, since the Freedom of Information Law was enacted in 1974, it has imposed what some have characterized as an "open vote" requirement. Although the Freedom of Information Law generally pertains to existing records and ordinarily does not require that a record be created or prepared [see §89(3)], an exception to that rule involves voting by agency members. Specifically, §87(3) of the Freedom of Information Law has long required that:

"Each agency shall maintain:

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

Stated differently, when a final vote is taken by members of an agency, a record must be prepared that indicates the manner in which each member who voted cast his or her vote. Further, in an Appellate Division decision that was affirmed by the Court of Appeals, it was found that "[t]he use of a secret ballot for voting purposes was improper", and that the Freedom of Information Law requires "open voting and a record of the manner in which each member voted" [Smithson v. Ilion Housing Authority, 130 AD 2d 965, 967 (1987), aff'd 72 NY 2d 1034 (1988)].

Mr. Alex MacFarlane

April 14, 2000

Page - 2 -

Based on the foregoing, to comply with the Freedom of Information Law, I believe that a record must be prepared and maintained indicating how each member cast his or her vote, disclosure of the record of votes represents the only means by which the public could know how their representatives asserted their authority. Ordinarily, a record of votes of the members will appear in minutes required to be prepared pursuant to §106 of the Open Meetings Law, and in my opinion, so long as minutes indicate how each member cast his or her vote, the requirements of the Freedom of Information Law would be satisfied.

I hope that I have been of assistance.

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-A0-12041

Committee Members

Mary O. Donohue
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April 17, 2000

Executive Director

Robert J. Freeman

Mr. Clifford Conyers
00-R-0017
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. Conyers:

I have received your letter of January 29 in which you sought assistance concerning an unanswered request for records of the Division of Parole.

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

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

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

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

Mr. Clifford Conyers
April 17, 2000
Page - 2 -

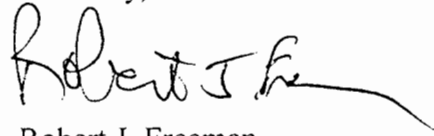
explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

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 to determine appeals at the Division of Parole is Counsel to the Division, 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:jm

cc: Thomas Walter
Terrence X. Tracy



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12042

Committee Members

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April 17, 2000

Executive Director

Robert J. Freeman

Mr. Thurl Parker
97-A-5697
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. Parker:

I have received your letter of January 21 concerning your efforts in obtaining certain records from a court pursuant to the Freedom of Information Law.

In this regard, the Freedom of Information Law, the statute within the advisory jurisdiction of the Committee on Open Government, is applicable to agency records. Section 86(3) of that statute defines the term "agency" to include:

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

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

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

Based on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. Since the matter involves criminal history records, it is suggested that you contact and seek guidance from the Division of Criminal Justice Services, the repository of those records.

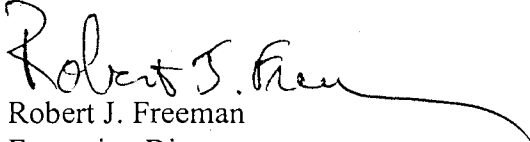
Mr. Thurl Parker

April 17, 2000

Page - 2 -

I hope that I 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-12043

Committee Members

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April 17, 2000

Executive Director

Robert J. Freeman

Mr. Conrad Wicks
99-A-5963
Eastern Correctional Facility
P.O. Box 338
Napanoch, NY 12458-0338

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

Dear Mr. Wicks:

I have received your letter of January 24 in which you raised a variety of issues, including your ability to obtain criminal history records pertaining to a witness who testified at your trial.

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

With respect to criminal history records, the general repository of those records is the Division of Criminal Justice Services. While the subject of a criminal history record may obtain such record from the Division, it has been held that criminal history records maintained by that agency are exempted from public disclosure pursuant to §87(2)(a) of the Freedom of Information Law [Capital Newspapers v. Poklemba, Supreme Court, Albany County, April 6, 1989]. Nevertheless, if, for example, criminal conviction records were used in conjunction with a criminal proceeding by a district attorney, it has been held that 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, 651 NYS2d 595, 234 AD2d 554 (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

Mr. Conrad Wicks
April 17, 2000
Page - 2 -

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,

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



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FODL-AD-12044

Committee Members

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April 17, 2000

Executive Director

Robert J. Freeman

Mr. Vincent Bernardo
98-A-6573
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. Bernardo:

I have received your letter of January 19. You have sought assistance in obtaining the address of the "security firm in charge of security" at Harlem Hospital.

In this regard, I offer the following comments.

First, I believe that the Harlem Hospital is part of the New York City Health and Hospitals Corporation. If that is so, I believe that it is subject to the Freedom of Information Law.

Second, pursuant to regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), each agency is required to designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests. It is suggested that you submit a request to the Records Access Officer, New York City Health and Hospitals Corporation, 125 Worth Street, New York, NY 10013. It is also suggested that you request a record that includes the address of the entity that provides security services at the Harlem Hospital.

Third, 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:

Mr. Vincent Bernardo
April 17, 2000
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..."

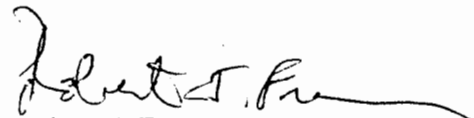
If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO-
FOIL-AO-12045

Committee Members

Mary O. Donohue
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April 17, 2000

Executive Director

Robert J. Freeman

Mr. Philip Prescott
#10067-014 Unit C-3
P.O. Box 1000
Lewisburg, PA 17857

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

Dear Mr. Prescott:

I have received your letter of January 19, as well as the materials attached to it. You have sought guidance concerning a request for records pertaining to yourself directed under the Freedom of Information Law and the Personal Privacy Protection Law to the Montgomery County Correctional Facility.

In this regard, I offer the following comments.

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

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

Based on the foregoing, the Personal Privacy Protection Law excludes from its coverage "any unit of local government", including a county agency.

I note, too, that rights of access conferred by that statute would not apply to the kinds of records at issue, even if they were maintained by a state agency. Subdivision (7) of §95 states that rights of access granted by the Personal Privacy Protection Law do not apply to public safety agency records. Section 92(8) of the Personal Privacy Protection Law defines the phrase "public safety agency record" to mean:

"a record of the commission of correction, the temporary state commission of investigation, the department of correctional services, the division for youth, the division of parole, the crime victims board, the division of probation or the division of state police or of any agency or component thereof whose primary function is the enforcement of civil or criminal statutes if such record pertains to investigation, law enforcement, confinement of persons in correctional facilities or supervision of persons pursuant to sections eight hundred thirty-seven, eight hundred thirty-seven-a, eight hundred thirty-seven-b, 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."

As such, in terms of disclosure, the Personal Privacy Protection Law generally excludes law enforcement records from rights of access to individuals.

Third, the Freedom of Information Law is applicable to units of local government agencies and, 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. Since I am unaware of the contents of records of your interest, specific guidance cannot be offered. However, several grounds for denial may be pertinent.

Of potential significance is §8(2)(b) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". That provision might be applicable relative to the deletion of identifying details in a variety of situations, i.e., where a record identifies a person other than yourself, such as 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 subparagraphs (i) through (iv) of §87(2)(e).

Another possible ground for denial is section 87(2)(f), which permits withholding to the extent that disclosure "would endanger the life or safety of any person". The capacity to withhold on that basis is dependent upon the facts and circumstances concerning an event.

Also potentially relevant ground for denial is §87(2)(g). The cited provision permits an agency to withhold records that:

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

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

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

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

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

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

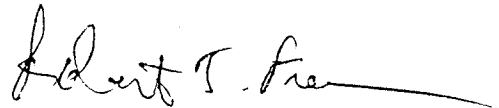
Mr. Philip Prescott
April 17, 2000
Page - 4 -

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of 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 horizontal line that extends 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-AU-12046

Committee Members

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April 17, 2000

Executive Director

Robert J. Freeman

Mr. Peter R. Aliseo
95-A-3758
Wyoming Correctional Facility
P.O. Box 501
Attica, NY 14011

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

Dear Mr. Aliseo:

I have received your letter of January 19 addressed to Gail S. Shaffer. Please note that Ms. Shaffer has not served as Secretary of State for more than five years. The current Secretary of State is Alexander F. Treadwell.

You asked that the Committee on Open Government initiate a "formal inquiry" concerning the treatment of a request made under the Freedom of Information Law to your facility.

In this regard, the Committee on Open Government has neither the resources nor the jurisdiction to engage in a "formal inquiry" or investigation. Similarly, the Committee is not empowered to compel an agency to comply with law or grant or deny access to records. Nevertheless, this office is authorized to provide advice, and 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..."

Mr. Peter R. Aliseo
April 17, 2000
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."

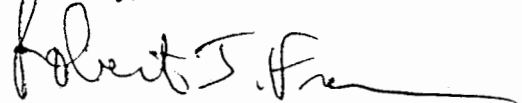
In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge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

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

If a record is accessible in its entirety because none of the grounds for denial apply, the record must be made available for inspection and copying. Further, an agency cannot in my view charge a fee for the inspection of a record in that circumstance.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Ms. Kennedy



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12047

Committee Members

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April 17, 2000

Executive Director

Robert J. Freeman

Mr. Hasheen 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 January 20. In brief, you asked whether an agency may assess fees for copies of records sought under the Freedom of Information Law when the applicant for the records demonstrates that he or she is unable to pay. You also asked what the intent of the drafters of the Freedom of Information Law might have been in relation to the matter.

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 or the actual cost of reproducing other records (i.e., computer tapes, tape recordings, etc.). With respect to your question, 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)].

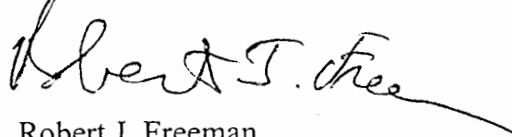
Having been involved in drafting the current version of the Freedom of Information Law in 1977, I believe that the Legislature attempted to draw on the experience gained under the federal Freedom of Information Act, which was enacted in 1974. The federal Act has since 1974 contained provisions concerning the waiver of fees, and I believe that the absence of any similar provision in the New York Freedom of Information Law was conscious and purposeful.

Lastly, it has been held that agency may require payment in advance of preparing copies of records (*Sambucci v. McGuire*, Supreme Court, New York County, November 4, 1982).

Mr. Hasheen Thompson
April 17, 2000
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:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12048

Committee Members

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Wade S. Norwood
David A. Schulz
Joseph J. Seymour
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April 17, 2000

Executive Director

Robert J. Freeman

Mr. Robert Morrison
90-B-3261 A4-4
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. Morrison:

I have received your letter of January 17 in which you sought assistance in obtaining records from the Mt. Morris Village Court.

In this regard, the provisions upon which you relied in seeking the records are not applicable. The federal Freedom of Information and Privacy Acts (5USC §§552 and 552a) apply only to federal agencies. Similarly, the New York 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., Uniform Justice court Act, §2019-a; 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

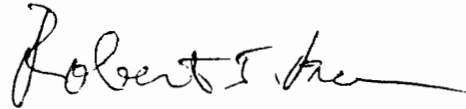
Mr. Robert Morrison
April 17, 2000
Page - 2 -

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 are seeking records from a justice court, it is suggested that a request for records be made to the clerk of the court, citing §2019-a of the Uniform Justice Court Act 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

PPPL-AO-
FOIL-AO-12049

Committee Members

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April 17, 2000

Executive Director

Robert J. Freeman

Mr. Anthony Bennett
96-B-1530
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. Bennett:

I have received your letter of January 18. You have asked whether dental records pertaining to an inmate may be "released to the Attorney General in a pending civil suit without the person's authorization or waiver being signed."

In this regard, as a general matter, medical and dental records are confidential and may not be disclosed without the consent of the person to whom the records pertain [see Public Health Law, §18; Personal Privacy Protection Law, §96(1)]. However, assuming that the Attorney General is serving as the legal representative of a party to the lawsuit, I believe that his office would essentially be in the same position as the agency he is representing.

If the Attorney General is not serving as the legal representative or counsel to the agency, it would be questionable in my view whether the records in question could be disclosed absent the consent of the subject of the records.

All agency records fall within the Freedom of Information Law. Pursuant to §§87(2)(b) and 89(2)(b), it is clear that the records at issue would, if disclosed, constitute "an unwarranted invasion of personal privacy."

Also pertinent 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

Mr. Anthony Bennett

April 17, 2000

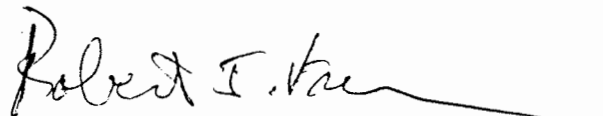
Page - 2 -

used to identify that data subject" [§92(7)]. For purposes of that statute, the term "record" is defined to mean "any item, collection or grouping of personal information about a data subject which is maintained and is retrievable by use of the name or other identifier of the data subject" [§92(9)].

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

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-12050

Committee Members

Mary O. Donohue
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April 17, 2000

Executive Director

Robert J. Freeman

Mr. Joseph Latera
99-R-3284
Marcy Correctional Facility
P.O. Box 3600
Marcy, NY 13403-3600

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

Dear Mr. Latera:

I have received your letter of January 19, as well as the materials attached to it. You have sought an advisory opinion concerning rights of access to a correctional facility's "Medical 'Policy and Procedures 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..."

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

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

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

- i. interfere with law enforcement investigations of judicial proceedings...
- ii. deprive a person of a right to a fair trial or impartial adjudication;
- iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
- iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

Under the circumstances, most relevant is §87(2)(e)(iv). The leading decision concerning that provision is Fink v. Lefkowitz, which involved access to a manual prepared by a special prosecutor that investigated nursing homes, in which the Court of Appeals held that:

"The purpose of this exemption is obvious. Effective law enforcement demands that violators of the law not be apprised the nonroutine procedures by which an agency obtains its information (see Frankel v. Securities & Exch. Comm., 460 F2d 813, 817, cert den 409 US 889). However beneficial its thrust, the purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution.

"To be distinguished from agency records compiled for law enforcement purposes which illustrate investigative techniques, are those which articulate the agency's understanding of the rules and regulations it is empowered to enforce. Records drafted by the body charged with enforcement of a statute which merely clarify procedural

or substantive law must be disclosed. Such information in the hands of the public does not impede effective law enforcement. On the contrary, such knowledge actually encourages voluntary compliance with the law by detailing the standards with which a person is expected to comply, thus allowing him to conform his conduct to those requirements (see Stokes v. Brennan, 476 F2d 699, 702; Hawkes v. Internal Revenue Serv., 467 F2d 787, 794-795; Davis, Administrative Law [1970 Supp], section 3A, p 114).

"Indicative, but not necessarily dispositive of whether investigative techniques are nonroutine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel (see Cox v. United States Dept. of Justice, 576 F2d 1302, 1307-1308; City of Concord v. Ambrose, 333 F Supp 958). It is no secret that numbers on a balance sheet can be made to do magical things by scrupulous nursing home operators the path that an audit is likely to take and alerting them to items to which investigators are instructed to pay particular attention, does not encourage observance of the law. Rather, release of such information actually countenances fraud by enabling miscreants to alter their books and activities to minimize the possibility 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).

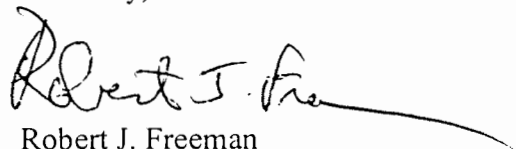
While I am unfamiliar with the records in question, it would appear that those portions which, if disclosed, would enable potential lawbreakers to evade detection could likely be withheld. It is noted that in another decision which dealt with a request for certain regulations of the State Police, the 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 might not if disclosed preclude employees from carrying out their duties effectively.

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

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

I hope that I have been of assistance.

Sincerely,

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:jm

cc: Ms. Todds



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12051

Committee Members

Mary O. Donohue
Alan Jay Gerson
Walter W. Grunfeld
Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Carole E. Stone
Alexander F. Treadwell

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April 17, 2000

Executive Director

Robert J. Freeman

Mr. Philip J. Congilaro
88-T-0399
Attica Correctional Facility
Attica, NY 14011-0149

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

Dear Mr. Congilaro:

I have received your letter of February 11 as well as the correspondence attached to it. Having reviewed their contents, I offer the following comments.

First, the statutes upon which your request is based, 5 USC §§551 and 552a are, respectively, the federal Freedom of Information and Privacy Acts. Those statutes apply only to federal agencies. The provision that generally governs rights of access to records of entities of state and local government in New York is the New York Freedom of Information Law.

Second, in a related vein, while the federal Freedom of Information Act includes provisions concerning the waiver of fees, the New York Freedom of Information Law contains no similar provision. Further, it has been held that an agency may charge its established fee for copies, even when the applicant is an indigent inmate [see Whitehead v. Morgenthau, 552 NYS 2d 518 (1990)].

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

It appears that §87(2)(g) would be most relevant in determining rights of access to the records sought, inmate evaluations. That provision permits an agency to withhold records that are:

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

- i. statistical or factual tabulations or data;

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

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

Lastly, 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."

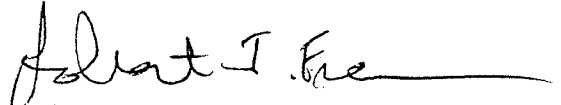
In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge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

Mr. Philip J. Congilaro
April 17, 2000
Page - 3 -

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

cc: Superintendent

No

FOIL - AO -

12052



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12053

Committee Members

Mary O. Donohue
Alan Jay Gerson
Walter W. Grunfeld
Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Carole E. Stone
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April 17, 2000

Executive Director

Robert J. Freeman

Mr. Joseph McGowan
97-A-3515
Upstate Prison
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. McGowan:

I have received your letter of January 31. You referred to a rejection of an appeal made under the Freedom of Information Law on the ground that it was not made within thirty days of a denial of a request as required by §89(4)(a) of the Freedom of Information Law. You asked whether "there exists a way to resubmit [your] FOIL appeal..."

In my view, you may resubmit a request. If the request is again denied, I believe that you would have the right to appeal within thirty days in accordance with the provision cited earlier.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12054

Committee Members

Mary O. Donohue
Alan Jay Gerson
Walter W. Grunfeld
Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
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April 17, 2000

Executive Director

Robert J. Freeman

Mr. Lorenzo Baron Knight
99-A-4203
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. Knight:

I have received your letter of January 24 in which you sought assistance in obtaining records from Truth Verification Laboratories, Inc.

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

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

Based on the foregoing, the Freedom of Information Law applies to records maintained by entities of state and local government in New York; it does not apply to private corporations, such as the company that you identified.

It is suggested that you discuss the matter with your attorney.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12055

Committee Members

Mary O. Donohue
Alan Jay Gerson
Walter W. Grunfeld
Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Carole E. Stone
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April 17, 2000

Executive Director

Robert J. Freeman

Ms. Flora Collins

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

Dear Ms. Collins:

I have received your letter of March 14 and the materials attached to it. You asked that this office "investigate" the treatment of your request made under the Freedom of Information Law to the Town of Plattsburgh.

In this regard, the Committee on Open Government is authorized to offer advice and opinions concerning the Freedom of Information Law. It does not have the capacity to conduct investigations, nor is it empowered to compel an agency to grant or deny access to records. However, in an effort to assist you, I offer the following comments.

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

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

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

April 17, 2000

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 you suggested in your letter to the Town Supervisor, an applicant for records is not required to identify the records sought with particularity. Section 89(3) of the Freedom of Information Law states that an applicant must "reasonably describe" the records. Therefore, so long as an applicant supplies sufficient detail to enable agency staff to locate the records, a request, in my view, would be valid and should be answered in a manner consistent with law.

In a related vein, I do not believe that an agency can require that a request be made on a prescribed form. The Freedom of Information Law, §89(3), as well as the regulations promulgated by the Committee (§1401.5), require that an agency respond to a request that reasonably describes the record sought within five business days of the receipt of a request. Further, the regulations indicate that "an agency may require that a request be made in writing or may make records available upon oral request" [§1401.5(a)]. As such, neither the Law nor the regulations refer to, require or authorize the use of standard forms. Accordingly, it has consistently been advised that any written request that reasonably describes the records sought should suffice.

It has also been advised that a failure to complete a form prescribed by an agency cannot serve to delay a response or deny a request for records. A delay due to a failure to use a prescribed form might result in an inconsistency with the time limitations imposed by the Freedom of Information Law. For example, assume that an individual requests a record in writing from an agency and that the agency responds by directing that a standard form must be submitted. By the time the individual submits the form, and the agency processes and responds to the request, it is probable that more than five business days would have elapsed, particularly if a form is sent by mail and returned to the agency by mail. Therefore, to the extent that an agency's response granting, denying or acknowledging the receipt of a request is given more than five business days following the initial receipt of the written request, the agency, in my opinion, would have failed to comply with the provisions of the Freedom of Information Law.

In short, 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.

Third, having reviewed your correspondence, 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 for information. For instance, if there is no particular record

Ms. Flora Collins

April 17, 2000

Page - 3 -

indicating the cost of a project, the Town would not be obliged to prepare a new record on your behalf in which a total is given. However, if there are a number of records reflective the costs incurred in relation to project, those records could be inspected or copied, and you could prepare a total on your own. Similarly, you asked whether certain taxpayers "will see an increase in their assessments..." The Freedom of Information Law requires that agencies disclose existing records; it does not require government officials to answer questions. While they may choose to do so, that would involve activity separate from the responsibility to comply with law.

Lastly, 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. From my perspective, the kinds of records that you are seeking would be accessible, for none of the grounds for denial would be pertinent.

Lastly, in addition to the Freedom of Information Law, some of the records of your interest may be available under the Town Law. For instance, §29(4) states that a town supervisor:

"Shall keep an accurate and complete account of the receipt and disbursement of all moneys which shall come into his hands by virtue of his office, in books of account in the form prescribed by the state department of audit and control for all expenditures under the highway law and in books of account provided by the town for all other expenditures. Such books of account shall be public records, open and available for inspection at all reasonable hours of the day, and, upon the expiration of his term, shall be filed in the office of the town clerk."

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

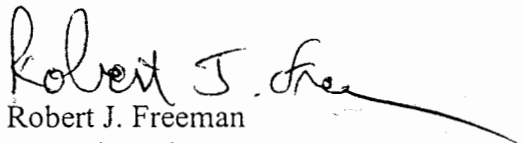
"When a claim has been audited by the town board of the town clerk shall file the same in numerical order as a public record in his office and prepare an abstract of the audited claims specifying the number of the claim, the name of the claimant, the amount allowed and the fund and appropriation account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

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

Ms. Flora Collins
April 17, 2000
Page - 4 -

I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Andrew Abdallah, Supervisor



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOEL-AD-12056

Committee Members

Mary O. Donohue
Alan Jay Gerson
Walter W. Grunfeld
Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schultz
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Carole E. Stone
Alexander F. Treadwell

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April 17, 2000

Executive Director

Robert J. Freeman

Mr. James C. Bugenhagen

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

Dear Mr. Bugenhagen:

I have received your letter of March 13, as well as the materials attached to it. You have sought assistance concerning a delay by the Town of Royalton in making available minutes of meetings that you requested under the Freedom of Information Law.

In this regard, I offer the following comments.

First, it is noted that §89(3) of the Freedom of Information Law requires that an applicant must "reasonably describe" the records sought. Therefore, a request must include sufficient detail to enable the staff of an agency to locate and identify the records. In the context of your request, even though it involves minutes covering a period of more than a year, those kinds of records are typically kept in a location in which they are readily retrievable. If that is so, I believe that your request would have met the standard of reasonably describing the records and that it must be honored by the Town.

Second, the Open Meetings Law, §106(3), requires that minutes of meetings of public bodies be prepared and made available within two weeks of meetings to which they pertain. Further, 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..."

Mr. James C. Bugenhagen

April 17, 2000

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)].

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

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

Hon. Carol Genet, Town Clerk



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12057

Committee Members

Mary O. Donohue
Alan Jay Gerson
Walter W. Grunfeld
Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Carole E. Stone
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April 17, 2000

Executive Director

Robert J. Freeman

Mr. Raquel Montalvo
44538004
FPC Alderson Cottage 12
Box A
Alderson, West VA 24910

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

Dear Mr. Montalvo:

I have received your letter of February 2 in which you complained that the New York City Police Department failed to respond to your request for records or an appeal that followed.

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

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

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

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

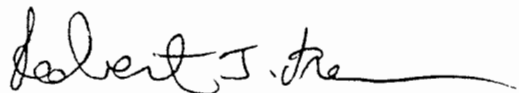
Mr. Raquel Montalvo
April 17, 2000
Page - 2 -

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, appearing to read "Robert J. Freeman", followed by a long horizontal flourish line.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FODL-AO-12058

Committee Members

Mary O. Donohue
Alan Jay Gerson
Walter W. Grunfeld
Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Carole E. Stone
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April 17, 2000

Executive Director

Robert J. Freeman

Mr. Glenn Stewart
81-A-5821
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. Stewart:

I have received your letter of February 9. You indicated that requests for records made to the City of Elmira Police Department and the Office of the Chemung County District Attorney were ignored. As such, you asked whether those entities are subject to the Freedom of Information Law.

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

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

Based on the foregoing, both of the entities in question are clearly "agencies" required to comply with the Freedom of Information Law.

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

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

Mr. Glenn Stewart
April 17, 2000
Page - 2 -

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

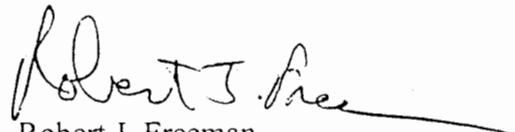
If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively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

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:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12059

Committee Members

Mary O. Donohue
Alan Jay Gerson
Walter W. Grunfeld
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David A. Schulz
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April 17, 2000

Executive Director

Robert J. Freeman

Mr. Melville Perry
97-A-6426
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. Perry:

I have received your letter of February 3. You asked initially how you may request a copy of a felony complaint filed in a case other than your own.

In this regard, I note that when charges are dismissed in favor of an accused, the records pertaining to the matter ordinarily are sealed pursuant to §160.50 of the Criminal Procedure Law and would be exempt from disclosure in accordance with §87(2)(a) of the Freedom of Information Law.

If charges are not dismissed, I believe that a felony complaint could be requested from the office of the prosecuting district attorney. Such a request should be directed to the "records access officer" at the office of the district attorney. The records access officer has the duty coordinating an agency's response to requests (see 21 NYCRR Part 1401).

Alternatively, although the courts are not subject to the Freedom of Information Law, court records are generally available from court clerks (see Judiciary Law, §255), and a request may be made to the clerk of the appropriate court.

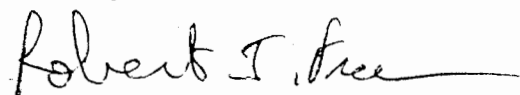
With regard to your second question, there is no entity outside of New York known as the "Committee on Open Government." Similar agencies exist in Massachusetts, Connecticut, Minnesota, Hawaii and Indiana. If you have a particular interest in any of those states, an address can be sent to you on request.

Lastly, enclosed is "Your Right to Know", an explanatory brochure pertaining to the New York Freedom of Information and Open Meetings Laws.

Mr. Melville Perry
April 17, 2000
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 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-12060

Committee Members

Mary O. Donohue
Alan Jay Gerson
Walter W. Grunfeld
Gary Lewi
Warren Mitofsky
Wade S. Norwood
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Carole E. Stone
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41 State Street, Albany, New York 12231

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April 17, 2000

Executive Director

Robert J. Freeman

Mr. Joseph Martinez
89-T-2539
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. Martinez:

I have received your letter of February 2 in which you sought assistance in obtaining "use of force reports" relating to certain incidents, as well as videotapes of those incidents. You indicated that your request had not been answered.

In this regard, I offer the following comments.

First, the statutes to which you referred in your correspondence, 5 USC §§552 and 552a, are, respectively, the federal Freedom of Information and Privacy Acts. Those statutes apply only to federal agencies. The statute dealing with public access to government records in New York is the New York Freedom of Information Law.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Since I am unaware of the contents of the records in which you are interested, or the effects of their disclosure, I cannot offer specific guidance. Nevertheless, the following paragraphs will review the provisions that may be significant in determining rights of access to the records in question.

Of potential significance is section 87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". That provision might be applicable relative to the deletion of identifying details in a variety of situations, i.e., where a record identifies persons other than yourself, 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 subparagraphs (i) through (iv) of §87(2)(e).

Another possible ground for denial is §87(2)(f), which permits withholding to the extent that disclosure "would endanger the life or safety of any person". The capacity to withhold on that basis is dependent upon the facts and circumstances concerning an event.

The remaining relevant ground for denial is §87(2)(g). The cited provision permits an agency to withhold records that:

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

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

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

Mr. Joseph Martinez
April 17, 2000
Page - 3 -

Records prepared by employees of an agency and communicated within the agency or to another agency would in my view fall within the scope of §87(2) (g). Those records might include opinions or recommendations, for example, that could be withheld.

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

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

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

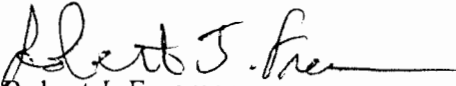
"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial,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

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

For your information, the person designated to determine appeals at the Department of Correctional Services is 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

FOIL-AU-12061

Committee Members

Mary O. Donohue
Alan Jay Gerson
Walter W. Grunfeld
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Wade S. Norwood
David A. Schulz
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(518) 474-2518

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April 17, 2000

Executive Director

Robert J. Freeman

Mr. Stephen M. Seifert
91-A-4999
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. Seifert:

I have received your letter of February 10 concerning a request made under the Freedom of Information Law to the Department of Correctional Services. Having reviewed my response to you of January 13, I do not believe that I can add to those comments as they pertain to the Department's duty to respond to your request or appeal.

With regard to rights of access to the record sought, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 §87(2)(g) would be pertinent in determining rights of access. That provision permits an agency to withhold records that:

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

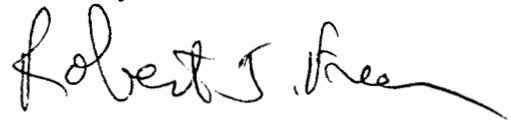
- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations; or
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

Mr. Stephen M. Seifert
April 17, 2000
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 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.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12062

Committee Members

Mary O. Donohue
Alan Jay Gerson
Walter W. Grunfeld
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April 17, 2000

Executive Director

Robert J. Freeman

Mr. Robert Garcia
91-A-8804
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. Garcia:

I have received your letter of February 2. You indicated that you requested records from a facility where you were formerly housed and paid for copies, but that you were moved to a different facility and did not obtain copies of the records.

In this regard, if you paid for copies and a disbursement form was completed, it is suggested that you submit the disbursement form to the entity that maintains the records as proof that you paid the appropriate fee. I would conjecture that the records were transmitted to your new facility when you were transferred.

Additionally, since you appealed a denial of access to records to this office, I note that the Committee on Open Government is not empowered to determine appeals. The provision concerning the right to appeal a denial of access, §89(4)(a) of the Freedom of Information Law, states in relevant part that:

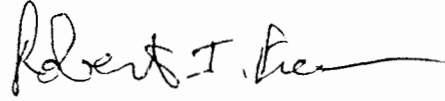
"any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal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

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

Mr. Robert Garcia
April 17, 2000
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-A0 - 12063

Committee Members

Mary O. Donohue
Alan Jay Gerson
Walter W. Grunfeld
Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
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Carole E. Stone
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April 17, 2000

Executive Director

Robert J. Freeman

Mr. Joseph Gwathney
99-R-0549
Bare Hill Correctional Facility
P.O. Box 20
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. Gwathney:

I have received your letter of January 31. You have sought guidance concerning the situation in which an agency "refuses to respond or even to comply" with the Freedom of Information Law.

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

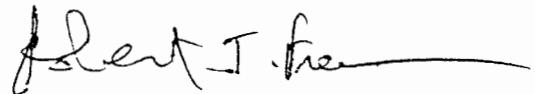
Mr. Joseph Gwathney
April 17, 2000
Page - 2 -

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 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-12064

Committee Members

Mary O. Donohue
Alan Jay Gerson
Walter W. Grunfeld
Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Carole E. Stone
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April 17, 2000

Executive Director

Robert J. Freeman

Mr. Michael Ford
90-T-2186
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. Ford:

I have received your letter of January 27. You wrote that your requests for a copy of your indictment have been "ignored" by the Office of the New York County District Attorney.

In this regard, first, I note that each agency is required to 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. Although I believe that person in receipt of your request should have responded in a manner consistent with law or forwarded your request to the records access officer, it is suggested that you resubmit the request, addressing it to the records access officer.

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

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

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

Mr. Michael Ford
April 17, 2000
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."

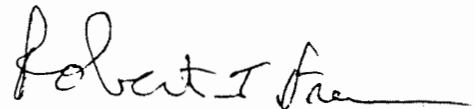
In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge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

Lastly, although the courts are not subject to the Freedom of Information Law, the indictment may be requested from the clerk of the appropriate court pursuant to §255 of the Judiciary 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-A0-12065

Committee Members

Mary O. Donohue
Alan Jay Gerson
Walter W. Grunfeld
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Wade S. Norwood
David A. Schulz
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April 24, 2000

Executive Director

Robert J. Freeman

Mr. Charles Leahey

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

Dear Mr. Leahey:

I have received your letter of March 13, as well as a variety of related correspondence.

You asked whether "there is any way that [you] can litigate in state court under the Freedom of Information Law to remove false information in [your] record that is in possession of a NYC agency." In this regard, while the Freedom of Information Law generally confers the right to inspect and copy records, there is nothing in that statute deals with the accuracy of the contents of records or that provides a right to challenge the accuracy of records. In short, I do not believe that the Freedom of Information Law provides a basis for attempting to remove information from a record that you believe to be false.

You also referred to requests for records made to the New York City Police Department that had not been answered. Here I point out that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests for records. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

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

Mr. Charles Leahey

April 24, 2000

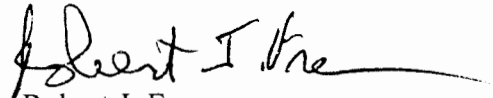
Page - 2 -

"...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 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-A0-12066

Committee Members

Mary O. Donohue
Alan Jay Gerson
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David A. Schulz
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April 24, 2000

Executive Director

Robert J. Freeman

Mr. John C. Barney
Barney, Grossman, Dubow & Marcus
Seneca Building West - Suite 400
119 East Seneca 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. Barney:

I have received your letter of March 16. You have raised a question concerning the Freedom of Information Law in your capacity as attorney for the Town of Ithaca.

According to your letter, the Town contracts with the local Society for the Prevention of Cruelty to Animals "to act, in essence, as dog warden for the Town." Having received complaints relating to barking dogs, the Town conducted an investigation and, in addition, "forwarded the matter to the SPCA for investigation." Following the investigation, an attorney for the complainant sought all records pertaining to the incident. In response to the request, the Town disclosed the records in its possession and asked the SPCA for copies of records that it maintains concerning the matter. The SPCA has contended that it is a private corporation that "treats all of its records as confidential" and will not provide the records to the Town. You have asked whether "the records of the SPCA related to the investigation of the Town of Ithaca Incident [are] mandated to be supplied by the SPCA to the Town of Ithaca to be supplied to a FOIL requester."

In this regard, I offer the following comments.

First, the SPCA is a private corporation and, as a private entity, it is not in my view subject to the Freedom of Information Law. That statute, as you are likely aware, pertains to agencies, and §86(3) defines the term "agency" to mean:

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

Mr. John C. Barney

April 24, 2000

Page - 2 -

Based on the foregoing, the Freedom of Information Law generally is applicable to entities of state and local government and does not apply to private entities. Nevertheless, insofar as the SPCA carries out functions pursuant to contract for the Town, it appears that the records prepared for the purpose of doing so fall within the coverage of the Freedom of Information Law.

I note and emphasize that §86(4) of the Freedom of Information Law defines the term "record" expansively to include:

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

Based upon the language quoted above, documents need not be in the physical possession of an agency to constitute agency records; so long as they are produced, kept or filed for an agency, the courts have held they constitute "agency records", even if they are maintained apart from an agency's premises.

For instance, it has been found that records maintained by an attorney retained by an industrial development agency were subject to the Freedom of Information Law, even though an agency did not possess the records and the attorney's fees were paid by applicants before the agency. The Court determined that the fees were generated in his capacity as counsel to the agency, that the agency was his client, that "he comes under the authority of the Industrial Development Agency" and that, therefore, records of payment in his possession were subject to rights of access conferred by the Freedom of Information Law (see C.B. Smith v. County of Rensselaer, Supreme Court, Rensselaer County, May 13, 1993).

More analogous to the situation that you described is a decision rendered by the Court of Appeals in which it was found that materials received by a corporation providing services for a branch of the State University pursuant to a contract were kept on behalf of the University and 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 short, insofar as the records are maintained for the Town, I believe that the Town would be required to direct the custodian of the records to disclose them in accordance with the Freedom of Information Law, or obtain them in order to review and disclose them to the extent required by law.

Second, the foregoing is not intended to suggest that all records maintained for the Town by the SPCA must be disclosed. In brief, the Freedom of Information Law is based upon a presumption

Mr. John C. Barney

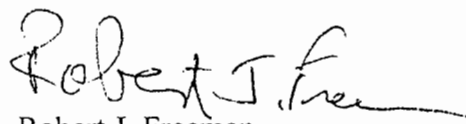
April 24, 2000

Page - 3 -

of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. It is possible that some of the records or portions thereof might justifiably be withheld in accordance with one or more of the grounds for denial.

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 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-12067

Committee Members

Mary O. Donohue
Alan Jay Gerson
Walter W. Grunfeld
Gary Lewi
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David A. Schulz
Joseph J. Seymour
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April 24, 2000

Executive Director

Robert J. Freeman

Ms. Jessica Greenwald

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

Dear Ms. Greenwald:

I have received your letter of March 16 in which you sought an advisory opinion relating to fees assessed by the New York City Board of Elections for copies of records, as well as related issues.

You indicated that the Board of Elections charges at least \$400 and as much as \$1000 for computer tapes of borough voter registration lists, and that "there is a \$400 fee for any specific district..." You also referred to "an optional field to fill-in a Home Phone number" and asked whether that field must be included "as part of their computerized records in addition to the required voter registration information" and whether the Board must "provide the phone numbers in addition to the required voter registration information when reproducing electronic records."

In this regard, I offer the following comments.

First, with respect to fees, as you may be aware, §87(1)(b)(iii) of the Freedom of Information Law authorizes agencies to charge up to twenty-five cents per photocopy for records up to nine by fourteen inches, or the actual cost of reproducing other records (i.e., those that cannot be photocopied, such as computer tapes or disks, tape recordings, etc.), unless a different fee is prescribed by statute.

The amount of fees permitted to be charged for a computerized voter registration list 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 more finite, direct and less inclusive than ‘[indirect] cost’, which is a concept as infinite and expandable as the mind of man. ‘Reproducing’ a record certainly does not include ‘producing’ a record in the first place -i.e., compiling the information from which the record is produced. The purpose and intention of the Freedom of Information Law is to further the concept of open government. For this reason charges for public records must be kept to a minimum. In a sense the information compiled by counties under election Law 5-602 and 5-604 is a part of that concept and charges for that information must be kept to a minimum so as to maximize access thereto.”

Further, using the standard of “actual cost of reproduction”, it was stated that:

“Where the record is a computerized record the charge shall be limited to the cost of a diskette or other computerized tape and a reasonable amount for the salary of the employee downloading said diskette or tape during the time such diskette or tape is being downloaded.”

When reproduction of a voter list involves a simple transfer of data from one storage medium to another, i.e., from a computer to one or more tapes or disks, I believe that the time and effort to do so would be minimal. If that is so, the “actual cost” would involve computer time plus the cost of a tape or disk. Computer disks generally cost less than a dollar each; tapes may be somewhat more expensive.

On the basis of the foregoing, it appears that the fees to which you referred are inconsistent 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. From my perspective, when that statute applies, home addresses and home telephone numbers may generally be withheld on the ground that disclosure would constitute “an unwarranted invasion of personal privacy” [see §87(2)(b)].

Nevertheless, §89(6) of the Freedom of Information Law states that:

"Nothing in this article shall be construed to limit or abridge any otherwise available right of access at law or in equity to any party to records."

As such, if records are available as a right under a different provision of law or by means of judicial determination, nothing in the Freedom of Information Law can serve to diminish rights of access [see e.g., Kwitny v. McGuire, 53 NY2d 968 (1981); Szikszy v. Buelow, 436 NYS 2d 558, 583 (1981)].

Relevant in this instance is §5-602 of the Election Law, entitled "Lists of registered voters; publication of", which states that voter registration lists are public. Specifically, subdivision (1) of that statute provides in part that a "board of elections shall cause to be published a complete list of names and residence addresses of the registered voters for each election district over which the board has jurisdiction"; subdivision (2) states that "The board of elections shall cause a list to be published for each election district over which it has jurisdiction"; subdivision (3) requires that at least fifty copies of such lists shall be prepared, that at least five copies be kept "for public inspection at each main office or branch of the board", and that "other copies shall be sold at a charge not exceeding the cost of publication."

Since §5-602 of the Election Law confers unrestricted public rights of access to voter registration lists, in my opinion, nothing in the Freedom of Information Law could be cited to restrict those rights. Further, as a general matter, I believe that a statute pertaining to a specific subject prevails over a statute pertaining to a general subject. A statute in the Election Law that pertains to particular records would in my view supersede a statute pertaining to records generally, such as the Freedom of Information Law.

In like manner, §3-220(1) of the Election Law states in part that: "All registration records, certificates, lists and inventories referred to in, or required by, this chapter shall be public records..." Additionally, §5-210 of the Election Law, entitled "Registration and enrollment and change of enrollment upon application", includes reference to voter application forms and provides in paragraph (k) of subdivision (5) that the form must include:

"(i) A space for the applicant to indicate whether or not he has ever voted or registered to vote before and, if so, the approximate year in which he last voted or registered and his name and address at the time.

(ii) The name and residence address of the applicant including the zip code and apartment number, if any.

(iii) The date of birth of the applicant."

(iv) A space for the applicant to indicate whether or not he is a citizen of the United States.

(v) The gender of the applicant (optional).

(vi) A space for the applicant to indicate his choice of party enrollment, with a clear alternative provided for the applicant to decline to affiliate with a party.

Ms. Jessica Greenwald

April 24, 2000

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(vii) The telephone number of the applicant (optional).

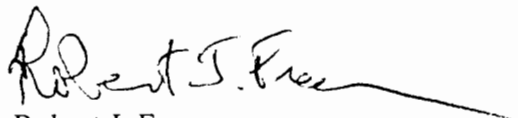
(viii) A place for the applicant to execute the form on a line which is clearly labeled 'signature of applicant'..."

Again, since the Election Law requires the disclosure of registration records, which include the items referenced above, nothing in the Freedom of Information Law may be asserted to withhold those records. Therefore, although certain of those items might justifiably be denied as an unwarranted invasion of personal privacy if contained in other kinds of records, the specific direction provided in the Election Law in my opinion requires disclosure of registration records, including those items.

With regard to your questions, I know of no provision in the Election Law that would require that a board of elections to include home phone numbers in voter registration lists. However, if they are included in computerized data pursuant to the Election Law, for the reasons described earlier, I believe that they would be accessible.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer, New York City Board of Elections

FOIL No. 12068

From: Robert Freeman
To: [REDACTED]
Date: 4/24/00 4:39PM
Subject: Dear Ms. Cedar:

Dear Ms. Cedar:

I have received your inquiry of April 22. With respect to the materials to which you referred, the District would clearly have the authority to withhold them from the public if they were requested under the Freedom of Information Law. That statute, as you are aware, provides that an agency may withhold records to the extent that disclosure would result in "an unwarranted invasion of personal privacy."

However, the Board of Commissioners is the governing body of the District; it is essentially the board of directors of a public corporation. In my view, when the Board reviews or seeks to review the records in question in the performance of its official duties, it would not be requesting them in a manner equivalent to a member of the public citing the Freedom of Information Law. Again, if its review of the records involves the performance of its official duties, disclosure of the records to the Board would not in my view be inappropriate or contrary to law.

If you would like to discuss the matter, I will be in the office on Wednesday.

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

OML-AO-3145
FOIL-AO-12069

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April 26, 2000

Executive Director

Robert J. Freeman

Mr. Thomas H. Greenwood
Greenwood Commercial Investment
Realtors, Inc.
6780 Northern Boulevard - Suite 400
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. Greenwood:

I have received a copy of your letter of April 14 addressed to Assemblyman Harold C. Brown, Jr., as well as materials that you forwarded to the Committee. You have sought an opinion concerning your "right to attend and participate in the discussions with regard to the management of the "Special Assessment District" in the City of Syracuse and its financial operations.

By way of background, you wrote that you are "required to pay a Special Assessment District Tax to the Downtown Committee of Syracuse, Inc.", a "private, not for profit, professional downtown management organization, representing all property owners and tenants within the central business district." You questioned "how this committee can call itself private" and wrote that its meetings and records are closed.

From my perspective, the entity in question is required to conduct its meetings in accordance with the Open Meetings Law. Further, I believe that its records are subject to rights of access conferred by the Freedom of Information Law. In this regard, I offer the following comments.

Among the materials that you forwarded is Chapter 38 of the General Ordinances of the City of Syracuse entitled "Special Assessment District." Section 1 created the District, and Section 3 states that, unless otherwise provided, all property situated within the District "shall be subject to assessment..." Section 4 pertains to the establishment of a "special district operation and development committee...to consist of fifteen members (15) appointed by the mayor..." The remainder of section 4 describes the functions and duties of the Committee. Section 7 is entitled "Not-for-profit corporation" and subdivision (1) states in relevant part that:

Mr. Thomas H. Greenwood

April 26, 2000

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“The special district operations and development committee shall establish a not-for-profit corporation. The directors of such corporation shall be the members of the special district operations and development committee. All directors shall initially serve terms of from one to four (4) years as determined by the mayor...The mayor shall designate one of their number as chairman of the board of directors. Vacancies in the board of directors shall be filled by the mayor.”

Subdivision (2) of Section 7 describes the powers of the Corporation, which include “Construction, operation and maintenance of authorized district improvements...”

In sum, the Special District Operations and Development Committee, whose members are designated solely by the Mayor pursuant to Section 5, is the *alter ego*, the same entity, as the not-for-profit corporation to which you referred, the Downtown Committee of Syracuse, Inc. Consequently, despite the corporate status of the Downtown Committee, it is clearly a creation of government and under the substantial control of the Mayor.

With respect to the ability to attend meetings of the Committee and/or the Board of Directors of the Corporation, I believe that the Open Meetings Law is applicable. For purposes of clarity, since the membership of the Committee and the Board are the same, the remainder of the commentary will refer to it as the “Committee/Board.”

The Open Meetings Law pertains to meetings of public bodies, and §102(2) of that statute defines the phrase “public body” to mean:

“...any entity for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body.”

Several decisions indicate that *ad hoc* entities consisting of persons other than members of public bodies having no power to take final action fall outside the scope of the Open Meetings Law. As stated in those decisions: “it has long been held that the mere giving of advice, even about governmental matters is not itself a governmental function” [Goodson-Todman Enterprises, Ltd. v. Town Board of Milan, 542 NYS 2d 373, 374, 151 AD 2d 642 (1989); Poughkeepsie Newspapers v. Mayor's Intergovernmental Task Force, 145 AD 2d 65, 67 (1989); see also New York Public Interest Research Group v. Governor's Advisory Commission, 507 NYS 2d 798, *aff'd* with no opinion, 135 AD 2d 1149, motion for leave to appeal denied, 71 NY 2d 964 (1988)].

In this instance, however, the entity in question is not *ad hoc*, for it has a continual existence and carries out a variety of functions pursuant to law. Moreover, it has been held that an advisory

Mr. Thomas H. Greenwood

April 26, 2000

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body created by law is a public body subject to the Open Meetings Law [see MFY Legal Services, Inc. v. Toia, 402 NYS 2d 510 (1977)].

The Committee/Board, in consideration of the totality of its functions, is not advisory in nature. On the contrary, particularly in view of the authority conferred in Section 7(2), it is empowered to carry out a series of functions for the City of Syracuse.

Further, a review of the definition of "public body" indicates that the Committee/Board maintains each of the characteristics necessary to conclude that it is a public body. It is an entity consisting of fifteen members; it is required to conduct its business by means of a quorum pursuant to §41 of the General Construction Law or the Not-for-Profit Corporation Law; and finally, based on Chapter 38 of the General Ordinances of the City of Syracuse, the Committee/Board conducts public business and performs a governmental function for a public corporation, the City of Syracuse.

As a general matter, the Open Meetings Law is based on a presumption of openness. Meetings of public bodies must be conducted open to the public, except to the extent that an executive session may be held. Section 102(3) defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded, and §105(1) specifies and limits the subjects that may properly be considered during an executive session.

Since you asked about your right to join in the discussions of the Committee/Board, I emphasize that the Open Meetings Law provides the public with the right to attend, listen to and observe the proceedings of public bodies; it is silent with respect to public participation. Consequently, while I believe that you may attend meetings of the Committee/Board, I do not believe that you have the right to speak or otherwise participate at its meetings. This is not to suggest that there may be no opportunity to do so, for many public bodies authorize the public to speak at their meetings. When a public body chooses to do so, it has been suggested that it adopt reasonable rules that treat members of the public equally.

Lastly, another avenue of accountability involves the use of the Freedom of Information Law. That statute is applicable 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, 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. Thomas H. Greenwood

April 26, 2000

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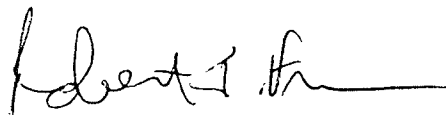
For instance, it has been found that records maintained by an attorney retained by an industrial development agency were subject to the Freedom of Information Law, even though an agency did not possess the records and the attorney's fees were paid by applicants before the agency. The Court determined 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, because records produced or kept by the Committee/Board are maintained for the City of Syracuse, I believe that the City 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.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Harold. C. Brown, Jr.

Hon. Roy Bernardi



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12070

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April 26, 2000

Executive Director

Robert J. Freeman

Mr. Steve Sevits

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

Dear Mr. Sevits:

I have received your letter of March 20 in which you asked whether a tape recording of a proceeding conducted in the Town of Sand Lake Justice Court is available under the Freedom of Information Law.

In this regard, 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."

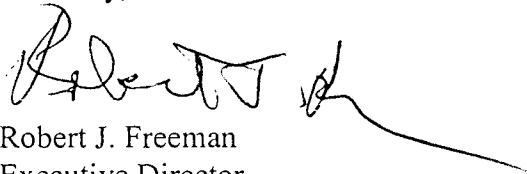
Based on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law (see e.g., Judiciary Law, §255; Uniform Justice Court Act, §2019-a) may 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. Steve Sevits
April 26, 2000
Page - 2 -

Since you are seeking records from a justice court, it is suggested that a request for records be made to the clerk of the court, citing §2019.a of the Uniform Justice Court Act 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

cc: Justice Court, Town of Sand Lake



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3198
FOIL-AO-12071

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April 26, 2000

Executive Director

Robert J. Freeman

Mr. Lawrence Barrett, Jr.

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

Dear Mr. Barrett:

I have received your letter of March 12 in which you expressed concerns relative to meetings and hearings conducted by governmental bodies in the Town of Rosendale.

In this regard, the Committee on Open Government is authorized to offer advice and opinions pertaining to the Open Meetings and Freedom of Information Laws. The Committee is not empowered to compel an entity to comply with those statutes or conduct audits. Nevertheless, in an effort to provide guidance, I offer the following comments.

First, you wrote that minutes of meetings of the Zoning Board of Appeals and the Planning Board are "missing...and incomplete." Section 106 of the Open Meetings Law provides direction concerning the contents of minutes and the time within which they must be prepared and disclosed. Specifically, that provision states that:

"1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.

2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.

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

Based upon the foregoing, minutes must be prepared and made available within two weeks of meetings.

It is noted that there is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. Nevertheless, as a matter of practice or policy, many public bodies approve minutes of their meetings. In the event that minutes have not been approved, to comply with the Open Meetings Law, it has consistently been advised that minutes be prepared and made available within two weeks, and that they may be marked "unapproved", "draft" or "non-final", for example. By so doing within the requisite time limitations, the public can generally know what transpired at a meeting; concurrently, the public is effectively notified that the minutes are subject to change.

You also wrote that the minutes do not include reference to those who voted "and what individual voted for or against." Here I point out that since its enactment in 1974, the Freedom of Information Law has included an "open vote" requirement. Section 87(3)(a) states that "[e]ach agency shall maintain a record of the final vote of each member in every agency proceeding in which the member votes." Therefore, in each instance in which a public body, such as the Zoning Board of Appeals or Planning Board, takes action, a record must be prepared specifying the manner in which each member cast his or her vote. Typically, the record of votes appears in minutes of meetings.

The remaining issues described in your letter pertain to notice of meetings and hearings. By way of background, a "meeting" is generally a gathering of quorum of a public body for the purpose of discussion, deliberation, and potentially taking action within the scope of its powers and duties. A "hearing" is generally held to provide members of the public with an opportunity to express their views concerning a particular subject, such as a proposed budget, a local law or a matter involving land use. Hearings are usually required to be preceded by the publication of a legal notice in the official newspaper designated by a public body. In contrast, §104(3) of the Open Meetings Law specifies that notice of a meeting must merely be "given" to the news media and posted. Further, there is no requirement that a newspaper, for example, publish a notice given regarding a meeting to be held under the Open Meetings Law, or that the notice given under that statute must be given to the official newspaper.

Specifically, the provisions in the Open Meetings Law pertaining to notice appear in §104 and state 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

Mr. Lawrence Barrett, Jr.
April 26, 2000
Page - 3 -

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.

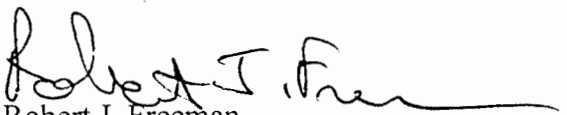
3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

There is no general provision that relates to legal notice that must be given prior to hearings. Those requirements are usually found in the sections of law dealing with the subject or activity at issue. For example, while towns, villages and school districts all must hold public hearings on their proposed budgets, there are separate provisions in the Town Law, the Village Law and the Education Law dealing with each. In short, notice requirements may differ, depending on the nature of the hearing.

In an effort to enhance compliance with and understanding of the law, copies of this opinion will be forwarded to the Zoning Board of Appeals and the Planning Board, as well as the Town Board.

I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Zoning Board of Appeals
Planning Board



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-A0-12072

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April 26, 2000

Executive Director

Robert J. Freeman

Mr. Anthony R. Gray
Editor in Chief
The Hudsonian
80 Vandenburg Avenue
Troy, NY 12180

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

Dear Mr. Gray:

As you are aware, I have received your letters of March 22 and March 27, and a variety of related materials.

You have sought an advisory opinion concerning the propriety of a denial of access to records by the Hudson Valley Community College Faculty Student Association (FSA). Specifically, you requested "invoices for textbooks purchased from publishing companies for sale as new texts in the FSA Bookstore for the Spring 2000 semester." Citing the "Encore Books" case and §87(2)(d) of the Freedom of Information Law, the FSA denied the request. You indicated that the "FSA runs the bookstore on college property; they don't have a commercial agreement with any bookseller to run the store for them or act as their agent in the sale of texts."

While I would agree that the "Encore Books" decision is relevant to an analysis of rights of access, due to dissimilar facts, the outcome must, in my view, be different. In this regard, I offer the following comments.

First, with respect to the FSA, the Freedom of Information Law 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."

Mr. Anthony R. Gray

April 26, 2000

Page - 2 -

Based on the foregoing, in general, an "agency" is a governmental entity.

Nevertheless, based on judicial decisions, even if the FSA is a not-for-profit corporation that contracts with the College, it is an "agency" required to comply with the Freedom of Information Law (see Stony Brook Statesman v. Associate Vice Chancellor for University Relations et.al, Supreme Court, Ulster County, January 26, 1996). Additionally, in a decision that involved what may be characterized as an adjunct of a public institution of higher education, it was held that a community college foundation, also a not-for-profit corporation, and its records are subject to the Freedom of Information Law. As stated by the court:

"At issue is whether the Kingsborough Community College Foundation, Inc (hereinafter 'Foundation') comes within the definition of an 'agency' as defined in Public Officers Law §86(3) and whether the Foundation's fund collection and expenditure records are 'records' within the meaning and contemplation of Public Officers Law §86(4).

The Foundation is a not-for-profit corporation that was formed to 'promote interest in and support of the college in the local community and among students, faculty and alumni of the college' (Respondent's Verified Answer at paragraph 17). These purposes are further amplified in the statement of 'principal objectives' in the Foundation's Certificate of Incorporation:

'1 To promote and encourage among members of the local and college community and alumni or interest in and support of Kingsborough Community College and the various educational, cultural and social activities conducted by it and serve as a medium for encouraging fuller understanding of the aims and functions of the college'.

Furthermore, the Board of Trustees of the City University, by resolution, authorized the formation of the Foundation. The activities of the Foundation, enumerated in the Verified Petition at paragraph 11, amply demonstrate that the Foundation is providing services that are exclusively in the college's interest and essentially in the name of the College. Indeed, the Foundation would not exist but for its relationship with the College" (Eisenberg v. Goldstein, Supreme Court, Kings County, February 26, 1988).

As in the case of the Foundation in Eisenberg, FSA would not exist but for its relationship with the SUNY/Stony Brook. Due to the similarity between the situation at issue and that presented in Eisenberg, I believe that FSA and its records are subject to the Freedom of Information Law. To suggest otherwise would, in my opinion, exalt form over substance.

Mr. Anthony R. Gray

April 26, 2000

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Moreover, there is precedent indicating in other instances that a not-for-profit corporation may indeed be an "agency" required to comply with the Freedom of Information Law. In Westchester-Rockland Newspapers v. Kimball [50 NYS 2d 575 (1980)], a case involving access to records relating to a lottery conducted by a volunteer fire company, the Court of Appeals found that volunteer fire companies, despite their status as not-for-profit corporations, are "agencies" subject to the Freedom of Information Law. In so holding, the Court stated that:

"We begin by rejecting respondent's contention that, in applying the Freedom of Information Law, a distinction is to be made between a volunteer organization on which a local government relies for performance of an essential public service, as is true of the fire department here, and on the other hand, an organic arm of government, when that is the channel through which such services are delivered. Key is the Legislature's own unmistakably broad declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (emphasis added; Public Officers Law, §84).

For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objections cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" (*id.* at 579).

The Court of Appeals again determined that a certain not-for-profit corporation constituted an "agency" subject to the Freedom of Information Law. In Buffalo News v. Buffalo Enterprise Development Corporation [84 NY 2d 488 (1994)], the Court determined that:

"The BEDC, a not-for-profit local development corporation, channels public funds into the community and enjoys many attributes of public entities. It should therefore be deemed an 'agency' within FOIL's reach in this case" (*id.*, 492).

It was also stated that:

"The BEDC principally pegs its argument for nondisclosure on the feature that an entity qualifies as an 'agency' only if there is

substantial governmental control over its daily operations...The Buffalo News counters by arguing that the City of Buffalo is 'inextricably involved in the core planning and execution of the agency's [BEDC] program'; thus, the BEDC is a 'governmental entity' performing a governmental function for the City of Buffalo, within the statutory definition.

"The BEDC's purpose is undeniably governmental. It was created exclusively by and for the City of Buffalo to attract investment and stimulate growth in Buffalo's downtown and neighborhoods. As a city development agency, it is required to publicly disclose its annual budget. The budget is subject to a public hearing and is submitted with its annual audited financial statements to the City of Buffalo for review. Moreover, the BEDC describes itself in its financial reports and public brochure as an 'agent' of the City of Buffalo. In sum, the constricted construction urged by appellant BEDC would contradict the expansive public policy dictates underpinning FOIL. Thus, we reject appellant's arguments" (*id.*, 492-493).

Second, if the FSA could not be characterized as an "agency", due to its relationship with the College, the invoices would be College records subject to rights of access conferred by the Freedom of Information Law. That statute pertains to all agency records, such as those involving community colleges, 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 cited in the materials that was rendered by the Court of Appeals, the state's highest court, it was found that documentation 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)].

Therefore, insofar as the records sought are maintained for the College, I believe that the College 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.

Third, in Encore, the Auxiliary Services Corporation (ASC) operated a campus bookstore for a branch of the State University pursuant to a contract, and, again, its records were found to be records of the State University and, therefore, subject to the Freedom of Information Law. Barnes & Noble was awarded a contract to stock course books designated by the faculty, and "[i]n order to ensure that the bookstore had a complete inventory of the textbooks needed for the upcoming semester, Barnes & Noble sent each faculty member a purchase order form on which they listed the desired books" (*id.*, 415). The forms were returned to Barnes & Noble, and copies were sent to ASC. Encore requested the lists furnished to the University by Barnes & Noble, for it operated a bookstore near the campus.

Although the Court found that the booklists maintained by ASC were State University records subject to rights conferred by the Freedom of Information Law, it determined that they could be withheld under §87(2)(d) of that statute. That provision 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;"

The Court adopted the "substantial competitive harm" test enunciated by federal courts in interpreting the federal Freedom of Information Act and found that the proper assertion of §87(2)(d) "turns on the commercial value of the requested information to competitors and the cost of acquiring it through other means" (*id.*, 420).

If you requested the booklists that a private company, like Barnes & Noble, had developed through a substantial expenditure of time, effort and resources, I believe that a denial of access would be fully appropriate and consistent with law and the holding in Encore. However, if your assertion is accurate, that there is no "commercial bookseller" with which the FSA or the College has contracted to collect information and run the bookstore, the basis for a denial of access in Encore

Mr. Anthony R. Gray
April 26, 2000
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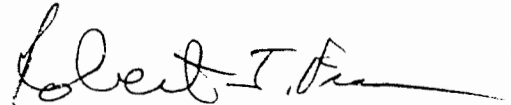
would be irrelevant; no commercial enterprise would be involved and, therefore, there would be no possibility that disclosure would "cause substantial injury to the competitive position" of any entity.

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. From my perspective, neither §87(2)(d) nor any other ground for denial could justifiably be asserted to withhold any aspect of the invoices.

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

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: John Buono, President
Anne Carozza
Willie Hammett

FOIL-AJ-12073

From: Robert Freeman
To: [REDACTED]
Date: 4/28/00 8:51AM
Subject: Good morning - -

Good morning - -

This office has always advised that insurance policies essentially are the terms of a contract and, therefore, are available under the FOIL, for none of the grounds for denial would be pertinent. I note, too, that the Court of Appeals has held that the FOIL may be used by a litigant, and that in that situation, the litigant is "as a member of the public" and has the same rights as the public, no more or less, despite his or her status as a litigant [see *Farbman v. NYC*, 62 NY2d 75 (1984)].

I hope that I have been of assistance. Should any questions arise, 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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Joseph J. Seymour
Carole E. Stone
Alexander F. Treadwell

May 1, 2000

Executive Director

Robert J. Freeman

E-mail

TO: Wallace S. Nolen [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. Nolen:

I have received your letter of February 22 in which you questioned the propriety of delays in the disclosure of records by agencies.

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

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

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

I hope that I have been of assistance.

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
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FOIL-AO-12075

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May 1, 2000

Executive Director

Robert J. Freeman

Mr. Larry Johnson
96-A-1246
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, unless otherwise indicated.

Dear Mr. Johnson:

I have received your letter of February 18 in which you asked that this office "look into" a denial of a request for "log book reports" made to the Office of the New York County District Attorney.

Having reviewed the correspondence relating to your letter, in a response of November 18, you were informed that "over 382 pages" of material were provided to your attorney prior to your trial, that some were not maintained by the Office of the District Attorney, and other records (not log book reports) were being withheld for a variety of reasons. As such, it appears that the records in question either were made available to your attorney or do not exist.

If they do not exist, the Freedom of Information Law would not apply. Further, based on the decision rendered in Moore v. Santucci [151 AD2d 677 (1989)], if the records in question do exist and were 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

Mr. Larry Johnson

May 1, 2000

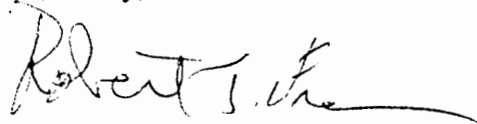
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counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

Based on the foregoing, it is suggested that you contact your attorney to determine whether he or she continues to possess the record. If the attorney no longer maintains the record, he or she should prepare an affidavit so stating that can be submitted to the office of the district attorney.

I hope that I have been of assistance.

Sincerely,

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: Gary J. Galperin
Susan C. Roque



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12076

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Alexander F. Treadwell

May 1, 2000

Executive Director

Robert J. Freeman

Mr. Guiseppe D'Alessandro
93-A-3422
Sing Sing Correctional Facility
354 Hunter Street
Ossining, NY 10562-5442

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

Dear Mr. D'Alessandro:

I have received your letter of February 16 and the materials attached to it. You have sought an opinion relating to a request for records made to 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. Guiseppe D' Alessandro

May 1, 2000

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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 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. Stankamp, 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;

Mr. Guiseppe D'Alessandro

May 1, 2000

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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 subparagraphs (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:

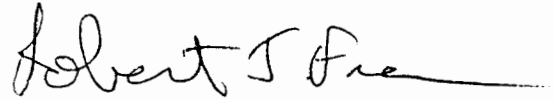
"...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of 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. Guiseppe D'Alessandro
May 1, 2000
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-AU-12077

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May 1, 2000

Executive Director

Robert J. Freeman

Mr. Sam Esposito

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

Dear Mr. Esposito:

Your letter of March 15 sent to the Office of the State Comptroller has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State, is authorized to offer advice and opinions concerning the Freedom of Information Law.

In brief, you have sought guidance relating to the ability to gain access to genealogical records in New York City.

In this regard, although the Freedom of Information Law pertains generally to access to government records and the fees that may be charged for copies of records, provisions of the Public Health Law deal specifically with birth and death records and fees for services rendered relating to searches for and copies of those records; the Domestic Relations Law includes provisions pertaining to marriage records. In brief, §4173 of the Public Health Law permits the disclosure of birth records by a registrar only upon issuance of a court order, or to the subject of the birth record or the parent or other lawful representative of a minor. Similarly, §4174 of the Public Health Law limits the circumstances under which the Commissioner of the Department of Health or registrars of vital records may disclose death records and specifies that those records are not subject to the Freedom of Information Law. As such, birth and death records are generally confidential and exempt from the disclosure requirements found in the Freedom of Information Law. Section 19 of the Domestic Relations Law pertains to marriage records maintained by town and city clerks and provides that some aspects of those records are available to the public, while others may be withheld unless there is a showing of a "proper purpose" that would justify disclosure.

Mr. Sam Esposito
May 1, 2000
Page - 2 -

The Public Health Law includes provisions that deal directly with genealogical records. Specifically, subdivision (3) of §4174 refers to searches for and the fees for records sought for genealogical or research purposes that may be imposed by "any person authorized" by the State Commissioner of Health, i.e., a registrar designated in a city, town or village. That provision states that:

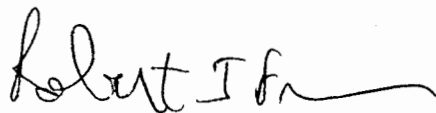
"For any search of the files and records conducted for authorized genealogical or research purposes, the commissioner or any person authorized by him shall be entitled to, and the applicant shall pay, a fee of ten dollars for each hour or fractional part of an hour of time for search, together with a fee of one dollar for each uncertified copy or abstract of such records requested by the applicant or for a certification that a search discloses no record."

Further, the Commissioner of Health has promulgated "Administrative Rules and Regulations" pertaining to genealogical research indicating that birth records need not be disclosed unless the subject of the birth record is known to have been deceased prior to 1924; death records need not be disclosed regarding deaths occurring after 1949. The summary also includes a restriction regarding the disclosure of marriage records. However, in an opinion rendered by this office with which the Department of Health has agreed, it was advised that basic information contained in marriage records, such as the names of the parties, the dates of a marriage or marriage application, the duration of the marriage and the municipality of residence of licensees should be made available to any person, unless a request is made for commercial or fund-raising purposes. More intimate information would only be disclosed upon a showing of a "proper purpose."

I believe that New York City abides by essentially the same policies, and it is suggested that you contact the Municipal Archives, which is part of the New York City Department of Records and Information Services at (212)788-8580 to obtain more precise information on the subject.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12078

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May 1, 2000

Executive Director

Robert J. Freeman

Mark L. Whitman
Commissioner of Police
City of Troy Department of Public Safety
55 State Street
Troy, NY 12180

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

Dear Commissioner Whitman:

I have received your letter of April 3 in which you raised the following question:

“Can counseling memos and other related information be maintained in an off-site location other than central personnel files?”

In this regard, there is nothing in the Freedom of Information Law or any other statute of which I am aware that deals with the location within a government agency where records must be maintained. Therefore, I do not believe that the City of Troy would be prohibited from maintaining personnel files in a location “other than central personnel files.”

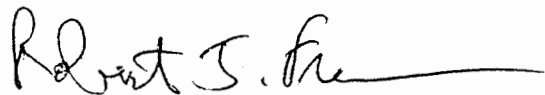
I note, too, that there is nothing in the Freedom of Information Law that deals specifically with personnel records or personnel files. Further, the nature and content of so-called personnel files may differ from one agency to another, and from one employee to another. In any case, neither the characterization of documents as “personnel records” nor their placement in personnel files would necessarily render those documents public or confidential 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 applicable law.

As suggested to you by phone, if indeed a counseling memo is essentially a warning rather than a conclusion reflective of a finding of misconduct, it would not constitute a final agency determination, and I believe that it could be withheld under §87(2)(g) of the Freedom of Information Law.

Mark L. Whitman, Commissioner
May 1, 2000
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 # 12079

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May 1, 2000

Executive Director

Robert J. Freeman

Mr. Douglas 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 February 16 in which you sought guidance concerning your efforts in obtaining certain medical records pertaining to yourself that were likely prepared at your former facility.

In this regard, first, it is my understanding that records pertaining to inmates are transferred with them when they are moved to a new facility. Therefore, if the records of your interest exist, it is likely that they would be maintained at your current facility, and a request should be made to the appropriate person at your facility.

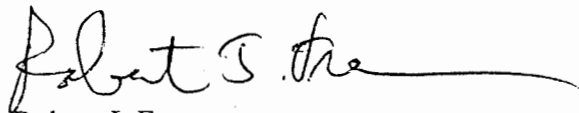
Second, as a general matter, with few exceptions, medical records pertaining to an individual that are maintained by an entity of government subject to the Freedom of Information Law would be available to that person under that statute or §18 of the Public Health Law. That latter provision deals specifically with access by patients to medical records, as well as confidentiality requirements.

Lastly, the Freedom of Information Law pertains to existing records, and §89(3) of that statute states in part that an agency is not required to create a record in response to a request. Therefore, to the extent that the information in which you are interested does not exist in the form of a record, the Freedom of Information Law would not apply.

Mr. Douglas Williamson
May 1, 2000
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 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-12080

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May 1, 2000

Executive Director

Robert J. Freeman

Mr. Johnnie McDuffie
99-A-4511 (A-6-359)
Green Haven Correctional Facility
Drawer B
Stormville, NY 12582

Dear Mr. McDuffie:

I have received your undated letter in which you appealed a denial of a request made to the Department of Correctional Services for copies of your pre-sentence report and sentencing minutes.

In this regard, first, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law; it is not empowered to determine appeals. The provision concerning the right to appeal, §89(4)(a), states in relevant part that:

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

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

Second, it appears that the denial of your request was proper. Although the Freedom of Information Law provides broad rights of access to records, the first ground for denial, §87(2)(a), states that an agency may withhold records or portions thereof that "...are specifically exempted from disclosure by state or federal statute..." Relevant under the circumstances is §390.50 of the Criminal Procedure Law, which, in my opinion represents the exclusive procedure concerning access to pre-sentence reports.

Section 390.50(1) of the Criminal Procedure Law states that:

Mr. Johnnie McDuffie

May 1, 2000

Page - 2 -

"Any pre-sentence report or memorandum submitted to the court pursuant to this article and any medical, psychiatric or social agency report or other information gathered for the court by a probation department, or submitted directly to the court, in connection with the question of sentence is confidential and may not be made available to any person or public or private agency except where specifically required or permitted by statute or upon specific authorization of the court. For purposes of this section, any report, memorandum or other information forwarded to a probation department within this state is governed by the same rules of confidentiality. Any person, public or private agency receiving such material must retain it under the same conditions of confidentiality as apply to the probation department that made it available."

In addition, subdivision (2) of §390.50 states in part that: "The pre-sentence report shall be made available by the court for examination and copying in connection with any appeal in the case..."

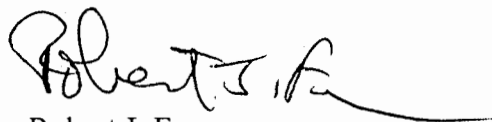
In view of the foregoing, I believe that a pre-sentence report may be made available only upon the order of a court, and only under the circumstances described in §390.50 of the Criminal Procedure Law. It is suggested that you review that statute.

With respect to sentencing minutes, I note that the Freedom of Information Law pertains to agency records, and the definition of the term "agency" appearing in §86(3) specifically excludes the judiciary. Therefore, the courts and court records fall beyond the coverage of the Freedom of Information Law. Frequently, however, other provisions of law require the disclosure of court records (see e.g., Judiciary Law, §255).

Further, it was held in Moore v. Santucci [151 AD2d 677 (1989)] that the respondent office of a district attorney was "not required to make available for inspection or copying any suppression hearing or trial transcripts of a witness' testimony in its possession, because the transcripts are court records, not agency records" (id. at 680).

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Mark Shepard



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12081

Committee Members

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May 1, 2000

Executive Director

Robert J. Freeman

Mr. Paul Priore

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

Dear Mr. Priore:

I have received your letter of March 21, as well as the correspondence attached to it. Having reviewed their contents, I offer the following comments.

First, in some instances, it appears that you sought information by raising questions (i.e., was a letter approved prior to its transmittal). In this regard, the Freedom of Information Law pertains to existing records, and an agency is not required to create a record in response to a request for information [see §89(3)] or to provide information as answers to questions.

Second, as suggested in my earlier response to you, it appears that the primary issue involves the extent to which your requests have "reasonably described" 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)

Mr. Paul Priore
May 1, 2000
Page - 2 -

(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).

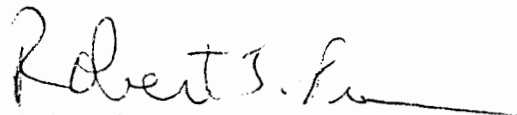
In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping system. In Konigsberg, it appears that the agency was able to locate the records on 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 a request for records that "mention [your] name, or which refer to [you], in any manner", a real question, in my view, involves where Department staff might begin to look for any such records. In short, there are often situations in which records that include the name of an individual may not be located based on that person's name.

Lastly, when a record is available in its entirety under the Freedom of Information Law, any person has the right to inspect the record at no charge. However, there are often situations in which some aspects of a record, but not the entire record, may properly be withheld in accordance with the grounds for denial appearing in §87(2). In 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.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Thomas G. Rozinski



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AJ-12082

Committee Members

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May 3, 2000

Executive Director

Robert J. Freeman

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 March 21 in which you questioned the propriety of a fee of \$10.00 for the first three pages of a transcript of a hearing that is being imposed by the City of Buffalo Division of Parking Enforcement.

From my perspective, the issue involves whether the City would be making a photocopy of an existing paper record or preparing a new record, a written transcript. If a paper transcript exists and you seek a photocopy of that record, pursuant to §87(1)(b)(iii) of the Freedom of Information Law, I believe that the City would be precluded from charging a fee in excess of twenty-five cents per photocopy. On the other hand, if no paper transcript exists, since the Freedom of Information Law pertains to existing records, that statute would not require the preparation of a paper transcript [see §89(3)]. If that is so and a request is made for a paper transcript, the Freedom of Information Law would not apply, and the City could, in my view, charge a reasonable fee for the preparation of a transcript.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Eva M. Hassett, Commissioner
Hon. Mary Martino



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12083

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Alexander F. Treadwell

May 4, 2000

Executive Director

Robert J. Freeman

Dr. John Zito
Sunset Station
P.O. Box 205154
Brooklyn, NY 11220

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

Dear Dr. Zito:

I have received your letter of March 23, as well as the materials attached to it.

By way of background, you reported alleged improprieties concerning a school principal to the Special Commissioner of Investigations for the New York City School District. Having later requested records pertaining to the investigation, the request was denied pursuant to §87(2)(b), (e) and (g) of the Freedom of Information Law.

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

Relevant is §87(2)(b), which permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". In addition, §89(2)(b) provides a series of examples of unwarranted invasions of personal privacy.

While the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public officers employees. It is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that they are required to be more accountable than others. With regard to records pertaining to public officers and employees, the courts have found that, in general, records that are relevant to the performance of a their official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co.

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

Several of the decisions cited above, Farrell, Sinicropi, Geneva Printing, Scaccia and Powhida, dealt with situations in which determinations indicating the imposition of some sort of disciplinary action pertaining to particular public employees were found to be available. However, when allegations or charges of misconduct have not yet been determined or did not result in disciplinary action or a finding of misconduct, the records relating to such allegations may, in my view, be withheld, for disclosure would result in an unwarranted invasion of personal privacy [see e.g., Herald Company v. School District of City of Syracuse, 430 NYS 2d 460 (1980)]. In addition, to the extent that charges are dismissed or allegations are found to be without merit, I believe that they may be withheld.

The exception pertaining to privacy would also likely be justifiably cited to withhold records or portions thereof that would identify witnesses and others questioned during an investigation.

In view of the duties of the Inspector General, also potentially relevant is §87(2)(e), which states in part that an agency may withhold records that:

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

- i. interfere with law enforcement investigations or judicial proceedings...
- iii. identify a confidential source or disclose confidential information relating to a criminal investigation..."

The preceding exception may be pertinent in a similar context as that described in relation to the protection of privacy of witnesses or others.

The remaining ground for denial of apparent relevance would be §87(2)(g), which permits an agency to withhold records that:

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

- i. statistical or factual tabulations or data;

Dr. John Zito
May 4, 2000
Page - 3 -

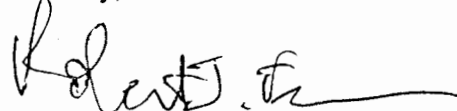
- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations; or
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

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.

Many of the records prepared in conjunction with an investigation would constitute inter-agency or intra-agency materials. Insofar as they consist of opinions, advice, conjecture, recommendations and the like, I believe that they could be withheld. For instance, recommendations concerning the course of an investigation or opinions offered by employees interviewed would fall within the scope of the exception.

I hope that 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: Regina A. Loughran
Susanna Chu



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-Ad-12084

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Carole E. Stone
Alexander F. Treadwell

May 4, 2000

Executive Director

Robert J. Freeman

Mr. Jeffrey H. Greenfield
NGL Group, LLC
Box 847
Lynbrook, NY 11563-0847

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

Dear Mr. Greenfield:

I have received your letter of March 23 and the correspondence attached to it. Having received a response to a request for records from the Village of Lynbrook indicating that "the Village Clerk is on vacation, and will respond to your FOIL request upon her return", you asked that I "instruct the Village...of what they are to do with a FOIL request in the event that someone is on vacation."

In this regard, first, the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law; the Committee is not empowered to compel an agency to grant or deny access to records.

Second, while I am unfamiliar with the nature of your request, the absence of the Clerk or perhaps others need not in my view serve as a basis for delaying or denying access, particularly if it has been established that a record is accessible under the law. I note by way of background that §89(1) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural implementation of that statute (21 NYCRR Part 1401). In turn, §87(1) requires the governing body of a public corporation to adopt rules and regulations consistent those promulgated by the Committee and with the Freedom of Information Law. Further, §1401.2 of the regulations provides in relevant part that:

"(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty

Mr. Jeffrey H. Greenfield

May 4, 2000

Page - 2 -

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."

In short, I believe that the records access officer has the duty of coordinating responses to requests.

Section 1401.2(b) of the regulations describes the duties of a records access officer and states in part that:

"The records access Officer is responsible for assuring that agency personnel...

- (3) Upon locating the records, take one of the following actions:
 - (i) make records promptly available for inspection; or
 - (ii) deny access to the records in whole or in part and explain in writing the reasons therefor.
- (4) Upon request for copies of records:
 - (i) make a copy available upon payment or offer to pay established fees, if any; or
 - (ii) permit the requester to copy those records..."

Based on the foregoing, again, the records access officer must "coordinate" an agency's response to requests. Therefore, I believe that when an official receives a request, he or she, in accordance with the direction provided by the records access officer, must respond in a manner consistent with the Freedom of Information Law or forward the request to the records access officer.

Further, even if the request was complex and warranted an extension of time to determine rights of access, the response in this instance, based on the language of the law, was inadequate. Section 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..."

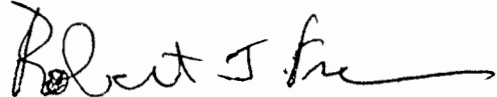
It has been held that agency officials "did not conform to the mandates" of the provision quoted above "when they did not...furnish a written acknowledgement of the receipt of...requests *along with a statement of the approximate date when action would be taken*" [Newton v. Police Department, 585 NYS2d 5, 8, 183 AD2d 621 (1992), emphasis added].

Mr. Jeffrey H. Greenfield
May 4, 2000
Page - 3 -

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 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: Village Clerk
Theresa Palladino



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AD - 3149
FOIL-AD - 12085

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May 4, 2000

Executive Director

Robert J. Freeman

Ms. Marie-Daniele Turcotte



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

Dear Ms. Turcotte:

I have received your letters of March 27. In your capacity as a member of the Marcellus Central School District Board of Education, you raised a series of questions relating to the Freedom of Information and Open Meetings Laws.

The initial area of inquiry involves a request by a resident that you provide copies of "handwritten notes from open school board meetings", and you asked whether:

- 1) the district's attorney had the right to review the information prior to its release to the resident;
- 2) [You] can release the excluded pages to the resident;
- 3) the district's reason for denial of these pages was legal and appropriate; and
- 4) what is 'Part of Investigatory File', i.e. the reason for denial of the excluded pages."

In this regard, by way of background, I point out that the Freedom of Information Law pertains to agency records (i.e., those of a school district) and defines the term "record" expansively to include:

"any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations,

memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

The Court of Appeals, the State's highest court, has construed the definition as broadly as its specific language suggests. The first such decision that dealt squarely with the scope of the term "record" involved documents pertaining to a lottery sponsored by a fire department. Although the agency contended that the documents did not pertain to the performance of its official duties, i.e., fighting fires, but rather to a "nongovernmental" activity, the Court rejected the claim of a "governmental versus nongovernmental dichotomy" [see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581 (1980)] and found that the documents constituted "records" subject to rights of access granted by the Law. Moreover, the Court determined that:

"The statutory definition of 'record' makes nothing turn on the purpose for which it relates. This conclusion accords with the spirit as well as the letter of the statute. For not only are the expanding boundaries of governmental activity increasingly difficult to draw, but in perception, if not in actuality, there is bound to be considerable crossover between governmental and nongovernmental activities, especially where both are carried on by the same person or persons" (id.).

In another decision rendered by the Court of Appeals, the Court focused on an agency claim that it could "engage in unilateral prescreening of those documents which it deems to be outside of the scope of FOIL" and found that such activity "would be inconsistent with the process set forth in the statute" [Capital Newspapers v. Whalen, 69 NY 2d 246, 253 (1987)]. The Court determined that:

"...the procedure permitting an unreviewable prescreening of documents - which respondents urge us to engraft on the statute - could be used by an uncooperative and obdurate public official or agency to block an entirely legitimate request. There would be no way to prevent a custodian of records from removing a public record from FOIL's reach by simply labeling it 'purely private.' Such a construction, which would thwart the entire objective of FOIL by creating an easy means of avoiding compliance, should be rejected" (id., 254).

Further, in a case involving notes taken by the Secretary to the Board of Regents that he characterized as "personal" in conjunction with a contention that he took notes in part "as a private person making personal notes of observations...in the course of" meetings. In that decision, the court cited the definition of "record" and determined that the notes did not consist of personal property but rather were records subject to rights conferred by the Freedom of Information Law [Warder v. Board of Regents, 410 NYS 2d 742, 743 (1978)].

Ms. Marie-Daniele Turcotte

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Second, 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)].

I am unaware of any statute that would prohibit a board member from disclosing the kinds of records 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 matters described in your correspondence.

Third, in terms of the District's attorney's "right to review" records prior to their release, for the purpose of offering perspective, §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, i.e., a board of education, 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 form 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 or an attorney prior to disclosure. I know of no provision that specifies that an attorney must or enjoys a "right" to review records prior to disclosure. Certainly there are numerous disclosures by agencies that are made without the knowledge or consent of or prior review by an attorney.

Third, the phrase "part of investigatory files" appeared in the Freedom of Information Law as originally enacted in 1974; it has not been in that statute, however, since 1978. The provision most closely analogous to that language is §87(2)(e), which authorizes agencies to withhold records "compiled for law enforcement purposes" in certain circumstances. I do not believe that notes taken by a Board member during an open meeting could be characterized as having been "compiled for law enforcement purposes" or that the basis for denial offered by the District could validly have been asserted.

In my view, the provision most pertinent to access to notes and which was cited in Warder, supra, concerning notes taken during an open meeting, 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.

In Warder, the court found, in brief, that the notes consisted of a factual rendition of events that occurred at an open meeting and, therefore, that they were accessible under §87(2)(g)(i).

The second area of inquiry relates to the ability of the public to speak or participate during open meetings of a board of education, as well as the authority of a board or its president to restrict that kind of activity.

It is emphasized at the outset that 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.

In my opinion, any such rules could serve as a basis for preventing verbal interruptions, shouting or other outbursts, as well as slanderous or obscene language or signs; similarly, I believe that the Board could regulate movement on the part of those carrying signs or posters or using camera equipment so as not to interfere with meetings or prevent those in attendance from observing or hearing the deliberative process.

A public body's rules pertaining to public participation typically indicate when, during a meeting (i.e., at the beginning or end of a meeting, for a limited period of time before or after an

agenda item or other matter is discussed by a public body, etc.) members of the public may speak. Most rules also limit the amount of time during which a member of the body may speak (i.e., no more than three minutes). If the rules are not heeded, a public body may contact a local law enforcement agency. Often the presence or possibility of the presence of an officer will encourage decorum. If a person continues to interrupt, I believe that an officer could be asked to remove the person or persons from the meeting. If, however, a person is not being disruptive, pursuant to §103 of the Open Meetings Law, I believe that he or she clearly has the right to attend a meeting.

With regard to the nature of speech or commentary that is permissible, 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.

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 one person defends or praises 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.

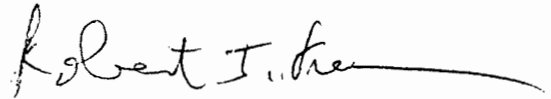
Ms. Marie-Daniele Turcotte

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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
Paul Bristol



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FIDL-AJ v 12086

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May 4, 2000

Executive Director

Robert J. Freeman

Ms. Donna Giordano
Gold Coast Gazette
57 Glen Street
Glen Cove, NY 11542

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

Dear Ms. Giordano:

I have received your letter of March 23, as well as a variety of materials relating to it. The issue, in brief, involves your unsuccessful efforts in obtaining a "Building Committee Task Force Report" from the Village of Sea Cliff. The Village Clerk indicated in response to your request that "[n]o such report has ever been filed" with her.

In this regard, first, it is emphasized that §86(4) of the Freedom of Information Law defines the term "record" expansively to include:

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

Based upon the language quoted above, documents need not be in the physical possession of an agency or agency officials 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

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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, if the report in question exists, since it was prepared "for" the Village, it would constitute a Village record subject to rights conferred by the Freedom of Information Law. Further, in that circumstance, I believe that the Village would be required to direct the custodian of the report to disclose it in accordance with the Freedom of Information Law, or obtain it in order to disclose it to you to the extent required by law.

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

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

In addition, while I am not suggesting that they are applicable, of potential relevance 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

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employee destroys a record following a request for that record in order to prevent public disclosure of the record. I do not believe that §240.65 applies when an agency denies access to a record, even though the basis for the denial may be inappropriate or erroneous, or when an agency cannot locate a record.

Second, assuming that the report exists, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 potential significance in my view would be §87 (2)(g), which enables an agency to withhold records that:

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

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

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

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 of Appeals rejected that finding and stated that:

"...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or

factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)..."
[Gould et al. v. New York City Police Department, 87 NY2d 267, 276 (1996)].

In short, that a record is "predecisional" or "not final" would not represent an end of an analysis of rights of access or an agency's obligation to review the contents of a record.

If the Committee that prepared the report consists of residents, volunteers who are not employed or retained by the Village, tangential to the matter but relevant to the analysis are several judicial decisions indicate generally that advisory ad hoc entities, other than committees consisting solely of members of public bodies, having no power to take final action fall outside the scope of the Open Meetings Law. As stated in those decisions: "it has long been held that the mere giving of advice, even about governmental matters is not itself a governmental function" [Goodson-Todman Enterprises, Ltd. v. Town Board of Milan, 542 NYS 2d 373, 374, 151 AD 2d 642 (1989); Poughkeepsie Newspapers v. Mayor's Intergovernmental Task Force, 145 AD 2d 65, 67 (1989); see also New York Public Interest Research Group v. Governor's Advisory Commission, 507 NYS 2d 798, aff'd with no opinion, 135 AD 2d 1149, motion for leave to appeal denied, 71 NY 2d 964 (1988)]. If the Committee that prepared the report does not constitute a public body subject to the Open Meetings Law, it would not perform a "governmental function."

Pertinent to the foregoing is §86(3) of the Freedom of Information Law, which defines the term "agency" to mean:

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

Based on the definition, an "agency" is a governmental entity performing a governmental function, such as the Village. If the Committee that prepared the report is not a public body for purposes of the Open Meetings Law because it does not perform a governmental function, for the same reason, it would not be an agency for purposes of the Freedom of Information Law. Therefore, the exception discussed earlier dealing with intra-agency materials, §87(2)(g), would not be applicable. Again, however, the report would constitute an agency record, for it was produced for the Village, which is clearly an agency.

Lastly, those involved in preparing the report apparently did so at the direction of the Village and acted on behalf of the Village. That being so, it is unlikely in my opinion that the other exception cited by the Village, §87(2)(b), would be pertinent. That provision enables an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal

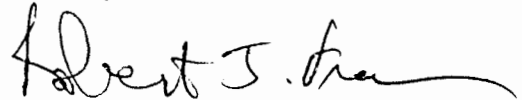
Ms. Donna Giordano
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privacy." Based on the information you provided, the report would not appear to include information of an intimate or personal nature.

Moreover, 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.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Claudia Moyne
Nancy Rose



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AD-3151
FOIL-AD-12087

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May 4, 2000

Executive Director

Robert J. Freeman

Hon. Robert L. North
Town Clerk
Town of Richland
P.O. Box 29
Pulaski, NY 13142

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

Dear Mr. North:

I have received your letter of March 16, which reached this office on March 27. You have raised a series of issues relating to the custody of records in conjunction with your role as town clerk, records access officer and records management officer, as well as the nature and content of minutes of meetings.

In this regard, I offer the following comments.

First, §30(1) of the Town Law dealing with the powers and duties of a town clerk states in part that the clerk "Shall have the custody of all records, books and papers of the town." As such, even though you may not have physical custody or possession of all Town records, as Clerk, I believe that you have legal custody of the records.

In a related vein, §57.19 of the Arts and Cultural Affairs Law, entitled "Local government records management program", states in relevant part that:

"The governing body, and the chief executive official where one exists, shall promote and support a program for the orderly and efficient management of records, including the identification and appropriate administration of records with enduring value for historical or other research. Each local government shall have one officer who is designated as records management officer. This officer shall coordinate the development of and oversee such program and shall coordinate legal disposition, including destruction of obsolete records. In towns, the town clerk shall be the records management officer."

Hon. Robert L. North
May 4, 2000
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As such, by statute, as Town Clerk, you have the duty of coordinating the Town's records management program.

Second, with respect to your role as records access 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 board of a public corporation, the Town of Richland, is the Town Board, and I believe that the Board is required to promulgate appropriate rules and regulations consistent with those adopted by the Committee on Open Government and with the Freedom of Information Law.

The initial responsibility to deal with requests is borne by an agency's records access officer, and the Committee's regulations provide direction concerning the designation and duties of a records access officer. Specifically, §1401.2 of the regulations provides in relevant part that:

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

As such, the Town Board has the obligation to designate "one or more persons as records access officer". Further, §1401.2(b) of the regulations describes the duties of a records access officer and states in part that:

"The records access officer is responsible for assuring that agency personnel:

- (1) Maintain an up-to-date subject matter list.
- (2) Assist the requester in identifying requested records, if necessary.
- (3) Upon locating the records, take one of the following actions:

- (i) make records promptly available for inspection; or
 - (ii) deny access to the records in whole or in part and explain in writing the reasons therefor.
- (4) Upon request for copies of records:
- (i) make a copy available upon payment or offer to pay established fees, if any; or
 - (ii) permit the requester to copy those records.
- (5) Upon request, certify that a record is a true copy.
- (6) Upon failure to locate the records, certify that:
- (i) the agency is not the custodian for such records; or
 - (ii) the records of which the agency is a custodian cannot be found after diligent search."

Assuming that the Clerk is the Town's designated records access officer, that person has the duty of coordinating the Town's response to requests for records. Therefore, in the absence of the assessor, for example, I believe that, as records access officer, you would have the authority to determine to grant or deny access to assessor's records.

I note that your function as records access officer would not, in my view, preclude the Supervisor from disclosing or disseminating records to other members of the Town Board. In short, I know of no provision of law that would create such a prohibition.

Third, there are two statutes that relate to notice of special meetings held by town boards. The phrase "special meeting" is found in §62(2) of the Town Law. That provision, from my perspective, deals with unscheduled meetings, rather than meetings that are regularly scheduled, and states in relevant part that:

"The supervisor of any town may, and upon written request of two members of the board shall within ten days, call a special meeting of the town board by giving at least two days notice in writing to the members of the board of the time when and place where the meeting is to be held."

The provision quoted above pertains to notice given to members of a town board, and the requirements imposed by §62 are separate from those contained in the Open Meetings Law.

Section 104 of the Open Meetings Law provides that:

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

2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously post in one or more designated public locations at a reasonable time prior thereto.

3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

Stated differently, if a meeting is scheduled at least a week in advance, notice of the time and place must be given to the news media and to the public by means of posting in one or more designated public locations, not less than seventy-two hours prior to the meeting. If a meeting is scheduled less than a week an advance, again, notice of the time and place must be given to the news media and posted in the same manner as described above, "to the extent practicable", at a reasonable time prior to the meeting. Although the Open Meetings Law does not make reference to "special" or "emergency" meetings, if, for example, there is a need to convene quickly, the notice requirements can generally be met by telephoning or faxing notice of the time and place of a meeting to the local news media and by posting notice in one or more designated locations.

The judicial interpretation of the Open Meetings Law indicates 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 clear necessity to do so.

Lastly, with respect to minutes of meetings, I believe that four provisions are relevant. First, §106 of the Open Meetings Law deals with minutes, and under that statute, it is clear that minutes need not consist of a verbatim account of what is said. Rather, at a minimum, minutes must consist of a record or summary of motions, proposals, resolutions, action taken and the vote of each member. Second, subdivision (1) of §30 of the Town Law states in relevant part that the town clerk "shall attend all meetings of the town board, act as clerk thereof, and keep a complete and accurate record of the proceedings of each meeting". Third, subdivision (1) of §30 of the Town Law provides that the clerk "shall have such additional powers and perform such additional duties as are or hereafter may be conferred or imposed upon him by law, and such further duties as the town board may determine, not inconsistent with law". And fourth, §63 of the Town Law states in part that a town board "may determine the rules of its procedure".

In my opinion, inherent in each of the provisions cited is an intent that they be carried out reasonably, fairly, with consistency, and that minutes be accurate.

More specifically, §106 of the Open Meetings Law provides that:

"1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.

2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.

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

Hon. Robert L. North

May 4, 2000

Page - 6 -

available to the public within one week from the date of the executive session."

Based on the foregoing, minutes need not consist of a verbatim account of everything that was said; on the contrary, so long as the minutes include the kinds of information described in §106, I believe that they would be appropriate and meet legal requirements. Certainly if a clerk wants to include more information than is required by law, he or she may do so.

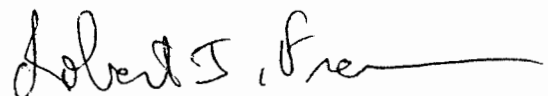
In good faith, I point out that in an opinion issued by the State Comptroller, it was advised that when a member of a board requests that his statement be entered into the minutes, the board must determine, under its rules of procedure, whether the clerk should record the statement in writing, which would then be entered as part of the minutes (1980 Op.St.Comp. File #82-181). Despite that opinion, it is unclear from my perspective whether a board has the authority to compel a clerk to include information in minutes beyond the requirements of the Open Meetings Law. It is unlikely in my view that a town board has the authority to require the exclusion of information from minutes of an open meeting that is accurate.

Although as a matter of practice, policy or tradition, many public bodies approve minutes of their meetings, there is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. In another opinion of the State Comptroller, it was found that there is no statutory requirement that a town board approve minutes of a meeting, but that it was "advisable" that a motion to approve minutes be made after the members have had an opportunity to review the minutes (1954 Ops.St.Compt. File #6609). While it may be "advisable" if not proper for a board to review minutes, due to the clear authority conferred upon town clerks under §30 of the Town Law, I do not believe that a town board can require that minutes be approved prior to disclosure.

In short, it is my view that you, in your position as clerk, have the responsibility and the authority to prepare minutes and to ensure their accuracy. While the Board and/or the Supervisor may have other areas of authority, I do not believe that they could validly remove or insist upon the removal of information from minutes, so long as the information is accurate and, again, presented reasonably, fairly and in a manner consistent with the contents of minutes as they are generally prepared.

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-AU-12088

Committee Members

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May 4, 2000

Executive Director

Robert J. Freeman

Ms. Ellen Connett

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

Dear Ms. Connett:

I have received your letter of March 21 and the correspondence attached to it.

You indicated that you submitted a request under the Freedom of Information Law to the NYS Department of Health for "cancer incidence and mortality data for St. Lawrence County" by zip code, "age groups", and the kinds of cancer for every year in which the Department maintains the data. The Department denied the request, citing §87(2)(a) of the Freedom of Information Law "because release of such information is specifically exempted from disclosure by state statute", that statute being §2402 of the Public Health Law. Section 2402 states that:

"The reports of cancer cases made pursuant to the provisions of this article shall not be divulged or made public so as to disclose the identity of any person to whom they relate, by any person, except in so far as may be authorized by sanitary code."

The Department's records access officer wrote that "[d]etailed tabulations of site specific cancers by zip code in a rural county can potentially identify individuals." In your letter to me, you expressed a willingness "to allow the DOH to aggregate cancer data from three (3) zip coded communities that are adjacent to one another."

If indeed the records that you requested include personally identifiable information, I would agree that they would be exempted from disclosure. Nevertheless, based on a judicial decision involving a similar request, it would be unlikely in my view that a court would determine that the information sought may justifiably be withheld.

In New York Times Company v. New York State Department of Health, 674 NYS2d 826, 243 AD2d 157 (1998), the issue involved a request for health care data and the ability to withhold certain items on the ground that disclosure would constitute “an unwarranted invasion of personal privacy” pursuant to §87(2)(b) of the Freedom of Information Law. Stated differently, to the extent that the data would be personally identifiable to patients, the Department would have the ability to deny access. Pursuant to its regulations, the Department granted access to a variety of items, but withheld data pertaining to treating physicians, hospitals and insurers. Following the initiation of a proceeding challenging the denial of access to those items, the Department agreed to release the names of hospitals and insurers. Nevertheless, it continued to withhold the names of physicians. The Supreme Court in its review of the denial “expressly rejected [the Department’s] argument that the disclosure of:

“...physician identifiers, even when such information was used in combination with other disclosable data, would lead to the identification of patients and, hence, would constitute an unwarranted invasion of personal privacy” (*id.*, 828).

The Appellate Division later unanimously affirmed the applicant’s right to the physician identifiers. In this regard, in brief, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. That being so, the Court determined that:

“It is well settled that all records of a public agency are presumptively available for public inspection and copying, unless the documents in question fall within one of the enumerated exemptions set forth in Public Officers Law § 87(2) (*see, Matter of Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 566, 505 N.Y.S.2d 576, 496 N.E.2d 665). To that end, ‘FOIL is to be liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government’ (*Matter of Capital Newspapers, Div. of Hearst Corp. v. Whalen*, 69 N.Y.2d 246, 252, 513 N.Y.S.2d 367, 505 N.E.2d 932). In this regard, the agency seeking to prevent disclosure bears the burden of demonstrating that the requested material falls squarely within the particular exemption claimed ‘by articulating a particularized and specific justification for denying access’ (*Matter of Capital Newspapers Div. of Hearst Corp. v. Burns, supra*, at 566, 505 N.Y.S.2d 576, 496 N.E.2d 665; *see, Matter of Ruberti, Girvin & Ferlazzo v. New York State Div. of State Police*, 218 A.D.2d 494, 496-497, 641 N.Y.S.2d 411; *Matter of Legal Aid Socy. of Northeastern N.Y. v. New York State Dept. of Social Servs.*, 195 A.D.2d 150, 153, 605 N.Y.S.2d 785). This respondent has failed to do.”

Ms. Ellen Connett
May 4, 2000
Page - 3 -

In finding that the Department could not demonstrate that disclosure would enable the public to identify patients, the Court stated that the Department:

“...would have the court believe...that...providing the identity of the patient’s physician is the one additional factor that ‘could readily permit a third party to deduce logically the identity of a given patient, resulting in a breach of medical confidentiality’. In our view, such speculation falls far short of ‘articulating a particularized and specific justification for denying access’” (*id.*).

The Court emphasized that other data is routinely disclosed including:

“...the patient’s gender, race and ethnicity; the month and year of the patient’s admission, the month and year of the patient’s discharge; the patient’s length of stay; the patient’s number of preoperative days; the patient’s number of postoperative days; the class of payor; the census tract location of the patient; the age of the patient or one-year intervals for patients one year old or older; the age of the patient at one-week intervals for patients less than one year old; the physician specialty; the number of attending physicians; the presence or absence of an accident; and the facility reimbursement peer group...” (*id.*).

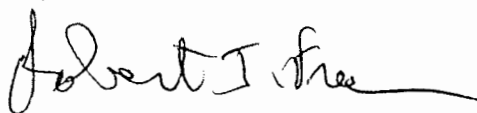
Since the Court determined in New York Times that the items enumerated, including the names of physicians and zip code of residence would not, if disclosed, constitute an unwarranted invasion of personal privacy because that combination of data did not consist of personally identifiable information, I do not believe that the data you seek could, under the terms of §2402 of the Public Health Law, “disclose the identity of any person.”

If my conclusion is accurate, the data must be made available.

Lastly, if the Department has the ability to aggregate data involving three adjacent zip codes and that arrangement is acceptable to you, a disclosure of that nature would further diminish the likelihood that any person could be identified.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm
cc: John Signor
Gene D. Therriault



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12089

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May 4, 2000

Executive Director

Robert J. Freeman

Mr. Arthur Evans
Telecommunications Regulatory Consultant
266 Jericho Turnpike, Suite F
Floral Park, NY 11001

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

Dear Mr. Evans:

I have received your note of March 29. As I understand your question, you asked whether an agency may treat applicants for the same records differently.

In this regard, as a general matter, when records are accessible to the public 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 AD2d 673, 378 NYS 2d 165 (1976)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Judith Lee
Steve Blow



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FJIL-AD-12090

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May 4, 2000

Executive Director

Robert J. Freeman

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

Mr. Frederick H. Ahrens, Jr.
County Attorney
County of Steuben Law Department
3 East Pulteney Square
Bath, NY 14810

Dear Messrs. Sheehan and Ahrens:

As you are aware, I have received correspondence from both of you relating to a request for records under the Freedom of Information Law, and particularly the fees that may be charged for copies.

In view of your commentary, irrespective of whatever past practices might have been, pursuant to §87(1)(b)(iii) of the Freedom of Information Law, unless a different statute provides to the contrary, an agency may charge a maximum of twenty-five cents per photocopy up to nine by fourteen inches.

I hope that your differences have been resolved.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AJ-12091

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May 4, 2000

Executive Director

Robert J. Freeman

E-Mail

TO: Wallace Nolen [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. Nolen:

I have received your letter of March 30 in which you sought an advisory opinion concerning your contention that the Albany Medical Center is required to comply with the Freedom of Information Law. You wrote that, in your view, because it uses public funds and is analogous to a volunteer fire department or other "quasi-public" organizations, it is subject to that statute.

In short, I disagree with your contention. As a general matter, the Freedom of Information Law applies to governmental entities, "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."

The Albany Medical Center is not a governmental entity, and it does not carry out its functions on behalf of government. That it uses or receives government funds is, in my opinion, not determinative of its status and does not alter its character as a private organization that falls beyond the coverage of the Freedom of Information Law.

I am mindful of the decisions relating to volunteer fire companies and similar entities. Despite being not-for-profit corporations, the courts found that they are subject to the Freedom of Information Law based on a finding that those entities would not exist but for their statutory and contractual relationships with one or more units of government. From my perspective, those kinds of relationships do not exist between the Albany Medical Center and any unit of government.

Mr. Wallace Nolen

May 4, 2000

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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.

RJF:jm

cc: John Cody



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AJ-12092

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May 5, 2000

Executive Director

Robert J. Freeman

Mr. Richard Entlich

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

Dear Mr. Entlich:

I have received your letter of March 29 in which you sought an opinion concerning the fees imposed by the Tompkins County Board of Elections for copies of machine readable voter registration records, and whether the Board may remove certain data, particularly dates of birth, from the files that it makes available in electronic format.

You indicated that the fee for "a machine-readable copy of portion of the registered voter roster is \$11.00 (\$1.00 for disk media plus a \$10.00 'setup' fee), plus \$.005 per voter." You added that having made a request for "a complete county list", you were informed "no more than 23 minutes later", that it was ready for you to pick up.

In my view, the basis of the fee is inappropriate and inconsistent with law. As you are likely aware, §87(1)(b)(iii) of the Freedom of Information Law authorizes agencies to charge up to twenty-five cents per photocopy for records up to nine by fourteen inches, or the actual cost of reproducing other records (i.e., those that cannot be photocopied, such as computer tapes or disks, tape recordings, etc.), unless a different fee is prescribed by statute.

The amount of fees permitted to be charged for a computerized voter registration list 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 more

finite, direct and less inclusive than '[indirect] cost', which is a concept as infinite and expandable as the mind of man. 'Reproducing' a record certainly does not include 'producing' a record in the first place -i.e., compiling the information from which the record is produced. The purpose and intention of the Freedom of Information Law is to further the concept of open government. For this reason charges for public records must be kept to a minimum. In a sense the information compiled by counties under election Law 5-602 and 5-604 is a part of that concept and charges for that information must be kept to a minimum so as to maximize access thereto."

Further, using the standard of "actual cost of reproduction", it was stated that:

"Where the record is a computerized record the charge shall be limited to the cost of a diskette or other computerized tape and a reasonable amount for the salary of the employee downloading said diskette or tape during the time such diskette or tape is being downloaded."

When reproduction of a voter list involves a simple transfer of data from one storage medium to another, i.e., from a computer to one or more tapes or disks, I believe that the time and effort to do so would be minimal. If that is so, the "actual cost" would involve computer time, the cost of a tape or disk, plus the minimal cost of personnel time of an employee. There is no basis, in my view, for charging a "setup" fee or a fee determined by the number of names produced.

With respect to the removal of data, by way of background, relevant is §5-602 of the Election Law, entitled "Lists of registered voters; publication of", which states that voter registration lists are public. Specifically, subdivision (1) of that statute provides in part that a "board of elections shall cause to be published a complete list of names and residence addresses of the registered voters for each election district over which the board has jurisdiction"; subdivision (2) states that "The board of elections shall cause a list to be published for each election district over which it has jurisdiction"; subdivision (3) requires that at least fifty copies of such lists shall be prepared, that at least five copies be kept "for public inspection at each main office or branch of the board", and that "other copies shall be sold at a charge not exceeding the cost of publication."

In like manner, §3-220(1) of the Election Law states in part that: "All registration records, certificates, lists and inventories referred to in, or required by, this chapter shall be public records..." Additionally, §5-210 of the Election Law, entitled "Registration and enrollment and change of enrollment upon application", includes reference to voter application forms and provides in paragraph (k) of subdivision (5) that the form must include:

"(i) A space for the applicant to indicate whether or not he has ever voted or registered to vote before and, if so, the approximate year in

Mr. Richard Entlich

May 5, 2000

Page 3

which he last voted or registered and his name and address at the time.

(ii) The name and residence address of the applicant including the zip code and apartment number, if any.

(iii) The date of birth of the applicant.”

(iv) A space for the applicant to indicate whether or not he is a citizen of the United States.

(v) The gender of the applicant (optional).

(vi) A space for the applicant to indicate his choice of party enrollment, with a clear alternative provided for the applicant to decline to affiliate with a party.

(vii) The telephone number of the applicant (optional).

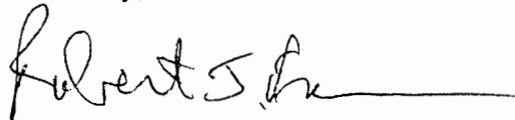
(viii) A place for the applicant to execute the form on a line which is clearly labeled ‘signature of applicant’...”

With regard to your questions, I know of no provision in the Election Law that would require that a board of elections to include any items other than names and residence addresses in voter registration lists. However, if they are included in computerized data pursuant to the Election Law, for the reasons described earlier, I believe that they would be accessible.

As you requested, copies of this opinion will be forwarded to the Election Commissioners.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Shary J. Zifchock
Elizabeth W. Cree



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

Oml-Ad - 3153
FOIL-Ad - 12093

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May 5, 2000

Executive Director

Robert J. Freeman

E-Mail

TO: Karen Vasile <karen_vasile@auburn.cnyric.org>

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. Vasile:

I have received your letter of April 3 in which you sought clarification concerning minutes and notes taken during executive sessions.

In your first area of inquiry, you wrote that:

“The Board of Education is required to approve minutes of a regular board meeting. If the Board of Education adjourns into executive session and minutes are taken in executive session, is the Board of Education required to approve the minutes of the executive session, as they are required to approve the minutes of the regular board meeting.”

From my perspective, the question is based on the mistaken assumption that minutes of meetings must be approved.

By way of background, first, §106 of the Open Meetings Law pertains to minutes of meetings and states that:

"1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.

2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.

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

In view of the foregoing, it is clear in my opinion that minutes of open meetings must be prepared and made available "within two weeks of the date of such meeting."

There is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. Nevertheless, as a matter of practice or policy, many public bodies approve minutes of their meetings. In the event that minutes have 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 "preliminary", for example. By so doing within the requisite time limitations, the public can generally know what transpired at a meeting; concurrently, the public is effectively notified that the minutes are subject to change. If minutes have been prepared within less than two weeks, I believe that those unapproved minutes would be available as soon as they exist, and that they may be marked in the manner described above.

Second, only in rare instances may a board of education take action during an executive session. As a general rule, a public body may take action during a properly convened executive session [see Open Meetings Law, §105(1)]. In the case of most public bodies, if action is taken during an executive session, minutes reflective of the action, the date and the vote must be recorded in minutes pursuant to §106(2) of the Law. If no action is taken, there is no requirement that minutes of the executive session be prepared. Various interpretations of the Education Law, §1708(3), however, indicate that, except in situations in which action during a closed session is permitted or required by statute, a school board cannot take action during an executive session [see United Teachers of Northport v. Northport Union Free School District, 50 AD 2d 897 (1975); Kursch et al. v. Board of Education, Union Free School District #1, Town of North Hempstead, Nassau County, 7 AD 2d 922 (1959); Sanna v. Lindenhurst, 107 Misc. 2d 267, modified 85 AD 2d 157, aff'd 58 NY 2d 626 (1982)]. Stated differently, based upon judicial interpretations of the Education Law, a school board generally cannot vote during an executive session, except in those unusual circumstances in which a statute permits or requires such a vote.

Those circumstances would arise, for example, when a board initiates charges against a tenured person pursuant to §3020-a of the Education Law, which requires that a vote to do so be

Ms. Karen Vasile

May 5, 2000

Page - 3 -

taken during an executive session. The other instance would involve a situation in which action in public could identify a student. When information derived from a record that is personally identifiable to a student, the federal Family Educational Rights and Privacy Act (20 USC §1232g) would prohibit disclosure absent consent by a parent of the student. Since §102(2) of the Open Meetings Law states that minutes need not include information that may be withheld under the Freedom of Information Law, and since unproven charges and records identifiable to students may be withheld, minutes containing those kinds of information would not be accessible to the public.

Lastly, if no was taken but the clerk took notes of an executive session, you asked whether the notes should be available "to the Board of Education or newspaper without a FOIL request." In this regard, the Freedom of Information Law pertains to agency records, and §86(4) of that statute defines the term "record" to mean:

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

Based on the foregoing, notes taken by the clerk constitute "records" that fall within the coverage of the Freedom of Information Law.

In brief, that law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. I would conjecture that, due to the nature of the subject matter typically discussed in an executive session, the notes could likely be withheld in great measure, if not in their entirety. If the Board seeks the notes in the performance of its duties, as the governing body, I believe that it would have the authority to obtain them. However, it would be inappropriate in my view to make the notes available to the public or the news media without reviewing them in order to determine the extent, if any, to which they may be withheld.

I hope that I have been of assistance.

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
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FUJL-AD-12094

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Carole E. Stone
Alexander F. Treadwell

May 5, 2000

Executive Director

Robert J. Freeman

E-Mail

TO: Jim Rickey [REDACTED]

FROM: Robert J. Freeman, Executive Director

RJF

Dear Mr. Rickey:

I have received your letter of March 31 in which you complained with respect to a delay of at least seven months by the State Department of Health in making genealogical records available.

In this regard, although the statute within the advisory jurisdiction of the Committee on Open Government, the Freedom of Information Law, pertains generally to access to government records and the fees that may be charged for copies of records, provisions of the Public Health Law deal specifically with birth and death records and fees for services rendered relating to searches for and copies of those records; the Domestic Relations Law includes provisions pertaining to marriage records.

In brief, §4173 of the Public Health Law permits the disclosure of birth records by a registrar only upon issuance of a court order, or to the subject of the birth record or the parent or other lawful representative of a minor. Similarly, §4174 of the Public Health Law limits the circumstances under which the Commissioner of the Department of Health or registrars of vital records may disclose death records and specifies that those records are not subject to the Freedom of Information Law. As such, birth and death records are generally confidential and exempt from the disclosure requirements found in the Freedom of Information Law. Section 19 of the Domestic Relations Law pertains to marriage records maintained by town and city clerks and provides that some aspects of those records are available to the public, while others may be withheld unless there is a showing of a "proper purpose" that would justify disclosure.

As you may be aware, the Public Health Law includes provisions that deal directly with genealogical records. Specifically, subdivision (3) of §4174 refers to searches for and the fees for records sought for genealogical or research purposes that may be imposed by "any person authorized" by the State Commissioner of Health, i.e., a registrar designated in a city, town or village. That provision states that:

Mr. Jim Rickey

May 5, 2000

Page - 2 -

"For any search of the files and records conducted for authorized genealogical or research purposes, the commissioner or any person authorized by him shall be entitled to, and the applicant shall pay, a fee of ten dollars for each hour or fractional part of an hour of time for search, together with a fee of one dollar for each uncertified copy or abstract of such records requested by the applicant or for a certification that a search discloses no record."

Further, the Commissioner of Health has promulgated "Administrative Rules and Regulations" pertaining to genealogical research indicating that birth records need not be disclosed unless the subject of the birth record is known to have been deceased prior to 1924; death records need not be disclosed regarding deaths occurring after 1949. They also include a restriction regarding the disclosure of marriage records. However, in an opinion rendered by this office with which the Department of Health has agreed, it was advised that basic information contained in marriage records, such as the names of the parties, the dates of a marriage or marriage application, the duration of the marriage and the municipality of residence of licensees should be made available to any person, unless a request is made for commercial or fund-raising purposes. More intimate information would only be disclosed upon a showing of a "proper purpose."

With respect to the delay in disclosure, it is my understanding that genealogy has become one of nation's most popular hobbies or pastimes, and that, consequently, the Department of Health receives more requests than it can process within the time that you suggested.

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

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

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. Jim Rickey

May 5, 2000

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I hope that I have been of assistance.

RJF:jm

cc: Peter Carucci, Director, Vital Records



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AD- 3156
FOIL-AD- 12095

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May 8, 2000

Executive Director

Robert J. Freeman

Neal Lewis, Esq.
Long Island Neighborhood Network
90 Pennsylvania Avenue
Massapequa, NY 11758

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

Dear Mr. Lewis:

I have received your letter of April 3. "On behalf of Connie Keper and Christopher O'Connor as individuals and on behalf of the Affiliated Brookhaven Civic Association (ABCO) and the Long Island Neighborhood Network (LINN) as not-for-profit organizations", you have sought an advisory opinion "in relation to the New York State Open Meetings and the Freedom of Information Laws and the practices of the Town of Brookhaven.

You wrote that, for some time, "a rumor has circulated that the Town Board conducts most of its business behind closed doors before the actual public meeting takes place", and you have sought an opinion "as to the legality of the Town of Brookhaven's practice of conducting meetings of the entire Town Board - with such meetings being described as executive sessions, but without first following the procedural prerequisites required for executive sessions..." You also sought an opinion "as to the rights of the public to request copies of the agendas of the meetings conducted by the entire Town Board....under the Freedom of Information Law."

In this regard, I offer the following comments.

First, by way of background, I point out the definition of "meeting" [see Open Meetings Law, §102(1) has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be conducted open to the public, whether or not there is an intent to have action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 Ad 2d 409, aff'd 45 NY 2d 947 (1978)].

The decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that so-called "work sessions" and similar gatherings, such as "agenda sessions," held for the purpose of discussion, but without an intent to take action, fell outside the scope of the Open Meetings Law. In discussing the issue, the Appellate Division, whose determination was unanimously affirmed by the Court of Appeals, stated that:

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

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

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

In view of the direction given by the courts, when a majority of the Board gathers to discuss Town business, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law.

Based on the foregoing, if indeed a majority of the Board gathers in advance of a scheduled meeting to discuss Town business, the gathering would constitute a "meeting" subject to the requirements of the Open Meetings Law, including a requirement that notice of the time and place be given in accordance with §104 of that statute.

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

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

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

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 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, it cannot be known in advance of that vote that the motion will indeed be approved.

Lastly, with respect to the right to seek agendas prior to meetings, I direct your attention to the Freedom of Information Law. That statute pertains to agency records, and §86(4) defines the term "record" to mean:

"any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets,

Neal Lewis, Esq.
May 8, 2000
Page - 4 -

forms, papers, designs, drawings, maps, photos, letters, microfilms,
computer tapes or discs, rules, regulations or codes."

Based on the foregoing, as soon as an agenda is prepared, I believe that it would constitute a "record" that falls within the scope of the Freedom of Information Law.

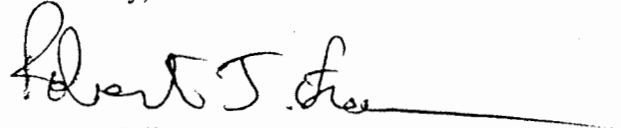
That statute, in brief, is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

If the agendas of your interest are typical of most agendas, they merely list, in general terms, the items to be considered. If that is so, I believe that they would be available, for none of the grounds for denial would be applicable. If, however, an agenda is more expansive, it is possible that portions might be deleted prior to disclosure of the remainder. For instance, if an agenda item involves filling a vacancy in a position and it identifies those who have applied, the names of those who have applied need not be disclosed [see Freedom of Information Law, §89(7)], and that portion of the record could be deleted.

In an effort to enhance compliance with and understanding of open government laws, a copy of this opinion will be forwarded to the Town Board.

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: Town Board



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12096

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May 8, 2000

Executive Director

Robert J. Freeman

Mr. Thomas A. Bucaro

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

Dear Mr. Bucaro:

I have received your letter of April 1 in which you sought guidance concerning a denial of your request for records by the City University of New York on the basis of §87(2)(g) of the Freedom of Information Law. In addition to questioning the breadth of the denial, you also contended that an "index" identifying the records that were withheld must be prepared and made available.

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. While I am unfamiliar with the specific contents of the records in question, it appears that the provision cited in the responses to your request is applicable in analyzing the extent to which the records could properly have been withheld.

Specifically, §87(2)(g) enables an agency to withhold records that:

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

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

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

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 related to incidents for which no final determination had been made. The Court of Appeals rejected that finding and stated that:

"...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87(2)(g)[111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)..." [Gould et al. v. New York City Police Department, 87 NY2d 267, 276 (1996)].

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. Thomas A. Bucaro

May 8, 2000

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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, they may be withheld; insofar as they consist of statistical or factual information, it appears that they must be disclosed.

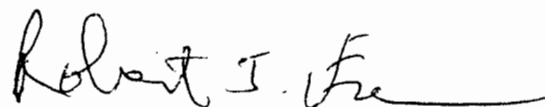
Second, I am unaware of any provision of the Freedom of Information Law or judicial decision that would require that a denial at the agency level identify every record withheld or include a description of the reason for withholding each document. Such a requirement has been imposed under the federal 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)].

Mr. Thomas A. Bucaro
May 8, 2000
Page - 4 -

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

cc: Roy P. Moskowitz
Kathleen Galvez



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12097

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May 10, 2000

Executive Director

Robert J. Freeman

Mr. David G. Reynolds

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

Dear Mr. Reynolds:

I have received your letter of April 2 in which you sought assistance in obtaining information from Chautauqua County, and particularly its District Attorney. In view of your comments, I believe that there are essentially two issues.

First, the title of the Freedom of Information Law may be somewhat misleading, for it is not a vehicle that requires agencies to provide information *per se*; rather, it requires agencies to disclose records to the extent provided by law. As such, while an agency official may choose to answer questions or to provide information by responding to questions, those steps would represent actions beyond the scope of the requirements of the Freedom of Information Law. Moreover, the Freedom of Information pertains to existing records. Section 89(3) of that statute states in part that an agency need not create a record in response to a request.

In the context of your requests, if, for example, there are no records that indicate "the number of instances, per year for the past ten years" that certain agreements or settlements were reached, County officials would not be required to prepare new records that contain the information sought. The same principle would apply with respect to other requests in which you questioned "the number of instances" in which certain actions occurred.

Second, as suggested in the correspondence attached to your letter, pursuant to §160.50 of the Criminal Procedure Law, if charges are dismissed in favor of an accused, the records typically are sealed. In that event, they could be withheld in accordance with §87(2)(a) of the Freedom of Information Law, which pertains to records that "are specifically exempted from disclosure by state or federal statute."

It is also noted that §50-b of the Civil Rights Law prohibits the courts and government agencies in New York from disclosing any records that would identify the victim of a sex offense.

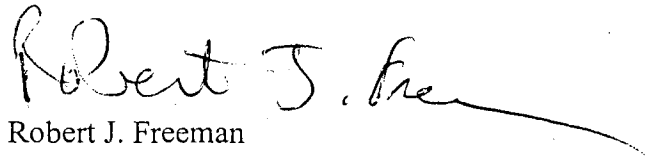
Mr. David G. Reynolds

May 10, 2000

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 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

OML-AO-3157
FOIL-AO-12098

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May 11, 2000

Executive Director

Robert J. Freeman

Mr. Nelson A. Castillo

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

Dear Mr. Castillo:

As you are aware, I have received your letter of April 5, as well as the material relating to it. I hope that you will accept my apologies for leaving the event New York City last week so quickly. A quick departure was necessary to be able to catch a train.

In brief, you have asked whether "Precinct Community Councils of the New York City Police Department" (the Councils) are subject to the Open Meetings and Freedom of Information Laws.

According to regulations apparently promulgated by the New York City Police Department, a Council consists of "a group of concerned individuals who are dedicated to the improvement of relations between the police and the community." Any member of a community at least 18 years of age may join a Council. Councils also sponsor programs and activities for the purpose of maintaining public interest in quality police services. Council meetings are open to the public.

Based on the information that you provided, a Council, in my view, is not subject to the requirements 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 "

Mr. Nelson A. Castillo

May 11, 2000

Page - 2 -

Based on the foregoing, a public body is, in my view, an entity required to conduct public business by means of a quorum that performs a governmental function and carries out its duties collectively, as a body.

Several judicial decisions indicate generally that advisory bodies, other than those consisting of members of a governing body, 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 Newspaper v. Mayor's Intergovernmental Task Force, 145 AD 2d 65, 67 (1989); see also New York Public Interest Research Group v. Governor's Advisory Commission, 507 NYS 2d 798, aff'd with no opinion, 135 AD 2d 1149, motion for leave to appeal denied, 71 NY 2d 964 (1988)]. In one of the decisions, Poughkeepsie Newspaper, supra, the Court found that "[t]he unifying principle running through these decisions is that groups or entities that do not, in fact, exercise the power of the sovereign are not performing a governmental function, hence they are not 'public bod[ies] subject to the Open Meetings Law...' (id.).

It is my understanding that a Council does not have the power or authority to take action on behalf of any government agency. If that is so, it does not perform a governmental function and would not constitute a "public body" subject to the Open Meetings Law. Most analogous to a Council, in my opinion, would be a PTA. PTAs exist to foster good relationships among parents, teachers and schools. Despite its relationship with government, a PTA is not part of the government, and the same would be so in the case of a Council.

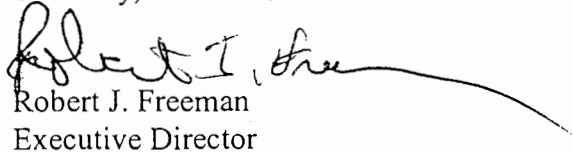
For a similar reason, I do not believe that a Council would be subject to the Freedom of Information Law. That statute pertains to agencies, and §86(3) defines the term "agency" to mean:

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

Since a Council is not a governmental entity performing a governmental function, I believe that its records would fall beyond the coverage of the Freedom of Information Law.

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:jm



STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

FOIL-Ad-12099

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May 12, 2000

Executive Director

Robert J. Freeman

Ms. Shawn M. Schultz
C.A.T.D.
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 letter, which reached this office on April 6. Attached is a copy of a "draft study" prepared for the Town of Rotterdam that was made available to you following a series of deletions.

You asked initially whether you are "within [your] rights to request under what statute each area of the report was redacted." From my perspective, although the Town's Appeals Officer did not refer to a specific section of law as the basis for deletions, his explanation alluded to a particular provision as the basis for each. That provision, §87(2)(g), pertains to "intra-agency materials" and permits an agency to deny access to records that are:

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

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

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

Ms. Shawn M. Schultz

May 12, 2000

Page - 2 -

You added that you are concerned with respect to a comment offered at the end of the determination of your appeal indicating that the Appeals Officer would suggest that the Town Board be informed of requests for records made to the Town Clerk that may involve "sensitive issues." In conjunction with the foregoing, you asked who makes the final determination as to what is accessible. Ultimately or perhaps indirectly, as the governing body, the Town Board, has the responsibility for insuring compliance with the Freedom of Information Law.

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

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

In this instance, the governing board of a public corporation, the Town of Rotterdam, is the Town Board, and the Board is required to promulgate appropriate rules and regulations consistent with those adopted by the Committee on Open Government and with the Freedom of Information Law.

The initial responsibility to deal with requests is borne by an agency's records access officer, and the Committee's regulations provide direction concerning the designation and duties of a records access officer. Specifically, §1401.2 of the regulations provides in relevant part that:

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

As such, the Town Board has the duty to designate "one or more persons as records access officer". In towns, the clerk is usually so designated in view of the functions of that position. Section 1401.2(b) of the regulations describes the duties of a records access officer and states that:

"The records access officer is responsible for assuring that agency personnel:

- (1) Maintain an up-to-date subject matter list.
- (2) Assist the requester in identifying requested records, if necessary.

(3) Upon locating the records, take one of the following actions:

- (i) make records promptly available for inspection; or
- (ii) deny access to the records in whole or in part and explain in writing the reasons therefor.

(4) Upon request for copies of records:

- (i) make a copy available upon payment or offer to pay established fees, if any; or
- (ii) permit the requester to copy those records.

(5) Upon request, certify that a record is a true copy.

(6) Upon failure to locate the records, certify that:

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

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" (§1401.7).

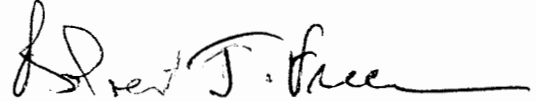
Ms. Shawn M. Schultz

May 12, 2000

Page - 4 -

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". The signature is fluid and cursive, with a long horizontal stroke at the end.

Robert J. Freeman
Executive Director

RJF:jm

cc: John DeGeorgio
Town Board



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-A0-12100

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Carole E. Stone
Alexander F. Treadwell

May 15, 2000

Executive Director

Robert J. Freeman

Ms. Judy Braiman
Empire State Consumer Association
50 Landsdowne Lane
Rochester, NY 14618

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

Dear Ms. Braiman:

I have received your correspondence of April 6. In brief, you have questioned whether a private college is subject to the Freedom of Information Law due to its receipt of government funds.

In short, the receipt of funding from government is not the factor that determines whether the Freedom of Information Law is applicable. That statute pertains to agencies, and §86(3) defines the term "agency" to mean:

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

Based on the foregoing, the Freedom of Information Law applies to governmental entities; it does not apply to private entities, such as private colleges, notwithstanding their receipt of government funding.

I hope that the preceding 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: William W. Wood



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AD-12101

Committee Members

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May 15, 2000

Executive Director

Robert J. Freeman

Ms. Helen I. Ficke

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

Dear Ms. Ficke:

I have received your letter of April 4 and the correspondence attached to it, all of which relates to your efforts in obtaining information from the City of Long Beach.

Having reviewed your requests, it is emphasized that the title of the Freedom of Information Law may be somewhat misleading, for it is not a vehicle that requires agencies to provide information per se; rather, it requires agencies to disclose records to the extent provided by law. As such, while an agency official may choose to answer questions or to provide information by responding to questions, those steps would represent actions beyond the scope of the requirements of the Freedom of Information Law. Moreover, the Freedom of Information pertains to existing records. Section 89(3) of that statute states in part that an agency need not create a record in response to a request. Therefore, insofar as information sought does not exist in the form of a record or records, the Freedom of Information Law would not apply.

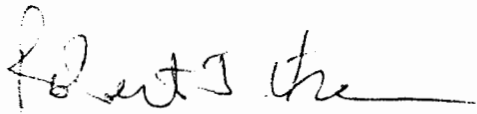
When an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession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

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

Ms. Helen I. Ficke
May 15, 2000
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: Joel Asarch



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AJ-12102

Committee Members

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May 16, 2000

Executive Director

Robert J. Freeman

Mr. Daryl Baldwin



The staff of the Committee 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. Baldwin:

I have received your letter of April 10 in which you sought guidance concerning a request to inspect the "DARE Program teaching materials" used by the Gloversville School District. Your request was apparently denied on the ground that the materials are copyrighted. You also questioned whether you have a right to inspect the materials pursuant to the "Hatch amendment."

In this regard, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. This office has neither the jurisdiction nor the expertise to offer guidance concerning the Hatch Act. As such, the following comments will focus on the Freedom of Information Law.

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

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

Based on the foregoing, assuming that the materials in question are in possession of the District, I believe that they clearly constitute "records" subject to rights conferred by the Freedom of Information Law.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. I note, too, that it has been held by the state's highest court that curricular materials

Mr. Daryl Baldwin
May 16, 2000
Page - 2 -

maintained by a government run educational institution are agency records that fall within the coverage of the Freedom of Information Law and that none of the grounds for denial would apply [Russo v. Nassau County Community College, 81 NY2d 690 (1993)].

Third, when records are accessible under the Freedom of Information Law, they are available for inspection and copying [see §87(2)]. However, if materials in possession of a government agency are copyrighted, the issue involves the effect of a claim of copyright protection. In terms of the ability of a citizen to use an access law to assert the right to reproduce copyrighted material, the matter has been considered by the U.S. Department of Justice with respect to copyrighted materials, and its analysis as it pertains to the federal Freedom of Information Act is, in my view, pertinent to the issue as it arises under the state Freedom of Information Law.

The initial aspect of its review involved whether the exception to rights of access analogous to §87(2)(a) of the Freedom of Information Law requires that copyrighted materials be withheld. The cited provision states that an agency may withhold records that are "specifically exempted from disclosure by state or federal statute." Virtually the same language constitutes a basis for withholding in the federal Act [5 U.S.C. 552(b)(3)]. In the fall 1983 edition of FOIA Update, a publication of the Office of Information and Privacy at the U.S. Department of Justice, it was stated that:

"On its face, the Copyright Act simply cannot be considered a 'nondisclosure' statute, especially in light of its provision permitting full public inspection of registered copyrighted documents at the Copyright Office [see 17 U.S.C. 3705(b)]."

Since copyrighted materials are available for inspection, I agree with the conclusion that records bearing a copyright could not be characterized as being "specifically exempted from disclosure...by...statute."

The next step of the analysis involves the Justice Department's consideration of the federal Act's exception (exemption 4) analogous to §87(2)(d) of the Freedom of Information Law in conjunction with 17 U.S.C. §107, which codifies the doctrine of "fair use". Section 87(2)(d) permits an agency to withhold records that "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise." Under §107, copyrighted work may be reproduced "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research" without infringement of the copyright. Further, the provision describes the factors to be considered in determining whether a work may be reproduced for a fair use, including "the effect of the use upon the potential market for or value of the copyrighted work" [17 U.S.C. §107(4)].

According to the Department of Justice, the most common basis for the assertion of the federal Act's "trade secret" exception involves "a showing of competitive harm," and in the context of a request for a copyrighted work, the exception may be invoked "whenever it is determined that the copyright holder's market for his work would be adversely affected by FOIA disclosure" (FOIA Update, supra). As such, it was concluded that the trade secret exception:

Mr. Daryl Baldwin

May 16, 2000

Page - 3 -

"stands as a viable means of protecting commercially valuable copyrighted works where FOIA disclosure would have a substantial adverse effect on the copyright holder's potential market. Such use of Exemption 4 is fully consonant with its broad purpose of protecting the commercial interests of those who submit information to government... Moreover, as has been suggested, where FOIA disclosure would have an adverse impact on 'the potential market for or value of [a] copyrighted work,' 17 U.S.C. §107(4), Exemption 4 and the Copyright Act actually embody virtually congruent protection, because such an adverse economic effect will almost always preclude a 'fair use' copyright defense... Thus, Exemption 4 should protect such materials in the same instances in which copyright infringement would be found" (id.).

Conversely, it was suggested that when disclosure of a copyrighted work would not have a substantial adverse effect on the potential market of the copyright holder, the trade secret exemption could not appropriately be asserted. Further, "[g]iven that the FOIA is designed to serve the public interest in access to information maintained by government," it was contended that "disclosure of nonexempt copyrighted documents under the Freedom of Information act should be considered a 'fair use'" (id.).

In my opinion, due to the similarities between the federal Freedom of Information Act and the New York Freedom of Information Law, the analysis by the Justice Department could properly be applied when making determinations regarding the reproduction of copyrighted materials maintained by entities of government in New York. In sum, if reproduction of copyrighted works would "cause substantial injury to the competitive position of the subject enterprise," i.e., the holder of the copyright, in conjunction with §87(2)(d) of the Freedom of Information Law, it would appear that an agency could preclude reproduction of the work.

In this instance, since you indicated that you would like to inspect the materials, and that you do not want a copy, I believe, in conjunction with the preceding remarks, that you have the right to do so.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Paul Fiacco

Officer Harzinski



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AD-12103

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Carole E. Stone
Alexander F. Treadwell

May 17, 2000

Executive Director

Robert J. Freeman

E-Mail

TO: Kathleen E. Wise [REDACTED]

FROM: Robert J. Freeman, Executive Director R J F

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

Dear Ms. Wise:

I have received your letter of April 8 in which you suggested that parents should have the right to review surveys in possession of school districts prior to their administration and completion by students. You contend that parents cannot "have a voice if they don't know what's happening."

In this regard, I offer the following comments.

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

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

Based on the language quoted above, once a survey comes into the possession of an agency, such as a school district, I believe that it constitutes a "record" subject to rights of access.

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

Ms. Kathleen E. Wise

May 17, 2000

Page - 2 -

Third, notwithstanding the foregoing, there is nothing in the Freedom of Information Law or any other law of which I am aware that would require a school district, on its own initiative and without a request for such a record, to disclose a survey in advance of its administration to students. While a survey would likely have to be disclosed following a request made pursuant to the Freedom of Information Law, a school district, in my opinion, would not be obliged to disclose the survey or its intent to administer the survey absent such a request.

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

RJF:jm

cc: Superintendent, Mount Markham School



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12104

Committee Members

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May 17, 2000

Executive Director

Robert J. Freeman



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

Dear 

I have received your letter of April 10, as well as a variety of correspondence relating to it. You have sought an opinion concerning public rights of access to "the substance of a complaint and related documents that were known to be made by" a named individual "concerning her daughter's alleged mistreatment by a School Administrator" in the Utica City School District.

In this regard, I offer the following comments.

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

Second, relevant to 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. Only parents of students under the age of eighteen or students themselves who have reached that age would have rights of access to education records or the ability to authorize disclosure to a member of the public.

Third, based on the judicial interpretation of the Freedom of Information Law, it has consistently been advised that unsubstantiated complaints, allegations or charges against public employees may be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §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].

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

May 17, 2000

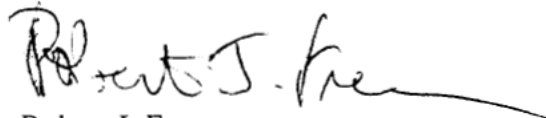
Page - 3 -

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)].

In short, if there has been no determination to the effect that an employee engaged in misconduct, I believe that a denial of access based upon considerations of privacy would be consistent with law.

I hope that the foregoing serves to clarify your understanding of applicable 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 F. Bruno



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AJ-12105

Committee Members

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May 17, 2000

Executive Director

Robert J. Freeman

Mr. Danny L. Duprey
Executive Director
Ogdensburg Bridge & Port Authority
One Bridge Plaza
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. Duprey:

I have received your letter of April 21 concerning the propriety of your response to a certain request made under the Freedom of Information Law.

In short, the applicant requested "a complete listing" indicating the full names, titles, salaries and public office addresses of every employee of the Authority, a "complete listing containing the telephone numbers" of each employee, and the e-mail addresses of employees. Further, he specified that he did not request the information on paper, but rather in electronic form, and that it be e-mailed to him.

In response, you indicated that the payroll list would be faxed, for those records are maintained only in paper format. You provided the central business telephone number for the authority and its central e-mail address and added that "home or private" telephone numbers and "private or personal e-mail addresses for individuals" could be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy."

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to existing records, and §89(3) of that statute provides in part that an agency need not create a record in order to satisfy a request. Therefore, if, for instance, the list of employees is maintained only on paper and the Authority lacks the capacity to generate the list electronically, I do not believe that you would be obliged to develop an electronic database containing the contents of the list in an effort to accommodate the applicant. Similarly, if there is no "complete listing" of the telephone numbers of each employee, the Authority in my view would not be required to prepare such a record.

Mr. Danny L. Duprey
May 17, 2000
Page - 2 -

Second, while I agree that employees' home telephone numbers may be withheld, I believe their business telephone numbers must be disclosed. As you are aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

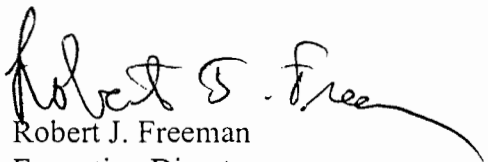
Of significance in this instance is §87(2)(b), which enables an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy", although the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public employees. It is clear that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. Further, the courts have found that, as a general rule, records that are relevant to the performance of a public employee's official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980; Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

From my perspective, one's home telephone number is irrelevant to one's duties and, therefore, may be withheld. However, there is nothing "personal" about the phone number used or assigned to an employee at his or her place of employment; it is used and relates to the performance of one's official duties.

Lastly, with respect to e-mail addresses, I have been led to believe by those with expertise in computer technology that a disclosure of a list of e-mail addresses could effectively preclude an agency from carrying out its functions if the list is used inappropriately. If that is so, two grounds for denial may be applicable. Section 87(2)(f) authorizes an agency to deny access when disclosure would "endanger the life or safety of any person"; §87(2)(i) permits an agency to withhold "computer access codes."

I hope that 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-3158
FOIL-AO-12106

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May 18, 2000

Executive Director

Robert J. Freeman

Hon. Lauren Ayers
Guilderland Town Councilmember
425 Danna Joelle Drive
Schenectady, NY 12303

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

Dear Councilmember Ayers:

As you are aware, I have received your letter of April 7 and the materials attached to it. You have raised a series of questions relating to an incident involving the death of a Town resident while in police custody.

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

However, viewing the matter from a more technical perspective, one of the functions of a public body involves acting collectively, as an entity. A town board, as the governing body of a public corporation, generally acts by means of motions carried by an affirmative vote of a majority of its total membership (see General Construction Law, §41). In my view, in most instances, a board member acting unilaterally, without the consent or approval of a majority of the total membership of the board, has the same rights as those accorded to a member of the public, unless there is some right conferred upon a board member by means of law or rule. In such a case, a member seeking records could presumably be treated in the same manner as the public generally.

Your last question is related to the first, for you asked whether the public has "a right to know of people who die while in police custody, or can government withhold this information?" From my perspective, it is likely that some aspects of the records must be disclosed, while others 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 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.

Of possible relevance is §87(2)(b) of the Freedom of Information Law, which states that an agency may withhold records or portions thereof that:

"if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article...."

In addition, §89(2)(b) lists a series of examples of unwarranted invasions of personal privacy, the first two of which pertain to:

- "i. disclosure of employment, medical or credit histories or personal references or applicants for employment;
- ii. disclosure of items involving the medical or personal records of a client or patient in a medical facility..."

In y view, a record of a medical emergency or similar 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)).

I believe that 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 description of an event would not likely constitute an unwarranted invasion of personal privacy. Further, the fact of one's death in police custody would, in my opinion, be public.

On the other hand, medical records, and perhaps other aspects of the records relating to the deceased, family members, or witnesses, for example, might, depending on the content of the records, might be withheld on the ground that disclosure would constitute an unwarranted invasion of privacy.

Also pertinent may be §87(2)(g), which enables an agency to withhold records that:

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

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

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

The records in question may include autopsy and related records prepared by a coroner. If that is so, §87(2)(a) would be applicable. That provision pertains to records that "are specifically exempted from disclosure by state or federal statute, and one such statute, §677(3)(b) of the County Law, 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 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.

Hon. Lauren Ayers

May 18, 2000

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Lastly, you asked whether a "violation of the open meetings law" would have occurred if the members of the Town Board met in private to discuss the incident. Without additional facts, I cannot offer unequivocal guidance. However, as a general matter, the Open Meetings Law applies to meetings of public bodies, and §102(1) of the Law defines the term "meeting" to mean "the official convening of a public body for the purpose of conducting public business". I note 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)].

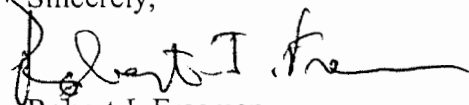
I point out that the decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that so-called "work sessions" and similar gatherings held for the purpose of discussion, but without an intent to take action, fell outside the scope of the Open Meetings Law. In discussing 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).

In short, based upon the direction given by the courts, if a majority of the public body, such as a town board, gathers to conduct the business of the body, in their capacities as board members, such a gathering, in my opinion, would ordinarily constitute a "meeting" subject to the Open Meetings Law.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12107

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Wade S. Norwood
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Carole E. Stone
Alexander F. Treadwell

May 19, 2000

Executive Director

Robert J. Freeman

Mr. Gerard Foote
97-A-2344
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. Foote:

I have received your letter of February 21 and the correspondence attached to it. Based on the materials, the Records Access Officer for the Office of Queens County District Attorney determined that various records that you requested would be made available upon payment of the requisite fee. Although you sent the proper amount, you had not yet received the records of the date of your letter to this office. In addition, you referred to a denial of your request for a felony complaint and "Grand Jury Synopsis Sheet."

You have sought assistance in the matter, and in this regard, I offer the following comments.

First, if you have tendered the proper amount in payment for copies of records determined to be available, I believe that an agency has the responsibility to promptly prepare photocopies and transmit them to the applicant [see Freedom of Information Law, §89(3)]. In the event that you have not yet received the records, a copy of this response will be sent, as a reminder, to the records access officer.

Second, the response to your request indicates that the felony complaint "is not the People's file." If the Office of the District Attorney does not maintain that record, it has no obligation to acquire a copy on your behalf. It is suggested that you seek a copy of that record from the clerk of the appropriate court pursuant to Judiciary Law, §255.

Lastly, while I am not familiar with the content of the "Grand Jury Synopsis Sheet", 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". One such statute, §190.25(4) of the Criminal Procedure Law deals with grand jury proceedings and provides in relevant part that:

Mr. Gerard Foote

May 19, 2000

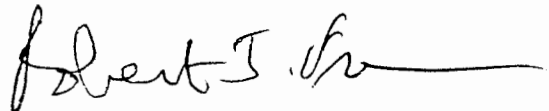
Page - 2 -

"Grand jury proceedings are secret, and no grand juror, or other person specified in subdivision three of this section or section 215.70 of the penal law, may, except in the lawful discharge of his duties or upon written order of the court, disclose the nature or substance of any grand jury testimony, evidence, or any decision, result or other matter attending a grand jury proceeding."

As such, records involving grand jury proceedings are generally outside the scope of rights conferred by the Freedom of Information Law. Any disclosure of those records would be based upon a court order or perhaps a vehicle authorizing or requiring disclosure that is separate and distinct from the Freedom of Information Law.

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

Sincerely,

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: Leslie Brovner



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-A0-12108

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Alexander F. Treadwell

May 19, 2000

Executive Director

Robert J. Freeman

Mr. Wayne Benson
96-A-0672
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. Benson:

I have received your undated letter in which you sought assistance concerning an unanswered request for records made to the Laboratory Corporation of America in Burlington, North Carolina under the federal Freedom of Information Act and the New York Freedom of Information Law.

In this regard, I do not believe that the entity to which your request was made is subject to the laws that you cited.

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

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

Based on the foregoing, the Freedom of Information Law is generally applicable to entities of state and local government in New York; it does not apply to private organizations or to any entity beyond the borders of New York.

Similarly, the federal Freedom of Information Act applies to federal agencies; it does not apply to private companies.

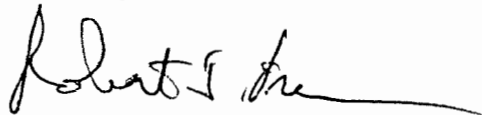
Mr. Wayne Benson

May 19, 2000

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", 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 A - 12109

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May 19, 2000

Executive Director

Robert J. Freeman

Mr. Ronald J. Hall
96-A-5913
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. Hall:

I have received your letter of February 14 and the materials attached to it. You have sought assistance in relation to a request directed to your facility for records concerning two incidents in which you were involved. Although the receipt of your request was acknowledged, it referred to only one among several categories of the records sought. In an earlier request, you asked that records disclosed "be organized and categorized, chronologically under topics, headers, indexes, etc.", that a "cover sheet" summarize the contents of the records, and that a list be prepared identifying each document withheld with the basis for denial.

In this regard, I offer the following comments.

First, it is noted at the outset that the Freedom of Information Law pertains to existing records, 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 the records sought do not exist, the Freedom of Information Law would not apply.

In a related vein, there is no requirement that records made available be arranged or identified in any particular manner or that a "cover sheet" or similar document be prepared concerning the content of records made available. Further, I am unaware of any provision of the Freedom of Information Law or judicial decision that would require that a denial at the agency level identify every record withheld or a description of the reason for withholding each document be given. Such a requirement has been imposed under the federal Freedom of Information Act, which may involve the preparation of a so-called "Vaughn index" [see Vaughn v. Rosen, 484 F.2D 820 (1973)]. Such an index provides an analysis of documents withheld by an agency as a means of justifying a denial

Mr. Ronald J. Hall

May 19, 2000

Page - 2 -

and insuring that the burden of proof remains on the agency. Again, I am unaware of any decision involving the New York Freedom of Information Law that requires the preparation of a similar index. Further, one decision suggests the preparation of that kind of analysis might in some instances subvert the purpose for which exemptions are claimed. In that decision, an inmate requested records referring to him as a member of organized crime or an escape risk. In affirming a denial by a lower court, the Appellate Division found that:

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

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. Since I am unaware of the contents of the records in which you are interested, or the effects of their disclosure, I cannot offer specific guidance. Nevertheless, the following paragraphs will review the provisions that may be significant in determining rights of access to the records in question.

Of potential significance is section 87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". That provision might be applicable relative to the deletion of identifying details in a variety of situations, i.e., where a record identifies a confidential source or a witness, for example.

Perhaps the most relevant provision concerning access to records maintained by law enforcement agencies is section 87(2)(e), which permits an agency to withhold records that:

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

i. interfere with law enforcement investigations or judicial proceedings;

ii. deprive a person of a right to a fair trial or impartial adjudication;

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

iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in subparagraphs (i) through (iv) of section 87(2)(e).

Another possible ground for denial is section 87(2)(f), which permits withholding to the extent that disclosure "would endanger the life or safety of any person". The capacity to withhold on that basis is dependent upon the facts and circumstances concerning an event.

The last relevant ground for denial is section 87(2)(g). The cited provision permits an agency to withhold records that:

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

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

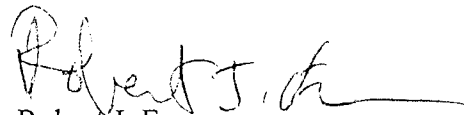
It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations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

Records prepared by employees of an agency and communicated within the agency or to another agency would in my view fall within the scope of section 87(2) (g). Those records might include opinions or recommendations, for example, that could be withheld.

Mr. Ronald J. Hall
May 19, 2000
Page - 4 -

I hope that I have been of some 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: Todd J. Wilhelm



STATE OF NEW YORK
DEPARTMENT OF STATE
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Alexander F. Treadwell

May 23, 2000

Executive Director

Robert J. Freeman

Mr. Paul F. Kulniszewski
Historic Erie Railroad Depot
1385 Erie Road
Darien Center, NY 14040

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

Dear Mr. Kulniszewski:

I have received your letter of April 20, as well as your more recent, undated correspondence. You have sought assistance in obtaining records indicating real property taxes paid in relation to a certain parcel in the Town of Darien.

In this regard, I offer the following comments.

First, pursuant to the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), each agency is required to designate one or more persons as "records access officer." That person has the duty of coordinating an agency's response to requests, and a request should ordinarily be made to him or her. In the majority of towns, the town clerk is the records access officer, for he or she is the custodian of all town records (see Town Law, §30). Irrespective of which Town official received the request, I believe that he or she should have responded in a manner consistent with the Freedom of Information Law or forwarded the request to the records access officer.

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

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

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

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

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

Third, it is emphasized that the Freedom of Information Law pertains to existing records, and that §89(3) states in part that an agency need not create a record in response to a request. Insofar as the records of your interest no longer exist, the Freedom of Information Law would not be applicable.

Next, 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. Tax bills would, in my view, clearly be accessible, for none of the grounds for denial would apply.

Moreover, long before the enactment of the Freedom of Information Law, it was established by the courts that records pertaining to the assessment of real property are generally available [see e.g., Sears Roebuck & Co. v. Hoyt, 107 NYS 2d 756 (1951); Sanchez v. Papontas, 32 AD 2d 948 (1969)]. For instance, index cards containing a variety of information concerning specific parcels of real property have long been accessible to the public. As early as 1951, it was held that the contents of a so-called "Kardex" system used by assessors were available. The records determined to be available were described as follows:

"Each card, approximately nine by seven inches (comprising the Kardex System), contains many printed items for insertion of the name of the owner, selling price of the property, mortgage, if any, frontage, unit price, front foot value, details as to the main building, including type, construction, exterior, floors, heating, foundation, basement, roofing, interior finish, lighting, in all, some eighty subdivisions, date when built or remodeled, as well as details as to

Mr. Paul F. Kulniszewski
May 23, 2000
Page - 3 -

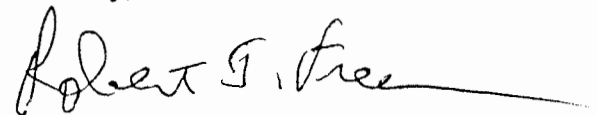
any minor buildings" [Sears Roebuck & Co. v. Hoyt, *supra*, 758; see also Property Valuation Analysts v. Williams, 164 AD 2d 131 (1990)].

Lastly, it is noted that assessment rolls and related documents have been found judicially to be available to the public, whether they are maintained in paper or computer tape format, and irrespective of the purpose for which a request is made.

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,

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: Town Board
Town Clerk
Elizabeth Lawson, Assessor



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AJ-12111

Committee Members

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May 23, 2000

Executive Director

Robert J. Freeman

Mr. Dmitri Loguinov

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

Dear Mr. Loguinov:

I have received your undated letter and the correspondence attached to it. You have sought my views concerning the propriety of a denial of your request for records by the Putnam County Sheriff's Office. The records relate to a citation issued to you by a deputy sheriff.

From my perspective, some of the records were properly withheld; others, however, should 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.

Among the records sought are certain training records pertaining to the deputy. Here I direct your attention to the initial ground for denial, §87(2)(a), which relates to records that "are specifically exempted from disclosure by state or federal statute." One such statute, §50-a of the Civil Rights Law, states that personnel records pertaining to police officers that are used to evaluate performance toward continued employment or promotion cannot be disclosed without the consent of the police officer or a court order. As such, I believe that the training records were properly withheld.

The remaining records were apparently withheld on the ground that they were "compiled for law enforcement purposes and disclosure would: 1. Interfere with Law Enforcement investigation or judicial proceedings [or] Reveal criminal investigative techniques or procedures." The language quoted above is derived from §87(2)(e), which permits an agency to withhold records that:

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

- i. interfere with law enforcement investigations or judicial proceedings;
- ii. deprive a person of a right to a fair trial or impartial adjudication;
- iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
- iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

As I understand the request, many of the records sought were prepared or received in the ordinary course of business, rather than for a law enforcement purpose. If that is so, the rationale for the denial of access would be inappropriate.

Insofar as the records were indeed compiled for law enforcement purposes, I believe that they may be withheld only to the extent that the harmful effects described in §87(2)(e) would arise by means of disclosure. That provision would appear to be most relevant with respect to your request for procedures involving the issuance of citations is subparagraph (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).

Mr. Dmitri Loguinov

May 23, 2000

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"Indicative, but not necessarily dispositive of whether investigative techniques are nonroutine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel (see Cox v. United States Dept. of Justice, 576 F2d 1302, 1307-1308; City of Concord v. Ambrose, 333 F Supp 958)."

In applying those criteria to specific portions of the manual, which was compiled for law enforcement purposes, the Court found that:

"Chapter V of the Special Prosecutor's Manual provides a graphic illustration of the confidential techniques used in a successful nursing home prosecution. None of those procedures are 'routine' in the sense of fingerprinting or ballistic tests (see Senate Report No. 93-1200, 93 Cong 2d Sess [1974]). Rather, they constitute detailed, specialized methods of conducting an investigation into the activities of a specialized industry in which voluntary compliance with the law has been less 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).

As the Court of Appeals has suggested, to the extent that the records in question include descriptions of investigative techniques which if disclosed would enable potential lawbreakers to evade detection or endanger the lives or safety of law enforcement personnel or others [see also, Freedom of Information Law, §87(2)(f)], a denial of access would be appropriate. I would conjecture, however, that not all of the investigative techniques or procedures contained in the records sought incident and the ensuing investigation could be characterized as "non-routine", and that it is unlikely that disclosure of each aspect of the records would result in the harmful effects of disclosure described above.

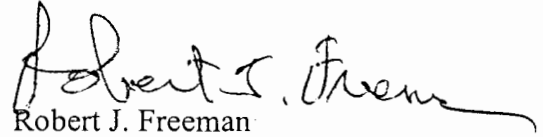
Mr. Dmitri Loguinov

May 23, 2000

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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 is positioned above the printed name and title.

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Robert D. Thoubboron, Sheriff



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AD-3159
FOIL-AD-12112

Committee Members

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May 23, 2000

Executive Director

Robert J. Freeman

Mr. Anthony M. Tesorio
Mr. Joseph Calarco
Auburn Enlarged City School District
78 Thornton Avenue
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 Board President Tesorio and Vice-President Calarco:

I have received your letter of April 16 in which you sought an advisory opinion in relation to the Open Meetings Law, as well as access to certain records. Although the following comments will not describe in detail the events that you presented, they will focus on the provisions and principles of law that are pertinent.

First, following a decision by the Board of Education to negotiate new contracts with the District's Superintendent and Associate Superintendent, information relating to the matter was reported in a local newspaper, despite the fact that the issue was discussed in executive session. A board member thereafter called for a special meeting, indicating that its purpose was to discuss "the employment of person." The Superintendent, however, later informed you that he asked the member to call for the meeting and that its purpose was, in your words, "to discuss the leak to the paper..." The meeting was held and an executive session was conducted, despite your protest. You added that an additional topic was discussed during the executive session, a request by a newspaper for records of "expenses incurred by the board attorney and convention expenses incurred by the board and the administration."

From my perspective, as you described the topics considered, there would not have been any basis for entry into executive session.

By way of background, the Open Meetings Law is based on a presumption of openness. In short, meetings of public bodies must be conducted in public, except to the extent that an executive session may properly be held. Further, the Law requires that a procedure be accomplished in public before an executive session may be held. Specifically, §105(1) states in relevant part that:

Mr. Anthony M. Tesorio
Mr. Joseph Calarco
May 23, 2000
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“Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only, provided, however, that no action be formal vote shall be taken to appropriate public moneys...”

Paragraphs (a) through (h) of §105(1) specify and limit the topics that may properly be considered during an executive session.

Again, based on your description of the matter, consideration of a leak to the news media would not have fallen with any of the grounds for entry into executive session. Similarly, a discussion of a request for records under the Freedom of Information Law would not, in my view, have been a proper topic for discussion in executive session. Moreover, the motion made for entry into executive session did not accurately reflect the subjects that were discussed.

With respect to the subject of leaks to the news media, I note that there is nothing inherently confidential about information said or heard during an executive session.

In this regard, both the Open Meetings Law and the Freedom of Information Law are permissive. While the Open Meetings Law authorizes public bodies to conduct executive sessions in circumstances described in paragraphs (a) through (h) of §105(1), there is no requirement that an executive session be held even though a public body has right to do so. Further, the introductory language of §105(1), which prescribes a procedure that must be accomplished before an executive session may be held, clearly indicates that a public body "may" conduct an executive session only after having completed that procedure. If, for example, a motion is made to conduct an executive session for a valid reason, and the motion is not carried, the public body could either discuss the issue in public, or table the matter for discussion in the future. Similarly, although the Freedom of Information Law permits an agency to withhold records in accordance with the grounds for denial, it has been held by the Court of Appeals that the exceptions are permissive rather than mandatory, and that an agency may choose to disclose records even though the authority to withhold exists [Capital Newspapers v. Burns], 67 NY 2d 562, 567 (1986)].

I am unaware of any statute that would prohibit a Board member from disclosing the kind of information at issue. Further, even when information might have been obtained during an executive session properly held or from records marked "confidential", I note that the term "confidential" in my view has a narrow and precise technical meaning. For records or information to be validly characterized as confidential, I believe that such a claim must be based upon a statute that specifically confers or requires confidentiality.

For instance, if a discussion by a board of education concerns a record pertaining to a particular student (i.e., in the case of consideration of disciplinary action, an educational program, an award, etc.), the discussion would have to occur in private and the record would have to be withheld insofar as public discussion or disclosure would identify the student. As you may be aware,

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the Family Educational Rights and Privacy Act (20 USC §1232g; "FERPA") 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).

Second, after the meeting, you requested minutes of the executive session. Section 106 of the Open Meetings Law pertains to minutes and states that:

"1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.

2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.

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

I point out that, as a general rule, a public body may take action during a properly convened executive session [see Open Meetings Law, §105(1)]. In the case of most public bodies, if action is taken during an executive session, minutes reflective of the action, the date and the vote must be recorded in minutes pursuant to §106(2) of the Law. If no action is taken, there is no requirement

Mr. Anthony M. Tesorio
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that minutes of the executive session be prepared. Various interpretations of the Education Law, §1708(3), however, indicate that, except in situations in which action during a closed session is permitted or required by statute, a school board cannot take action during an executive session [see United Teachers of Northport v. Northport Union Free School District, 50 AD 2d 897 (1975); Kursch et al. v. Board of Education, Union Free School District #1, Town of North Hempstead, Nassau County, 7 AD 2d 922 (1959); Sanna v. Lindenhurst, 107 Misc. 2d 267, modified 85 AD 2d 157, aff'd 58 NY 2d 626 (1982)]. Stated differently, based upon judicial interpretations of the Education Law, a school board generally cannot vote during an executive session, except in rare circumstances in which a statute permits or requires such a vote. In this instance, I believe that any action or final vote by Board should have occurred during an open meeting.

The remaining issues involve your requests for records, which include a contract with the teachers' union, records of expenses to which reference was made earlier, and "lost time" records relating to leave time used by the Superintendent. Based on the judicial interpretation of the Freedom of Information Law, those records would be available not only to you as Board members, but to any member of the public.

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

A contract, such as a collective bargaining agreement, would, in my opinion, clearly be available, for none of the grounds for denial would be applicable.

With respect to "lost time" records and records reflective of expenses incurred by public officers and employees, two of the grounds for denial are relevant. However, those records, based on judicial decisions, must be disclosed in great measure, if not in their entirety.

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 "lost time" or 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)].

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

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

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

Based on the preceding analysis, it is clear in my view that attendance records, including those concerning the use or accrual of sick leave, for instance, must be disclosed under the Freedom of Information Law.

Lastly, with regard to records indicating charges by or payments to a school district attorney and others, I believe that 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

Mr. Anthony M. Tesorio
Mr. Joseph Calarco
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disclosure by state or federal statute" (see Civil Practice Law and Rules, section 4503). Therefore, while some identifying details or descriptions of services rendered found in the records sought might justifiably be withheld, numbers indicating the amounts expended and other details to be discussed further are in my view accessible under the Freedom of Information Law.

There may be other grounds for denial that would apply with regard to attorneys' bills or similar records pertaining to legal work performed for a school district. For instance, insofar as those kinds of records identify or could identify particular students, I believe that they must be withheld. As indicated earlier, FERPA exempts records from disclosure. In general, that statute provides that any "education record," a term that is broadly defined, that is personally identifiable to a particular student or students is confidential, unless the parents of students under the age of eighteen waive their right to confidentiality, or unless a student eighteen years or over similarly waives his or her right to confidentiality.

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

Whether the provisions or situations described above would be relevant with respect to the particular records at issue is unknown to me. In a decision dealing with what might have been 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.)

Mr. Anthony M. Tesorio
Mr. Joseph Calarco
May 23, 2000
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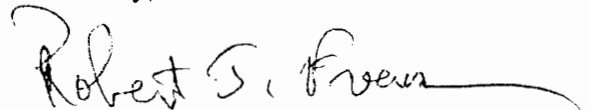
"There appear to be no New York cases which specifically address how much of a fee arrangement must be revealed beyond the name of the client, the amount billed and the terms of the agreement. However, the United States Court of Appeals, in interpreting federal law, has found that questions pertaining to the date and general nature of legal services performed were not violative of client confidentiality. (Cotton v. United States, 306 F.2d 633.) In that Court's analysis such information did not involve the substance of the matters was not privileged...

"...Respondents have not justified their refusal to obliterate any and all information which would reveal the date, general nature of service rendered and time spent. While the Court can understand that in a few limited instances the substance of a legal communication might be revealed in a billing statement, Respondents have failed to come forward with proof that such information is contained in each and every document so as to justify a blanket denial of disclosure. Conclusory characterizations are insufficient to support a claim of privilege. (Church of Scientology v. State of New York, 46 NY 2d 906, 908.)...Therefore, Petitioner's request for disclosure of the fee, type of matter and names of parties to pending litigation on each billing statement must be granted."

In my view, disclosure of information analogous to that described in Knapp would be required.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: William Miller



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12113

Committee Members

Mary O. Donohue
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Website Address: <http://www.dos.state.ny.us/coog/coogwww.html>

May 23, 2000

Executive Director

Robert J. Freeman

Mr. Stephen Roberts
93-A-7854
Mohawk Correctional Facility
P.O. Box 8451
Rome, NY 13442-8451

Dear Mr. Roberts:

I have received your letter of May 22 in which you appealed to this office under the Freedom of Information Law.

In this regard, the Committee on Open Government is authorized to offer advice and opinions concerning the Freedom of Information Law. The Committee is not empowered to 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 thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12114

Committee Members

Mary O. Donohue
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May 23, 2000

Executive Director

Robert J. Freeman

E-Mail

TO: Dorothy Parker [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. Parker:

I have received your letter in which you sought advice in appealing a denial of a request on the ground that the agency claims that it does not possess the records. It is your contention that the agency, the New York City Police Department, is obligated to maintain the records of your interest.

In this regard, if indeed the Department is required to maintain the records, it is suggested that you cite or refer to the provision that imposes such an obligation. In addition, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." I recommend that you request 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.

RJF:jm



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Committee Members

Mary O. Donohue
Alan Jay Gerson
Walter W. Grunfeld
Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
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Website Address: <http://www.dos.state.ny.us/coog/coogwww.html>

May 24, 2000

Executive Director

Robert J. Freeman

Mr. Randolph Drakes



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

Dear Mr. Drakes:

I have received your letter of April 13, which was faxed to this office on April 20. Having reviewed an opinion addressed to you on February 23, you contended that officials of the Banking Department "intentionally misled" me and that those with whom I communicated "are not knowledgeable about the operations of the operating divisions within the Banking Department."

In this regard, first, when I speak with agency officials or others, it is assumed that they are acting in good faith and that the information that they provide is accurate.

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)].

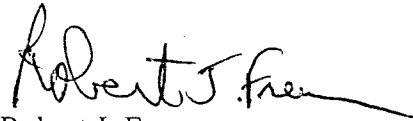
Mr. Randolph Drakes

May 24, 2000

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:jm

cc: Christine Cardi
Sara A. Kelsey
Ted McElroy



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FUJL-AO-12116

Committee Members

Mary O. Donohue
Alan Jay Gerson
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May 24, 2000

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 April 21. From my perspective, the only "new issue" that you raised involves a contention that "employee college transcripts" are "exempt pursuant to FERPA."

In my view, transcripts maintained by an employer regarding an employee would not be subject to FERPA or exempt from disclosure pursuant to that statute. However, it has been held that transcripts maintained by a school district regarding its employees may be withheld under the Freedom of Information Law on the ground that disclosure would constitute an unwarranted invasion of personal privacy (see Steinmetz v. Board of Education, Supreme Court, Suffolk County, NYLJ, October 30, 1980).

I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12117

Committee Members

Mary O. Donohue
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May 24, 2000

Executive Director

Robert J. Freeman

Mr. James K. Specht



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

Dear Mr. Specht:

I have received your letter of April 19 and the correspondence attached to it. The materials relate to your request made to the Suffolk County Civil Service Department for copies of the 1999 Police Exam, the answer key used to grade the exam, and the answer key that you submitted. The Department denied the request, citing "examination security" as the basis, and you appealed the denial to the County Attorney. As of the date of your letter to this office, there had been no response to the appeal.

In this regard, I offer the following comments.

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

Section 87(2)(h) states that an agency may withhold records or portions thereof that "are examination questions or answers which are requested prior to the final administration of such questions." As such, insofar as examination questions will be used in the future, both the questions and the answers may be withheld.

Also relevant is §87(2)(g), which enables an agency to withhold records that:

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

- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. Similarly, in my view, examination questions would not constitute the kind of information that falls within the categories of accessible information reflected in subparagraphs (i) through (iv) of §87(2)(g).

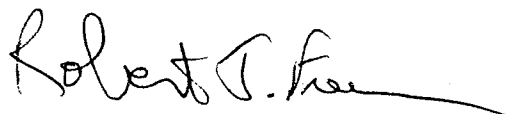
Second, with respect to your appeal, §89(4)(a) of the Freedom of Information Law states in relevant part that:

"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."

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 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: Allen Hartvik
Robert Cimino
Derrick Robinson



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12118

Committee Members

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Wade S. Norwood
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Carole E. Stone
Alexander F. Treadwell

May 24, 2000

Executive Director

Robert J. Freeman

Ms. Shari Dewey Collins
Vice President
LOCAL 2574, AFSCME
80 Sherman Street
Belfast, NY 14711

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

Dear Ms. Collins:

I have received your letter of April 21. You have complained with respect to a failure by the Allegany County Board of Legislators to respond to your request for records. Further, you expressed the belief that the agency does not maintain a "reasonably detailed current list by subject matter" of its 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:

Ms. Shari Dewey Collins
May 24, 2000
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 pertains to existing records, and an agency is not required to create a record in response to a request [see §89(3)]. However, an exception that rule relates to the subject of your inquiry. Specifically, §87(3) of the Freedom of Information Law states in relevant part that:

"Each agency shall maintain...

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

The "subject matter list" required to be maintained under §87(3)(c) is not, in my opinion, required to identify each and every record of an agency; rather I believe that it must refer, by category and in reasonable detail, to the kinds of records maintained by an agency. Further, the regulations promulgated by the Committee on Open Government state that such a list should be sufficiently detailed to enable an individual to identify a file category of the record or records in which that person may be interested [21 NYCRR 1401.6(b)]. I emphasize that §87(3)(c) does not require that an agency ascertain which among its records must be made available or may be withheld. Again, the Law states that the subject matter list must refer, in reasonable detail, to the kinds of records maintained by an agency, whether or not they are available.

It has been suggested that the records retention and disposal schedules developed by the State Archives and Records Administration at the State Education Department may be used as a substitute for the subject matter list. It is suggested that you ask to review the retention schedule applicable to the College. Alternatively, you could request a copy of the schedule from the State Archives and Records Administration by calling (518)474-6926.

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 Chairman of the Board of Legislators.

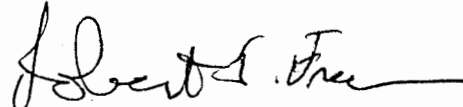
Ms. Shari Dewey Collins

May 24, 2000

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

cc: Hon. Ed Sherman, Chairman



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12119

Committee Members

Mary O. Donohue
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May 25, 2000

Executive Director

Robert J. Freeman

Ms. Marsha T. Glassman



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

Dear Ms. Glassman:

I have received your letter of April 24 and appreciate your kind words. You have sought guidance concerning a situation in which substantial portions of records have been withheld and asked whether there is an investigative or similar agency that you may contact when you believe that an agency has failed to disclose records as required by law.

In this regard, first, as you may be aware, the Committee on Open Government is authorized to offer advice and opinions concerning the Freedom of Information Law. While the opinions rendered by this office are not binding and the Committee cannot compel an agency to grant or deny access to records, it is my hope that the opinions are educational and persuasive, and that they enhance compliance with and understanding of the Freedom of Information Law. There is no other governmental entity that oversees the operation of that statute.

If you believe that a denial of access to records is inconsistent with law and the denial is sustained following an appeal, you have 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.

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.

The records at issue in your correspondence were withheld in part pursuant to §87(2)(g) of the Freedom of Information Law. While that provision potentially serves as a basis for a denial of access, due to its structure, it frequently requires substantial disclosure. Specifically, the cited provision permits an agency to withhold records that:

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

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

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

Pertinent 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. 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)].

I note that it has been held that factual information appearing in narrative form, as well as those portions appearing in numerical or tabular form, is available under §87(2)(g)(i). For instance, in Ingram v. Axelrod, the Appellate Division held that:

"Respondent, while admitting that the report contains factual data, contends that such data is so intertwined with subject analysis and opinion as to make the entire report exempt. After reviewing the report in camera and applying to it the above statutory and regulatory criteria, we find that Special Term correctly held pages 3-5 ('Chronology of Events' and 'Analysis of the Records') to be disclosable. These pages are clearly a 'collection of statements of objective information logically arranged and reflecting objective reality'. (10 NYCRR 50.2[b]). Additionally, pages 7-11 (ambulance records, list of interviews) should be disclosed as 'factual data'. They also contain factual information upon which the agency relies (Matter of Miracle Mile Assoc. v Yudelson, 68 AD2d 176, 181 mot for lve to app den 48 NY2d 706). Respondents erroneously claim that an agency record necessarily is exempt if both factual data and opinion are intertwined in it; we have held that '[t]he mere fact that some of the data might be an estimate or a recommendation does not convert it into an expression of opinion' (Matter of Polansky v Regan, 81 AD2d 102, 104; emphasis added). Regardless, in the instant situation, we find these pages to be strictly factual and thus clearly disclosable" [90 AD 2d 568, 569 (1982)].

Similarly, the Court of Appeals has specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

"While the reports in principle may be exempt from disclosure, on this record - which contains only the barest description of them - we cannot determine whether the documents in fact fall wholly within the scope of FOIL's exemption for 'intra-agency materials,' as claimed by respondents. To the extent the reports contain 'statistical or factual tabulations or data' (Public Officers Law section 87[2][g][i]), or other material subject to production, they should be redacted and made available to the appellant" [Xerox Corp. v. Town of Webster, 65 NY2d 131, 133 (1985)].

In short, even though statistical or factual information may be "intertwined" with opinions, the statistical or factual portions, if any, as well as any policy or determinations, would be available, unless a different ground for denial may properly be asserted.

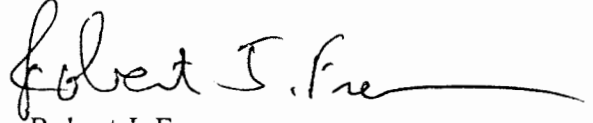
Ms. Marsha Glassman

May 25, 2000

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: Thomas Litsky
Terrell Brown



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12120

Committee Members

Mary O. Donohue
Alan Jay Gerson
Walter W. Grunfeld
Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Carole E. Stone
Alexander F. Treadwell

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May 26, 2000

Executive Director

Robert J. Freeman

Mr. Joseph Schuster

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

Dear Mr. Schuster:

I have received your letter of April 24 in which you complained that a request made to the Division of Human Rights for copy of a signed agreement to which you are a party had not been answered.

In this regard, I offer the following comments.

First, pursuant to the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), each agency is required to designate one or more persons as "records access officer." That person has the duty of coordinating an agency's response to requests, and a request should ordinarily be made to him or her. Irrespective of which official received the request, I believe that he or she should have responded in a manner consistent with the Freedom of Information Law or forwarded the request to the records access officer.

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

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

If neither a response to a request nor an acknowledgement of 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. Joseph Schuster

May 26, 2000

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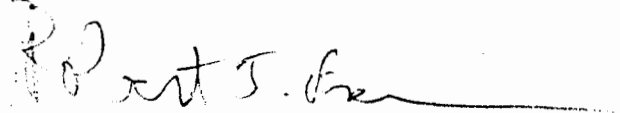
that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...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 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. Jerome H. Blue



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AD-12121

Committee Members

Mary O. Donohue
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May 26, 2000

Executive Director

Robert J. Freeman

Mr. Paul Priore

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

Dear Mr. Priore:

I have received your note, which is appended to a letter of April 24 addressed to Susan H. Simon, Acting Counsel for the New York City Department of Parks and Recreation. You asked that I "advise" with respect to the letter and the materials attached to it.

In view of our previous correspondence and the substance of Ms. Simon's response to you of April 11, in an effort to offer advice, I reiterate the essence of her statement. Specifically, the title of the Freedom of Information Law may be somewhat misleading, for it is not a vehicle that requires agencies to provide information per se; rather it is a statute that may require agencies to disclose existing records. Similarly, §89(3) of the Freedom of Information Law provides in part that an agency is not required to create a record in response to a request. In short, while agency officials may choose to answer questions or offer explanations of their actions or the contents of records, they are not required to do so by 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: Susan H. Simon



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-A-12122

Committee Members

Mary O. Donohue
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May 26, 2000

Executive Director

Robert J. Freeman

Ms. Nancy Harrigan
Planning Board Member
P.O. Box 603
Hague, NY 12836

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

Dear Ms. Harrigan:

I have received your letter of April 26, which you prepared in your capacity as a member of the Planning Board of the Town of Hague.

According to your letter, following the Board's review of draft minutes of meetings, the draft is corrected, and a vote is taken to accept the minutes as amended. Board members do not receive a copy of the final version of the minutes, and when you asked the Town Clerk for final copies of the minutes for the past six meetings, "she informed [you] they are kept in the locked office of the Zoning Administrator and he had informed her [you] could see them only when he was in the office." You have raised questions concerning the propriety of the practice, the "preservation and storage" of minutes of meetings of boards that function for the Town, and access to the minutes by board members, as well as the public.

In this regard, I offer the following comments.

First, although the records at issue may be in the physical custody of the Zoning Administrator, §30 of the Town Law states that all town records are in the legal custody of the Town Clerk. Therefore, even though the Clerk does not have physical possession of the records sought, I believe that she has legal custody of the records.

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

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

In this instance, the governing board of a public corporation, the Town of Hague, is the Town Board, and I believe that the Board is required to promulgate appropriate rules and regulations consistent with those adopted by the Committee on Open Government and with the Freedom of Information Law.

The initial responsibility to deal with requests is borne by an agency's records access officer, and the Committee's regulations provide direction concerning the designation and duties of a records access officer. Specifically, §1401.2 of the regulations provides in relevant part that:

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

As such, the Town Board has the ability to designate "one or more persons as records access officer". Further, §1401.2(b) of the regulations describes the duties of a records access officer and states in part that:

"The records access Officer is responsible for assuring that agency personnel:

- (1) Maintain an up-to-date subject matter list.
- (2) Assist the requester in identifying requested records, if necessary.
- (3) Upon locating the records, take one of the following actions:
 - (i) make records promptly available for inspection; or
 - (ii) deny access to the records in whole or in part and explain in writing the reasons therefor.
- (4) Upon request for copies of records:

Ms. Nancy Harrigan

May 26, 2000

Page - 3 -

- (i) make a copy available upon payment or offer to pay established fees, if any; or
 - (ii) permit the requester to copy those records.
- (5) Upon request, certify that a record is a true copy.
- (6) Upon failure to locate the records, certify that:
- (i) the agency is not the custodian for such records; or
 - (ii) the records of which the agency is a custodian cannot be found after diligent search."

In most towns, the town clerk is the designated records access officer. If that is so in this instance, the Clerk has the duty of coordinating the Town's response to requests for records. Therefore, at her direction, I believe that the Zoning Administrator must either turn the records over to the Clerk or disclose the records to the extent ordered by the Clerk.

Second, in a related vein, when a request for records is made under the Freedom of Information Law, §89(3) of that statute requires that an agency respond within five business days. A failure on the part of the Zoning Administrator or any other Town official to disclose records or inform the records access officer that a request has been made would effectively preclude the records access officer from carrying out her duty to coordinate the Town's response to requests and respond to requests in a manner consistent with law.

Third, with respect to the preservation and storage 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..."

I note, too, that §57.19 of the Arts and Cultural Affairs Law states in part that a town clerk is the "records management officer" for a town and that in that role, the clerk "shall coordinate the development of and oversee" a "program for the orderly and efficient management of records".

Lastly, any person would have a right of access to the minutes. In construing the Freedom of Information Law, it has been held that accessible records should be made equally available to any

Ms. Nancy Harrigan

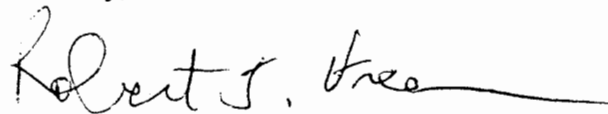
May 26, 2000

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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)]. Further, if it is clear that records are requested in the performance of one's official duties, the request might not be viewed as having been made under the Freedom of Information Law. In such a situation, if a request is reasonable, and in the absence of a board rule or policy to the contrary, I believe that a member of the board should not generally be required to resort to the Freedom of Information Law in order to seek or obtain records. In my view, that should be so in this instance, for minutes of meetings are clearly accessible to anyone.

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:jm

cc: Town Clerk
Zoning Administrator



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-A0-12123

Committee Members

Mary O. Donohue
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May 31, 2000

Executive Director
Robert J. Freeman

Mr. Anthony Rein

Dear Mr. Rein:


I have received your undated letter, which reached this office on May 1, as well as the materials attached to it. You have sought assistance in obtaining information relating to your assessment from the Town of Barker.

Based on a review of the correspondence, I contacted Christine Gillette, the Town Clerk, who informed me that the Town has disclosed to you all of the records that the Town maintains concerning your property and its assessment. As she inferred, the title of the Freedom of Information Law may be somewhat misleading, for it is not a vehicle that requires agencies to provide information per se; rather it is a statute that may require agencies to disclose existing records. Similarly, §89(3) of the Freedom of Information Law provides in part that an agency is not required to create a record in response to a request. In short, while agency officials may choose to answer questions or offer explanations of their actions or the contents of records, they are not required to do so by the Freedom of Information Law.

In short, I believe that the Town has satisfied its obligations in relation to your requests made under the Freedom of Information Law.

I hope that the foregoing serves to enhance your understanding of the matter and regret that I cannot be of greater assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Christine L. Gillette, Town Clerk



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

oml-AO-3165
FOIL-AO-12124

Committee Members

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May 31, 2000

Executive Director

Robert J. Freeman

Patricia and Thomas Pawlaczyk

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

Dear Mr. and Ms. Pawlaczyk:

I have received your letter of April 27, as well as the materials attached to it. You have raised issues relating to both the Open Meetings and Freedom of Information Laws.

You referred to a meeting characterized as an "emergency meeting" by the Village of Bergen Administrator and indicated that she (the Village Administrator) stated that the Village was not obligated by law to provide notice of the meeting to the official newspaper. She added that she did provide notice to the official newspaper, but that the newspaper did not print "any public notification of this meeting."

In this regard, the Open Meetings Law requires that notice be posted and given to the news media prior to every meeting of a public body, such as a village board of trustees. Specifically, §104 of that statute provides that:

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

2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.

3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

Stated differently, if a meeting is scheduled at least a week in advance, notice of the time and place must be given to the news media and to the public by means of posting in one or more designated public locations, not less than seventy-two hours prior to the meeting. If a meeting is scheduled less than a week an advance, again, notice of the time and place must be given to the news media and posted in the same manner as described above, "to the extent practicable", at a reasonable time prior to the meeting. Although the Open Meetings Law does not make reference to "special" or "emergency" meetings, if, for example, there is a need to convene quickly, the notice requirements can generally be met by telephoning or faxing notice of the time and place of a meeting to the local news media and by posting notice in one or more designated locations.

The Open Meetings Law does not specify that notice of a meeting must be given to the official newspaper. In some instances, the official newspaper may be a weekly publication, and notice in some circumstances might be more appropriately given to a daily newspaper or radio station, for example. Further, to comply with the Open Meetings Law, a public body is not required to pay to place a legal notice in a newspaper or to "advertise" that a meeting will be held at a certain time and place; a public body must merely "give" notice to the news media and post the notice. In some circumstances, public bodies have given notice to the news media, and the newspapers or radio stations in receipt of the notices have chosen not to print or publicize the meetings to which the notices relate. In those cases, despite the failure of a notice to be publicized, a public body would have complied with law.

I note that 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:

Patricia and Thomas Pawlaczyk

May 31, 2000

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"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.

The second issue involves a resolution approved "to allow the Village attorneys to rehire [an] environmental consulting firm." Nevertheless, you wrote that the minutes of the meeting indicate that the matter was discussed during an executive session held "to discuss potential litigation." You asked whether "the attorneys hiring the consulting firm [will] restrict using FOIL to gain access to information about this public project."

With respect to the propriety of the executive session, the provision in the Open Meetings Law 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. Since potential litigation could be the subject or result of nearly any topic discussed by a public body, an executive session could not in my view be held to discuss an issue merely because there is a possibility of litigation; in my opinion, only to the extent that public body discusses its litigation strategy could an executive session be properly held under §105(1)(d).

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

As I understand the matter, that the attorneys for the Village were given the authority to hire a consulting firm would not remove the records prepared by the firm for the Village from 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 records prepared by a consulting firm *for* the Village would constitute Village records that fall within the coverage of the Freedom of Information Law.

I note that under §3101(d) of the Civil Practice Law and Rules, material prepared for litigation is shielded from disclosure. However, 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. Moscydlowski, 58 AD 2d 234 (1977)]. It is my understanding that the records prepared by the consulting firm would not be prepared solely for litigation.

It appears that the only pertinent ground for denial would be §87(2)(g), which permits an agency to withhold records that:

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

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

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

determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

In a discussion of the issue of records prepared by consultants for agencies, the Court of Appeals stated that:

"Opinions and recommendations prepared by agency personnel may be exempt from disclosure under FOIL as 'predecisional materials, prepared to assist an agency decision maker***in arriving at his decision' (McAulay v. Board of Educ., 61 AD 2d 1048, aff'd 48 NY 2d 659). Such material is exempt 'to protect the deliberative process of government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers (Matter of Sea Crest Const. Corp. v. Stubing, 82 AD 2d 546, 549).

"In connection with their deliberative process, agencies may at times require opinions and recommendations from outside consultants. It would make little sense to protect the deliberative process when such reports are prepared by agency employees yet deny this protection when reports are prepared for the same purpose by outside consultants retained by agencies. Accordingly, we hold that records may be considered 'intra-agency material' even though prepared by an outside consultant at the behest of an agency as part of the agency's deliberative process (see, Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD 2d 546, 549, supra; Matter of 124 Ferry St. Realty Corp. v. Hennessy, 82 AD 2d 981, 983)" [Xerox Corporation v. Town of Webster, 65 NY 2d 131, 132-133 (1985)].

Based upon the foregoing, records prepared by a consultant for an agency may be withheld or must be disclosed based upon the same standards as in cases in which records are prepared by the staff of an agency. It is emphasized that the Court in Xerox specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

"While the reports in principle may be exempt from disclosure, on this record - which contains only the barest description of them - we cannot determine whether the documents in fact fall wholly within the scope of FOIL's exemption for 'intra-agency materials,' as claimed by respondents. To the extent the reports contain 'statistical or factual tabulations or data' (Public Officers Law section 87[2][g][i]), or other material subject to production, they should be redacted and made available to the appellant" (id. at 133).

Patricia and Thomas Pawlaczyk
May 31, 2000
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Therefore, a record prepared by a consultant for an agency would be accessible or deniable, in whole or in part, depending on its contents.

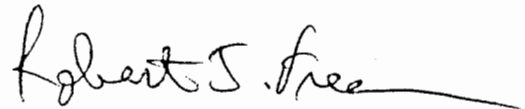
The Court in the Gould decision cited earlier dealt with the issue of what constitutes "factual data" that must be disclosed under §87(2)(g)(i). In its consideration of the matter, the Court found that:

"...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][i]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182)." (Gould, supra, 276-277).

In accordance with the direction offered by the Court of Appeals, insofar as records prepared by a consultant for the Village consist of statistical or factual information, it would appear that they must be disclosed.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees
Tracy Jong



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12125

Committee Members

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Wade S. Norwood
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Joseph J. Seymour
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Alexander F. Treadwell

May 31, 2000

Executive Director

Robert J. Freeman

Ms. Arlene Green

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

Dear Ms. Green:

I have received your letter of April 27 in which you sought an advisory opinion concerning a failure on the part of the Town of Wallkill to respond to your request for records.

In this regard, I offer the following comments.

First, pursuant to the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), each agency is required to designate one or more persons as "records access officer." That person has the duty of coordinating an agency's response to requests, and a request should ordinarily be made to him or her. In the majority of towns, the town clerk is the records access officer, for he or she is the custodian of all town records (see Town Law, §30). Irrespective of which Town official received the request, I believe that he or she should have responded in a manner consistent with the Freedom of Information Law or forwarded the request to the records access officer.

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

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

May 31, 2000

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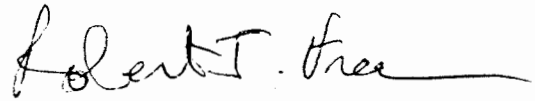
If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively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

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: Hon. Tom Nosworthy
Hon. Jeanne Gervasi



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12126

Committee Members

Mary O. Donohue
Alan Jay Gerson
Walter W. Grunfeld
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May 31, 2000

Executive Director

Robert J. Freeman

Mr. Robert Sears

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

Dear Mr. Sears:

I have received your letter, which reached this office on May 1, as well as the materials attached to it.

You indicated that you were an unsuccessful candidate in a village election and that you want to "see the paper roll to check on the votes [you] did get." Your request to do so, however, was refused. Based on my understanding of the Election Law, which was confirmed by an attorney for the State Board of Elections, there is no general right of public access to the kind of record in which you are interested.

In this regard, although the Freedom of Information Law provides broad rights of access, the first ground for denial, §87(2)(a), would, in my view, be pertinent in the context of your inquiry. That provision pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §9-124 of the Election Law, which states in subdivision (1) that:

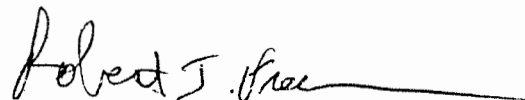
"After the returns of the canvass are made out and signed, the inspectors shall enclosed the protested, void and wholly blank ballots and the ballots cast in affidavit envelopes in a separate sealed envelope or envelopes and endorse thereon a certificate signed by each of them stating the number of the district and the number of ballots contained in such envelope or envelopes. The inspectors shall then tie up and seal the other voted ballots and return them to the ballot box which contained them and securely lock and seal the box, except that at elections in which voting machines are used, absentee and military, special federal, special presidential and emergency ballots and stubs, if any, shall be sealed in the envelope or envelopes provided therefor."

Mr. Robert Sears
May 31, 2000
Page - 2 -

Based on the foregoing, I believe that the records of your interest must be sealed and, therefore, are exempt from disclosure for purposes of the Freedom of Information Law.

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, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Delores E. Bogart



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12127

Committee Members

Mary O. Donohue
Alan Jay Gerson
Walter W. Grunfeld
Gary Lewi
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Wade S. Norwood
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May 31, 2000

Executive Director

Robert J. Freeman

Mr. Timothy E. Mahler
Systems Manager
Dutchess County Office of Computer
Information Systems
31-33 Haight Avenue
Poughkeepsie, NY 12603-2448

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

Dear Mr. Mahler:

I have received your letter of May 1 in which you sought my views concerning the fees that may be charged for the duplication of records maintained electronically by the County. You referred specifically to a request for certain data "in electronic format." The data sought was printed out, and after that was learned by the applicant, you received a letter from the applicant indicating that he/she would like the data on paper at a cost of twenty-five cents per page. Nevertheless, substantial time and effort were expended to reach the point at which a printout could be generated.

In this regard, by way of background, §87(1)(b)(iii) of the Freedom of Information Law contains two standards relating to the fees that may be charged for reproducing records. One involves photocopying, in which case an agency may charge up to twenty-five cents per photocopy up to nine by fourteen inches. The other involves other records, i.e., those that cannot be photocopied, such as data stored in a computer, computer tapes or disks, audio and video recordings, etc. In those instances, an agency may charge up to the "actual cost of reproduction." In the situation that you described, the County generated a paper document from information stored in a computer; it did not prepare a photocopy from an existing record, and the County in my view may, therefore, assess its fee based on the actual cost of producing that document.

By way of background, as you may be aware, the Freedom of Information Law pertains to agency records, and §86(4) defines the term "record" expansively to mean:

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

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

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

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

"Public Officers Law [section] 87(2) provides that, 'Each agency shall...make available for public inspection and copying all records...' Section 86(4) includes in its definition of 'record', computer tapes or discs. The policy underlying the FOIL is 'to insure maximum public access to government records' (Matter of Scott, Sardano & Pomerantz v. Records Access Officer, 65 N.Y.2d 294, 296-297, 491 N.Y.S.2d

289, 480 N.E.2d 1071). Under the circumstances presented herein, it is clear that both the statute and its underlying policy require that the DOB comply with Brownstone's reasonable request to have the information, presently maintained in computer language, transferred onto computer tapes" [166 Ad 2d, 294, 295 (1990)].

In another decision that cited Brownstone, it was held that: "[a]n agency which maintains in a computer format information sought by a F.O.I.L. request may be compelled to comply with the request to transfer information to computer disks or tape" (Samuel v. Mace, Supreme Court, Monroe County, December 11, 1992). That decision involved a request for a school district wide mailing list in the form of computer generated mailing labels. Since the district had the ability to generate the labels, the court ordered it to do so.

The issue of fees for generating computerized information was considered in some detail in Schulz v. New York State Board of Elections (Supreme Court, Albany County, September 7, 1995), in which it was held that:

"The language of the Freedom of Information Law (Public Officers Law, sec. 87(1)(b)(iii), which limits charges for requested public records to 'the actual cost of reproducing' [emphasis added], is elucidating. 'Actual cost' would reasonably seem to mean more finite, direct and less inclusive than '[indirect] cost', which is a concept as infinite and expandable as the mind of man. 'Reproducing' a record certainly does not include 'producing' a record in the first place - i.e., compiling the information from which the record is produced. The purpose and intention of the Freedom of Information Law is to further the concept of open government. For this reason charges for public records must be kept to a minimum."

Further, using the standard of "actual cost of reproduction", it was stated that:

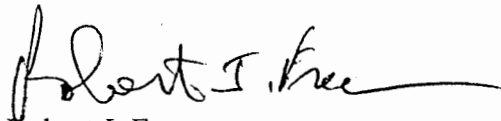
"Where the record is a computerized record the charge shall be limited to the cost of a diskette or other computerized tape and a reasonable amount for the salary of the employee downloading said diskette or tape during the time such diskette or tape is being downloaded."

In the context of your inquiry, again, transferring the data to paper did involve making a photocopy of an existing record. Therefore, I believe that you may assess a fee based on the standard described above in Schulz.

Mr. Timothy E. Mahler
May 31, 2000
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 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-12128

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May 31, 2000

Executive Director

Robert J. Freeman

Mr. Janusz Muszak

The staff of the Committee on Open 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 May 6. You wrote that a friend gave your wife power of attorney and asked that she represent him/her during a pre-trial divorce conference. When the "Special Matrimonial Referee" conducting the conference stated that your wife had no right to do so, she made a request under the Freedom of Information Law for "any paragraph of any law that verifies" that your wife could not represent her friend. The Referee, who is also a law clerk to a justice of the Supreme Court, indicated that the matter is exempt from the Freedom of Information Law, and you have sought my opinion on the matter.

In this regard, 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."

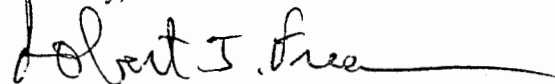
Based on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law.

Mr. Janusz Muszak
May 31, 2000
Page - 2 -

Further, even if the same or a similar request had been made to an "agency", I do not believe that it would have been valid or consistent with law. In essence, your wife sought 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 made, for example, for "section 255 of the Judiciary 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 would not, in my view, be a proper request for a record as envisioned by 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,

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-12129

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June 5, 2000

Executive Director

Robert J. Freeman

Mr. Richard Simpson
86-A-5912 B-1-13
P.O. Box 2001
Dannemora, NY 12929

Dear Mr. Simpson:

I have received your undated letter, which reached this office on June 1. Citing the federal Freedom of Information and Privacy Acts as the basis for your request, you have sought information that would enable you to locate the "appropriate agency" to which you might submit your "primary request." You referred the airing on ABC World News of your videotaped confession given to a district attorney. As I understand the matter, you were promised during the confession that a recording would not be broadcast, and you have contended that the promise was violated. As such, you have asked for the name of "the specific agency to which [you] may file [your] request for proof of the May 10, 00 airing of this video-taped confession."

In short, I know of no such agency, and in this regard, I offer the following comments.

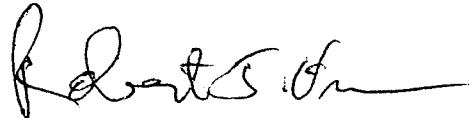
First, this office is a New York State agency. Consequently, it is not subject to the federal Freedom of Information or Privacy Acts. Second, those statutes pertain to records maintained by federal agencies. A private company, such as ABC or any other network, or a newspaper, for example, would not constitute an "agency" and, therefore, would not be subject to the federal Acts to which you referred. Similarly, the New York Freedom of Information Law pertains to records maintained by state and local government in New York. Like the federal Act, its state counterpart does not extend to records maintained by private entities. Third, the federal and the New York statutes deal with access to existing records; you sought information rather than records, and in my view, the request was inconsistent with those statutes.

In short, I am unaware of any government agency that would provide you with proof that a program aired. Nevertheless, I would conjecture that ABC News would sell you a videotape of the program that aired on the date in question.

Mr. Richard Simpson
June 5, 2000
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 extending to the right.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-A0-12130

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June 5, 2000

Executive Director

Robert J. Freeman

Ms. Victoria Szerko

The staff of the Committee on Open 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 April 12. Please accept my apologies for the delay in response. You have questioned the legality of a resolution recently adopted by the Village of Fleischmanns that limits the time that a member of the public may inspect records to one hour a day. In addition, you questioned the value of the Freedom of Information Law in view of the absence of sanctions when an agency fails to comply.

In this regard, first, 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:

Ms. Victoria Szerko

June 5, 2000

Page - 2 -

“(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].

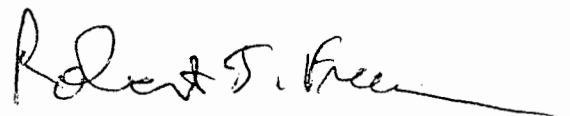
Based on the foregoing, the Village, in my view, cannot limit a persons’s ability to inspect records to a period less than its regular business hours.

Second, with respect to sanctions, I note that a recent decision involved a situation in which a person initiated an action under the Freedom of Information Law and prevailed in court, which ordered the disclosure of the records sought. When the agency official failed to do so, he was ordered to pay attorney’s fees and was cited for contempt. In addition to the initial amount to be paid, the official and the agency were also required to pay fifty dollars a day each for each day following the issuance of the order that the records were not made available [see C.B. Smith v. County of Rensselaer, Supreme Court, Rensselaer County, May 17, 2000].

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

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FDL-AO-12131

Committee Members

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June 5, 2000

Executive Director

Robert J. Freeman

Mr. Leslie Latimer
87-A-8124
Otisville Correctional Facility
P.O. Box 8
Otisville, NY 10963

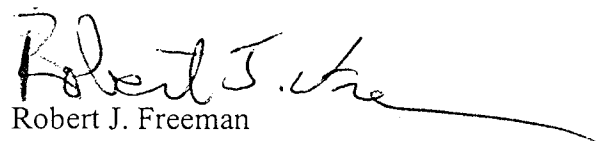
Dear Mr. Latimer:

I have received your letter of February 19 in which you criticized the content of an opinion addressed to you on February 14. Having reviewed that opinion, I see no reason to amend or reconsider my comments.

For purposes of clarification, however, I would agree that if a list of inmates housed in a particular unit at a certain time exists, such a list should be available based on the requirements of the Freedom of Information Law and the holding in Bensing v. LeFevre [506 NYS 2d 822 (1986)]. Nevertheless, in my view, any aspect of such a list or similar record that includes an individual's race 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. In short, while I believe that the names would be available, names coupled with race or ethnicity, for example, could be withheld.

I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-A-12132

Committee Members

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June 5, 2000

Executive Director

Robert J. Freeman

Mr. Eric H. Ramirez
90-A-2972
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. Ramirez:

I have received your letters of February 25, 28 and 29, as well as a letter of March 13. In the three earlier items, you sought advisory opinions concerning your requests for records pertaining to your case from the Division of State Police, the Division of Parole and the Office of the Sullivan County District Attorney. Since your inquiries in some instances may involve issues arising in relation to more than one request, the following comments will deal with principles of law, rather than specific aspects of the requests.

First, the Freedom of Information Law pertains to existing records, and §89(3) states in part that an agency need not create or prepare a record in response to a request. Similarly, an agency is not required to answer questions. Therefore, if, for instance, you seek information regarding "how, when, where and by whom [an] item came into evidence, why it was classified" in a certain manner, you would not have requested records, and the Freedom of Information Law would not have applied.

Second, the phrase "master index" is used in the regulations of the Department of Correctional Services for the purpose of describing the "subject matter list" required to be maintained pursuant to §87(3)(b). That provision requires that agencies maintain a list by subject matter "in reasonable detail" of the records in its possession. As such, the master index is not required to make reference to particular records; rather, it required to indicate the categories of records maintained by an agency, by subject matter. In a related vein, I know of no law that requires the office of a district attorney or any other agency to maintain an index that makes reference to every record in its possession or that pertains to a particular case.

Mr. Eric H. Ramirez
June 5, 2000
Page - 2 -

Third, as you are aware, §89(3) provides that an applicant must reasonably describe the records sought. To meet that standard, an applicant must provide detail appropriate to enable an agency to locate and identify the records.

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

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

Fifth, I believe that the ability to obtain records via discovery provisions is separate and distinct from the ability to do so under the Freedom of Information Law.

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.

In considering the records falling within the scope of your requests, of likely relevance 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. Yudelsohn, 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.

Section 87(2)(g) may be pertinent in relation to your request for records concerning your transfer. In a case dealing with those kinds of records, 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.

Another ground for denial 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. I do not believe, however, that you can invade your own privacy or that your own statement, for example, could justifiably be withheld.

Often the most relevant provision concerning access to records maintained by law enforcement agencies is §87(2)(e), which permits an agency to withhold records that:

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

- i. interfere with law enforcement investigations or judicial proceedings;
- ii. deprive a person of a right to a fair trial or impartial adjudication;
- iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
- iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in subparagraphs (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 may be 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).

Mr. Eric H. Ramirez

June 5, 2000

Page - 8 -

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: William J. Callahan
Lt. Laurie M. Wagner
Hon. Stephen F. Lungen



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AU-12133

Committee Members

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June 7, 2000

Executive Director

Robert J. Freeman

Mr. Bob Allen
Syracuse City School District
725 Harrison 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. Allen:

I have received your note concerning what you characterized as a "new type of request." In short, the application sought information by raising a series of questions.

In this regard, as you are likely aware, the title of the Freedom of Information Law may be somewhat misleading, for it is not a vehicle that requires agencies to provide information per se; rather it is a statute that may require agencies to disclose existing records. Similarly, §89(3) of the Freedom of Information Law provides in part that an agency is not required to create a record in response to a request. In short, while agency officials may choose to answer questions or offer explanations of their actions or the contents of records, they are not required to do so by the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

F01L-AJ-12134

Committee Members

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June 7, 2000

Executive Director
Robert J. Freeman

MEMORANDUM

TO: Anne M. Miller

FROM: Robert J. Freeman, Executive Director *RJF*

I have received a copy of your Freedom of Information Law appeal directed to the Greece Central School District.

For purposes of clarification, the title of the Freedom of Information Law may be somewhat misleading, for it is not a vehicle that requires agencies to provide information per se; rather it is a statute that may require agencies to disclose existing records. Similarly, §89(3) of the Freedom of Information Law provides in part that an agency is not required to create a record in response to a request. In short, while agency officials may choose to answer questions or offer explanations of their actions or the contents of records, they are not required to do so by the Freedom of Information Law.

I hope that the foregoing serves to clarify your understanding of the Freedom of Information Law.

RJF:jm

cc: Donald Nadolinski



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12135

Committee Members

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June 8, 2000

Executive Director

Robert J. Freeman

Mr. Michael R. Kindred
97-A-6458
Upstate Correctional Facility
P.O. Box 2001
Malone, NY 12953

Dear Mr. Kindred:

I have received your letter in which you sought the names and addresses of the persons to whom you may appeal denials of requests made to the City of Albany and the Office of the Albany County District Attorney.

This office maintains no list or directory of appeals officers. However, I believe that the person designated to determine appeals in the City of Albany is Mr. Harold Greenstein, City Hall, Albany, NY 12207. With respect to the Office of the District Attorney, it is suggested that you appeal to Mr. Sol Greenberg, District Attorney, Albany County Courthouse, Albany, NY 12207.

It is unclear whether your appeal would be based on a failure on the part of an agency to respond or a written denial. If you received a written denial, I note that §89(4)(a) of the Freedom of the Freedom of Information Law states that the person denied access has thirty days to appeal. I note, further, however, that the regulations promulgated by the Committee on Open Government require that a written denial of a request for records must inform the applicant of the name and address of the person or body to whom an appeal may be directed [21 NYCRR §1401.7].

I hope that I 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-12136

Committee Members

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June 8, 2000

Executive Director

Robert J. Freeman

Mr. Jerome Curry
98-A-6098
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. Curry:

I have received your letter of February 23 concerning a request that was denied on the ground that you had not demonstrated satisfactorily that you no longer had possession of a record previously made available.

In this regard, based on the decision rendered in Moore v. Santucci [151 AD2d 677 (1989)], if a record was made available to you or your attorney, there must be a demonstration that neither you nor your attorney possesses the record in order to successfully obtain a second copy. Specifically, the decision states that:

"...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

Mr. Jerome Curry

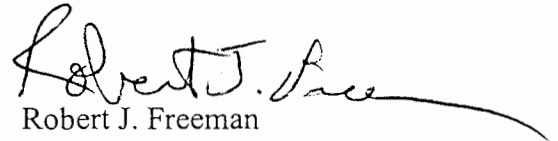
June 8, 2000

Page - 2 -

Based on the foregoing, it is suggested that you contact your attorney to determine whether he or she continues to possess the record. If the attorney no longer maintains the record, he or she should prepare an affidavit so stating that can be submitted to the office of the district attorney.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12137

Committee Members

Mary O. Donohue
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June 9, 2000

Executive Director

Robert J. Freeman

Mr. Frank Bellezza
97-A-4585 HBA-0-26
Sing Sing Correctional Facility
354 Hunter Street
Ossining, NY 10562-5442

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

Dear Mr. Bellezza:

I have received your letter of February 28 in which you referred to an unanswered request made at your facility for "a copy of the mandate authorizing [your] imprisonment."

In this regard, first, I am unfamiliar with any record that would be characterized as a "mandate authorizing imprisonment" other than a sentence pronounced by a judge. If your facility has a copy of a record indicating your sentence, I believe that it should be disclosed. In short, none of the grounds for a denial of access appearing in the Freedom of Information Law would be applicable.

An alternative source of such a record would be the court in which sentence was pronounced. While the courts are not subject to the Freedom of Information Law, court records are generally available from the clerks of courts pursuant to other provisions of law (see e.g., Judiciary Law, §255). As such, a request might be made to the clerk of the appropriate court, citing an applicable provision of law as the basis for the request.

Second, when a request is made to an agency subject to the Freedom of Information Law, that statute provides direction concerning the time and manner in which the agency must respond. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

Mr. Frank Bellezza

June 9, 2000

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:

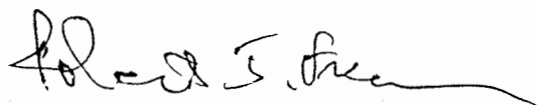
"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial,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

I hope that I 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-12138

Committee Members

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June 9, 2000

Executive Director

Robert J. Freeman

Mr. Dominick Larocco
97-A-6278
Clinton Correctional Facility
P.O. Box 2001
Dannemora, NY 12929

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

Dear Mr. Larocco:

I have received your letter of February 28 in which you asked how you might obtain copies of newspaper articles pertaining to you or your case published in Queens.

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

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

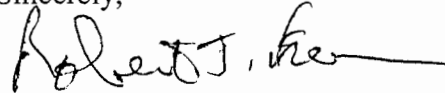
Based on the foregoing, the Freedom of Information Law generally applies to records maintained by entities of state and local government; it does not apply to private entities, such as newspapers.

While the Freedom of Information Law may not be cited to obtain copies of the articles of your interest, I would conjecture that the newspapers themselves would sell copies to you. In some instances, they might have the capacity to locate articles based on a search by name, and it is suggested that you contact the newspapers that you believe published articles of value to you. In addition, public libraries in the vicinity of the event might collect copies of local newspapers.

Mr. Dominick Larocco
June 9, 2000
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-12139

Committee Members

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June 9, 2000

Executive Director

Robert J. Freeman

Mr. Peter D. Costa, Jr.
Ms. Jennifer E. McNamee

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

Dear Mr. Costa and Ms. McNamee:

I have received your recent letter in which you asked what action might be taken when an agency fails to respond to a request made under the Freedom of Information Law.

In this regard, 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:

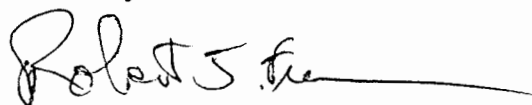
"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial,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

Mr. Peter D. Costa, Jr.
Ms. Jennifer E. McNamee
June 9, 2000
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 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-12140

Committee Members

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Carole E. Stone
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June 9, 2000

Executive Director

Robert J. Freeman

Mr. Alvaro Sanchez
87-A-7358
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. Sanchez:

I have received your letters of February 26 and May 22, and I hope that you will accept my apologies for the delay in response.

You asked, first, for an opinion concerning what constitutes "a diligent search" for records. 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.

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". In a recent decision, it was held that:

"Conclusory certifications made upon information and belief by people without direct knowledge are insufficient to show a diligent search...

"This burden was not met, because respondents failed to certify either that the Police Department did not have the records that it claimed were not in its possession or that it had conducted a diligent search for the records (*Matter of Cuadrado v. Morgenthau*, ___AD2d___, 699 NYS2d 367). Lt. Suarez merely stated that "[b]ased on the information you provided and after searching for the following

Mr. Alvaro A. Sanchez

June 9, 2000

Page - 2 -

requested document(s), this unit was unable to locate' certain documents. It is unclear what role, if any, he played in searching for the documents and whether in fact a diligent search had been conducted" (Bellamy v. The New York City Police Department, First Department, Appellate Division, NYLJ, May 11, 2000; ___AD2d___).

Other decisions indicate that a claim that a diligent search was carried out when "the employee who conducted the actual search for the documents in question submitted an affidavit which provided an adequate basis upon which to conclude that a 'diligent search' for the documents had been made" [Thomas v. Records Access Officer, 613 NYS 2d 929, 205 AD 2d 786 (1994)]. In another recent determination, the Court indicated that "the Assistant District Attorney who headed the related prosecutions affirms that he conducted a diligent search of the District Attorney's file and did not find the requested documents" and that "[t]his statement suffices to satisfy respondent's FOIL obligations" [Lugo v. Galperin, 703 NYS2d 182, ___AD2d___ (2000)].

I note that I am familiar with the legislative history of the Freedom of Information Law and the bill jacket, and that I do not believe that there is any indication of what was intended in relation to the obligation to conduct a "diligent search" for records.

Second, you asked whether "the Office of Character and Fitness" is an agency that must respond to a request made under the Freedom of Information Law. As you may be aware, that statute is applicable to agency records, and §86(3) defines the term "agency" to include:

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

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

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

As such, the Freedom of Information Law excludes the courts and court records from its coverage.

With respect to the character, fitness and discipline of attorneys, §90(10) of the Judiciary Law states that:

"Any statute or rule to the contrary notwithstanding, all papers, records and documents upon the application or examination of any person for admission as an attorney or counsellor at law and upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of an attorney or attorneys, shall be sealed and be

Mr. Alvaro A. Sanchez

June 9, 2000

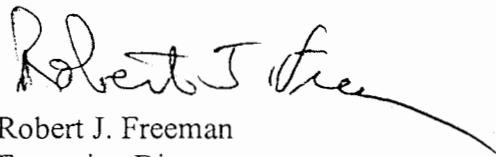
Page - 3 -

deemed private and confidential. However, upon good cause being shown, the justices of the appellate division having jurisdiction are empowered, in their discretion, by written order, to permit to be divulged all or any part of such papers, records and documents. In the discretion of the presiding or acting presiding justice of said appellate division, such order may be made without notice to the persons or attorneys to be affected thereby or upon such notice to them as he may direct. In furtherance of the purpose of this subdivision, said justices are also empowered, in their discretion, from time to time to make such rules as they may deem necessary. Without regard to the foregoing, in the event that charges are sustained by the justices of the appellate division having jurisdiction in any complaint, investigation or proceeding relating to the conduct or discipline of any attorney, the records and documents in relation thereto shall be deemed public records."

Based on the foregoing, when records are subject to §90(10) of the Judiciary Law, I believe that they may be disclosed only in conjunction with that statute, and that the Freedom of Information Law would be inapplicable.

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



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AJ-12141

Committee Members

Mary O. Donohue
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Website Address: <http://www.dos.state.ny.us/coog/coogwww.html>

June 9, 2000

Executive Director

Robert J. Freeman

Mr. Thomas Dallio
88-T-2364
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. Dallio:

I have received your letter of February 28 concerning the requirement that an agency maintain and make available a record that identifies each employee of the agency.

In this regard, by way of historical background, I point out that the Freedom of Information Law as originally enacted in 1974 required only that titles and salaries of law enforcement agency employees be disclosed; their names did not have to be included in a payroll list. However, that version of the Freedom of Information Law was repealed and replaced with the current Freedom of Information Law, which became effective in 1978. Further, subject to one qualification, I believe that the titles and salaries, as well as the names of all public employees, must be disclosed.

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

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:

Mr. Thomas Dallio

June 9, 2000

Page - 2 -

"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.

One of the grounds for denial, §87(2)(b), permits an agency to withhold record or portions of records when disclosure would result in "an unwarranted invasion of personal privacy." However, payroll information has been found by the courts to be available [see e.g., Miller v. Village of Freeport, 379 NYS 2d 517, 51 AD 2d 765, (1976); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NYS 2d 954 (1978)]. Miller dealt specifically with a request by a newspaper for the names and salaries of public employees, and in Gannett, the Court of Appeals held that the identities of former employees laid off due to budget cuts, as well as current employees, should be made available. In addition, this Committee has advised and the courts have upheld the notion that records that are relevant to the performance of the official duties of public employees are generally available, for disclosure in such instances would result in a permissible as opposed to an unwarranted invasion of personal privacy [Gannett, *supra*; Capital Newspapers v. Burns, 109 AD 2d 292, aff'd 67 NY 2d 562 (1986); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980; Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); and Montes v. State, 406 NYS 664 (Court of Claims 1978)]. As stated prior to the enactment of the Freedom of Information Law, payroll records:

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

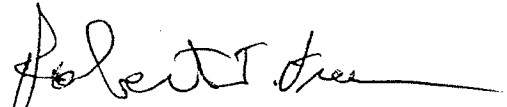
In short, subject to the following qualification, a record identifying agency employees by name, public office address, title and salary must in my view be maintained and made available.

In my opinion, the only exception to rights of access that could appropriately be cited with respect to the payroll record is §87(2)(f). The cited provision states that an agency may withhold records or portions of records when disclosure would "endanger the life or safety of any person." In my view, disclosure of the identities of agency employees, including law enforcement officers, would not in most instances endanger their lives or safety. In rare circumstances in which a law enforcement agency has engaged employees in undercover positions, for example, §87(2)(f) might be cited with justification as a basis for deleting those portions of a payroll record that identify such individuals. Other than in that rare situation, I believe that the payroll record required to be maintained pursuant to §87(3)(b) must be made available.

Mr. Thomas Dallio
June 9, 2000
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: M. Corcoran, Acting Superintendent
Anthony J. Annucci, Counsel



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12142

Committee Members

Mary O. Donohue
Alan Jay Gerson
Walter W. Grunfeld
Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Carole E. Stone
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41 State Street, Albany, New York 12231
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June 9, 2000

Executive Director

Robert J. Freeman

Mr. Joseph Santos Goncalves Jr.
98-B-2093
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. Goncalves:

I have received your letter of February 28 in which you sought assistance in obtaining copies of trial transcripts from a court clerk.

In this regard, the Freedom of Information Law, the statute within the advisory jurisdiction of the Committee on Open Government, is applicable to agency records. Section 86(3) of that statute defines the term "agency" to include:

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

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

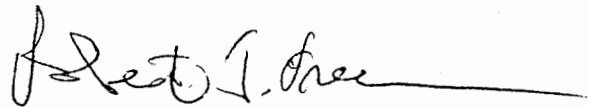
"the courts of the state, including any municipal or district court, whether or not of record."

Based on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law (see e.g., Judiciary Law, §255) may grant broad public access to those records. It is recommended that a request for court records be directed to the clerk of the court in which the proceeding was conducted, citing an applicable provision of law as the basis for the request.

Mr. Joseph Santos Goncalves Jr.
June 9, 2000
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: Yates County Clerk



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12143

Committee Members

Mary O. Donohue
Alan Jay Gerson
Walter W. Grunfeld
Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
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June 9, 2000

Executive Director

Robert J. Freeman

Mr. Gordy Richardson
94-A-1103
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. Richardson:

I have received your letter of February 28. You have sought assistance in relation to an unanswered request made under the Freedom of Information Law for a record maintained at your facility.

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

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

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

Mr. Gordy Richardson

June 9, 2000

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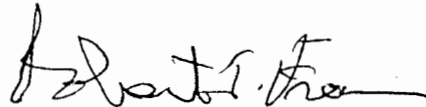
"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, 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 of Correctional Services to determine appeals is Counsel to the Department, Anthony J. Annucci.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Ms. Todd

FOIL-AO-12144

From: Robert Freeman
To: [REDACTED]
Date:
Subject: Re: penal code

Good afternoon:

The only "penal code" aspect of FOIL would involve the situation in which a request is made for a record and the agency official denies that the record exists knowing that it does exist or destroys the record to prevent the applicant from obtaining it. That provision, "Unlawful prevention of public access to records" appears in §240.65 of the Penal Law; a companion provision appears in the Freedom of Information Law [Public Officers Law, §89(8)]. Other than those provisions, there are no criminal penalties ordinarily associated with the FOIL.

Robert J. Freeman
Executive Director
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL AD- 12145

Committee Members

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June 13, 2000

Executive Director

Robert J. Freeman

Ms. Patricia White

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

Dear Ms. White:

I have received your letter of May 3 and the materials attached to it. As I understand the matter, you attempted to obtain various records from the New York City Office of Management and Budget, but the request was denied based on a finding that it does not maintain the records sought, even though certain rules and regulations indicate that the records should have been prepared.

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to existing records. Even if there is a requirement that the records of your interest should have been prepared pursuant to the regulations that you cited, the Freedom of Information Law would not require that an agency to do so [see §89(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)].

Ms. Patricia White
June 13, 2000
Page - 2 -

Third, 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.

To the extent that the kinds of records in which you are interested exist, it appears that §87(2)(g) would be most significant. That provision permits an agency to deny access to records that:

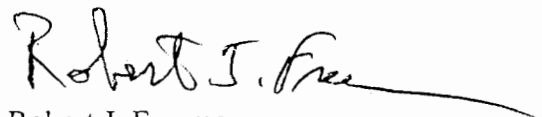
"are inter-agency or intra-agency materials which are not:

- 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.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Andrew G. Burdess

FOIL-AO - 12146

From: Robert Freeman
To: [REDACTED]
Date: 6/13/00 9:34AM
Subject: Dear Mr. Payne:

Dear Mr. Payne:

In general, I would agree with the Town's position that the opinion of an attorney may be withheld on the ground that it is subject to the attorney-client privilege and constitutes "intra-agency" material. Only to the extent that the opinion was read at an open meeting or otherwise disclosed to the public would the Town, in my view, lose its authority to deny access to the record.

If you would like a detailed opinion on the matter, please let me know. Due to my backlog, I would anticipate that an opinion would be prepared in approximately a month.

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
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12147

Committee Members

Mary O. Donohue
Alan Jay Gerson
Walter W. Grunfeld
Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
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June 13, 2000

Executive Director

Robert J. Freeman

Mr. James Higgs
97-R-7993
Wyoming Correctional Facility
P.O. Box 501
Attica, NY 14011-0501

Dear Mr. Higgs:

I have received your letter of May 28, which was received on June 12. You have appealed a denial of access to records by the Town of Poughkeepsie Police Department.

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 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 a record, §89(4)(a) of the Freedom of Information Law, states in relevant part that:

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

Based on the foregoing, I believe that an appeal may be made to the Town Board as the governing body of the Town of Poughkeepsie, or a person or body designated by the Town Board.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12147A

Committee Members

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Alan Jay Gerson
Walter W. Grunfeld
Gary Lewi
Warren Mitofsky
Wade S. Norwood
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June 13, 2000

Executive Director

Robert J. Freeman

Mr. Gary L. Burkett, Jr.
Southport Correctional Facility
Box 2000
Pine City, NY 14871

Dear Mr. Burkett:

I have received your undated letter, which reached this office on June 12. You have requested records relating to a hearing apparently conducted or to be conducted at your facility.

In this regard, the Committee on Open Government is authorized to offer advice concerning the Freedom of Information Law. The Committee does not maintain possession or control of records generally, and it has none of the records that you are seeking.

As a general matter, a request should be directed to the agency that maintains the records of your interest. I point out that the regulations promulgated by the Department of Correctional Services indicate that a request for records kept at a correctional facility may be made to the facility superintendent or his designee.

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

I would conjecture that some aspects of your request may properly be denied. For instance, opinions expressed by employees of an agency, such as the facility or a county jail, may be withheld pursuant to §87(2)(g).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-A0-12148

Committee Members

Mary O. Donohue
Alan Jay Gerson
Walter W. Grunfeld
Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
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Website Address: <http://www.dos.state.ny.us/coog/coogwww.html>

June 15, 2000

Executive Director

Robert J. Freeman

Mr. Michael Melendez
91-A-9649
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. Melendez:

I have received your letter of February 25, which reached this office on March 8. Please note new address of the Committee on Open Government.

You have sought guidance in relation to a request made under the Freedom of Information Law and a delay in response. 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. Therefore, an applicant must provide sufficient detail to enable agency staff to locate and identify the records. As I understand the matter, in response to your request for certain tapes, you were asked to supply the numbers associated with the tapes. Since you did so, it would appear that your amended request would have met the requirement of reasonably describing the records.

Second, although you provided the numbers as requested on January 20, as of the date of your letter to this office, you had received no response. Here I point out that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

Mr. Michael Melendez
June 15, 2000
Page - 2 -

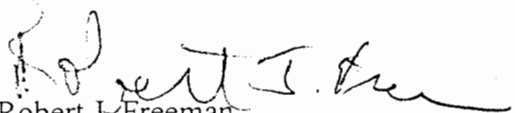
If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively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



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12149

Committee Members

Mary O. Donohue
Alan Jay Gerson
Walter W. Grunfeld
Gary Lewi
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Wade S. Norwood
David A. Schulz
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June 16, 2000

Executive Director

Robert J. Freeman

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 May 6, as well as the materials attached to it.

You referred to earlier correspondence concerning the fee imposed by the City of Buffalo for a transcript of a hearing. In your latest letter, you indicated that the hearing was tape recorded, and you asked whether the City must provide the record in the form in which it exists, i.e., "A copy of the tape." If a tape recording exists, you asked what the fee for a copy should be. The City's Supervising Hearing Officer indicated that "In order for you to receive a copy of the hearing you must order a transcript; we do not sent [sic] copies of tapes."

In this regard, I offer the following comments.

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

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

Based on the foregoing, a tape recording of a hearing maintained by the City in my opinion clearly constitutes a "record" that falls within the scope of the Freedom of Information Law.

Mr. Michael A. Kless
June 16, 2000
Page - 2 -

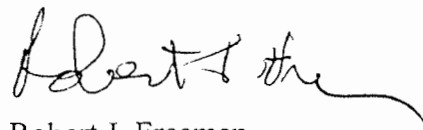
Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, a tape recording of a hearing during which you were present should be accessible, for none of the grounds for denial would apply. Moreover, there is case law indicating that a tape recording of a public proceeding is accessible for listening and/or copying under the Freedom of Information Law [see Zaleski v. Board of Education of Hicksville Union Free School District, Supreme Court, Nassau County, NYLJ, December 27, 1978].

Third, in Zaleski, the court referred to the standard for determining fees for copies of tape recordings pursuant to §87(1)(b)(iii) of the Freedom of Information Law. Under that provision, for making copies of records other than by means of photocopying, the fee is based on "the actual cost of reproduction." The court determined in that case that the actual cost of reproduction involved the price of a cassette.

Lastly, it has been determined that when an agency has the ability to make records available in the form requested by the applicant, the agency must do so [see Brownstone Publishers, Inc. v. New York City Department of Buildings, 550 NYS2d 564, aff'd 166 AD2d 294 (1990); also Samuel v. Mace and Penfield Central School District, Supreme Court, Monroe County, December 18, 1991], so long as the applicant pays the appropriate fee. Therefore, if the City has the ability to prepare a duplicate tape recording of the hearing, I believe that it must do so upon payment of 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-AJ-12150

Committee Members

Mary O. Donohue
Alan Jay Gerson
Walter W. Grunfeld
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June 16, 2000

Executive Director

Robert J. Freeman

Ms. Susan Cockburn

Ms. Joan 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. Cockburn and Ms. Smith:

I have received your letter transmitted to this office on May 11, as well as a copy of a response to your request for a "consulting report" in which the Town of Montgomery denied access on the ground that the record "is considered an intra-agency memorandum."

While I agree that the record sought may be characterized as "intra-agency material", there may be portions of the record that must be disclosed. In this regard, I offer the following comments.

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

Second, based upon the judicial interpretation of the Freedom of Information Law, records prepared for an agency by the staff of an agency or by a consultant 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

Ms. Susan Cockburn
Ms. Joan Smith
June 16, 2000
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.

In a discussion of the issue of consultant reports, the Court of Appeals stated that:

"Opinions and recommendations prepared by agency personnel may be exempt from disclosure under FOIL as 'predecisional materials, prepared to assist an agency decision maker***in arriving at his decision' (McAulay v. Board of Educ., 61 AD 2d 1048, aff'd 48 NY 2d 659). Such material is exempt 'to protect the deliberative process of government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers (Matter of Sea Crest Const. Corp. v. Stubing, 82 AD 2d 546, 549).

"In connection with their deliberative process, agencies may at times require opinions and recommendations from outside consultants. It would make little sense to protect the deliberative process when such reports are prepared by agency employees yet deny this protection when reports are prepared for the same purpose by outside consultants retained by agencies. Accordingly, we hold that records may be considered 'intra-agency material' even though prepared by an outside consultant at the behest of an agency as part of the agency's deliberative process (see, Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD 2d 546, 549, supra; Matter of 124 Ferry St. Realty Corp. v. Hennessy, 82 AD 2d 981, 983)" [Xerox Corporation v. Town of Webster, 65 NY 2d 131, 132-133 (1985)].

Based upon the foregoing, a report prepared by a consultant for an agency may be withheld or must be disclosed based upon the same standards as in cases in which records are prepared by the staff of an agency. It is emphasized that the Court in Xerox specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

"While the reports in principle may be exempt from disclosure, on this record - which contains only the barest description of them - we cannot determine whether the documents in fact fall wholly within the scope of FOIL's exemption for 'intra-agency materials,' as claimed by

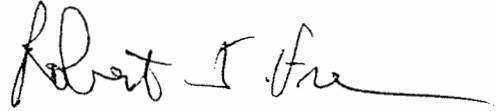
Ms. Susan Cockburn
Ms. Joan Smith
June 16, 2000
Page - 3 -

respondents. To the extent the reports contain 'statistical or factual tabulations or data' (Public Officers Law section 87[2][g][i], or other material subject to production, they should be redacted and made available to the appellant" (id. at 133).

Therefore, a record prepared by a consultant for an agency would be accessible or deniable, in whole or in part, depending on its contents. It appears in this instance that those portions of the report consisting of statistical or factual information must be disclosed.

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: Amolia Miller
Town Board



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12151

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June 16, 2000

Executive Director

Robert J. Freeman

Ms. Ellen Moran
Central Credit Bureau
P.O. Box 388
Burnt Hills, NY 12027

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

Dear Ms. Moran:

As you are aware, I have received your letter of May 16. You asked whether it is "within [y]our rights under the Freedom of Information Law to expect compliance from each city, town, village in New York State in making all evictions available to [you] without [you] searching for a specific case."

In this regard, I offer the following comments.

First, I would conjecture that, in most instances, the records in question would not be subject to the Freedom of Information Law. That statute applies to agencies, and §86(3) defines the term "agency" to include:

"any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines "judiciary" to mean:

"the courts of the state, including any municipal or district court, whether or not of record."

Based on the foregoing, the courts and court records are not subject to the Freedom of Information Law.

Ms. Ellen Moran

June 16, 2000

Page - 2 -

This is not to suggest that court records are not generally public, for other statutes may provide broad rights of access (see e.g., Judiciary Law, §255; Uniform Justice Court Act, §2019-a).

Second, whether the records of your interest are maintained by an agency or a court, a key issue involves the ability of either entity to locate the records of your interest *via* its filing or recordkeeping system. Using the standard in the Freedom of Information Law to illustrate the point, §89(3) of that statute requires that an applicant must "reasonably describe" the records sought. It has been held by the Court of Appeals that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

The Court in Konigsberg found that the agency could not reject the request due to its breadth and also stated that:

"respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency'])" (id. at 250).

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping system. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number.

To the extent that the records sought can be located with reasonable effort, I believe that a request would meet the requirement of reasonably describing the records. On the other hand, if the records are not maintained in a manner that permits their retrieval except by reviewing perhaps hundreds or even thousands of records individually in an effort to locate those falling within the scope of the request, to that extent, the request would not in my opinion meet the standard of reasonably describing the records.

In the context of your inquiry, if an entity has a separate file concerning evictions or an electronic information system that permits the retrieval of records involving evictions, a request for the records at issue would likely meet the requirement that the records be reasonably described. If, however, records of evictions are not maintained or retrievable separately, and if they are mixed or filed with records of other kinds of proceedings (i.e., chronologically), there may be no means of

Ms. Ellen Moran

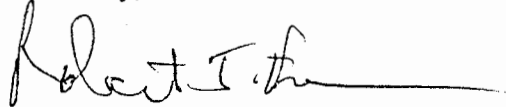
June 16, 2000

Page - 3 -

locating them without reviewing large numbers of records. In that event, I do not believe that an entity would be required to engage in a search of that nature.

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 line extending to the right.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3172
FOIL-AO-12/52

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June 16, 2000

Executive Director

Robert J. Freeman

Ms. Tamara O'Bradovich

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. O'Bradovich:

As you are aware, I have received your letter of May 14 in which you raised questions relating to meetings and access to records.

Several aspects of your inquiry concern the procedure that must be followed in order to adopt a local law. In this regard, the Committee on Open Government is authorized to offer advice and opinions relating to the Open Meetings and Freedom of Information Laws. Issues involving the adoption of local laws fall beyond the scope of the jurisdiction or expertise of this office. Further, I do not believe that there is a procedure or series of requirements that would be universally applicable. Boards of education, for example, cannot adopt local laws, and the statutes pertinent to the matter may differ based upon the nature of a municipality, i.e., a town as opposed to a village or a city.

With respect to minutes of meetings, the Open Meetings Law contains what might be characterized as minimum requirements concerning the contents of minutes. Specifically, §106 of that statute states that:

"1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.

2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter

which is not required to be made public by the freedom of information law as added by article six of this chapter.

3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

Based on the foregoing, 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 note, too, that there is no provision of law of which I am aware that requires that minutes be approved. While it is common practice to do so, the approval of minutes is accomplished *via* tradition, policy, or custom, for example, rather than pursuant to law.

Typically, minutes are approved or amended by motion or the adoption of a resolution. As indicated earlier, minutes must include reference to any motions or actions taken, including motions to approve or amend the minutes themselves. Further, it is implicit in my view that minutes must accurately reflect what transpired at a meeting.

With respect to requests for records, although an agency may accept an oral request, it may require that a request be made in writing [see Freedom of Information Law, §89(3)].

Even though an agency may require that a request be made in writing, I do not believe that it can require that a request be made on a prescribed form. The Freedom of Information Law, §89(3), as well as the regulations promulgated by the Committee (§1401.5), require that an agency respond to a request that reasonably describes the record sought within five business days of the receipt of a request. Further, the regulations indicate that "an agency may require that a request be made in writing or may make records available upon oral request" [§1401.5(a)]. 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.

When records are accessible under the Freedom of Information Law, it has been held that they should be made equally available to any person, regardless of one's status, interest or the intended use of the records [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Moreover, the Court of Appeals, the State's highest court, has held that:

"FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on government decision-making, its ambit is not confined to records actually used in the decision-making process. (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request" [Farbman v. New York City Health and Hospitals Corporation, 62 NY 2d 75, 80 (1984)].

Farbman pertained to a situation in which a person involved in litigation against an agency requested records from that agency under the Freedom of Information Law. In brief, it was found that one's status as a litigant had no effect upon that person's right as a member of the public when using the Freedom of Information Law, irrespective of the intended use of the records. Similarly, unless there is a basis for withholding records in accordance with the grounds for denial appearing in §87(2), the use of the records, the purpose for which a request is made, and the status of the applicant, are in my opinion irrelevant. That being so, an agency cannot generally require that an applicant indicate the reason for his or her request.

Lastly, the Freedom of Information Law does not require that an applicant "give the exact description" of the records sought. When that statute was initially enacted in 1974, it required that an applicant request "identifiable" records. Therefore, if an applicant could not name the record sought or "identify" it with particularity, that person could not meet the standard of requesting identifiable records. In an effort to enhance its purposes, when the Freedom of Information Law was revised, the standard for requesting records was altered. Since 1978, §89(3) has stated that an applicant must merely "reasonably describe" the records sought. 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.

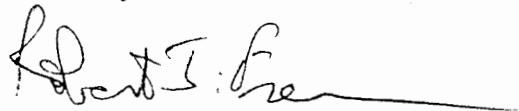
National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified 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.

When the records sought can be located with reasonable effort, I believe that a request would meet the requirement that a request "reasonably describe" the records. However, if the records of your interest are kept or filed, not by subject matter, for example, but rather intermingled with other kinds of records chronologically or by some other means, and if a search for them would involve a record by record review of hundred or perhaps thousands of records, the request, in my view, would 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
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FOIL-AO-12153

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June 19, 2000

Executive Director

Robert J. Freeman

Ms. Dorine A. Hanevy
Fulton Bureau Chief
The Palladium-Times
140 West First 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. Hanevy:

I have received your letter of May 15 in which you sought assistance in relation to requests for records of the Office of the Oswego County District Attorney, the Sheriff's Department, and the City of Oswego Police Department "about any incidents of domestic violence that may have involved" a particular woman and/or her husband.

You indicated that the woman was reported missing on August 7, 1996, and that despite various theories concerning her whereabouts, she remains missing. At the time of the report, she was estranged from her husband, and you added that the husband "may have attempted to choke his wife during the summers of 1994 or 1995", and that several persons you have interviewed stated that the wife complained to law enforcement authorities of abuse by her husband.

You wrote that your requests are intended to enable you to "confirm or deny suggestions that others have made about domestic violence between the couple."

In this regard, I offer the following comments.

First, 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 agencies to which your requests were made, 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, a request would not in my opinion meet the standard of reasonably describing the records.

Second, assuming that a request meets the standard of reasonably describing the records sought, an agency generally has three options in terms of its response: it may grant access to records, deny access to records, or it may assert that it does not possess the records or cannot locate them after having made a diligent search [see Freedom of Information Law, §89(3)].

Third, insofar as records exist and can be found, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. While I am unfamiliar with the contents of any existing records that fall within the scope of your requests, I believe that there may be a variety of possibilities in attempting to ascertain rights of access.

For instance, law enforcement agency records indicating the location of incidents, reports of occurrences or criminal activity 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 or sheriff's 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, 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 accessible.

A provision that is frequently pertinent in the context of inquiries similar to yours 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."

In my view the ability of an agency to withhold records under §87(2)(e) involves a finding that the harmful effects described in subparagraphs (i) through (iv) would arise by means of disclosure.

Also of possible significance is §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." Under one such statute, §160.50 of the Criminal Procedure Law, if a person is charged with a crime and the charge is dismissed in his or her favor, the records are sealed and would be exempt from disclosure.

I note 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, the state's highest court, 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 a police department. In Gould v. New York City Police Department [87 NY 2d 267 (1996)], the Court determined that:

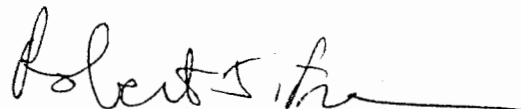
"To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 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). The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (*id.*, 276). The Court then stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (*id.*, 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, directing that:

"...to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents (*Matter of Fink v. Lefkowitz, supra*, 47 N.Y.2d, at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material (*see, Matter of Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 133, 490 N.Y.S. 2d, 488, 480 N.E.2d 74; *Matter of Farbman & Sons v. New York City Health & Hosps. Corp.*, *supra*, 62 N.Y.2d, at 83, 476 N.Y.S.2d 69, 464 N.E.2d 437)" (*id.*).

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Chief Kathleen McPherson
Reuel Todd, Sheriff
Dennis Hawthorne, Sr., District Attorney



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-A0-12154

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June 19, 2000

Executive Director

Robert J. Freeman

Ms. Nancy Coughler



The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Coughler:

I have received your letter of May 8, which reached this office on May 18. You have asked what the "normal procedure" might be and what fees may be charged in relation to genealogical searches.

In this regard, although the statute within the advisory jurisdiction of the Committee on Open Government, the Freedom of Information Law, pertains generally to access to government records and the fees that may be charged for copies of records, the provisions of the Public Health Law deal specifically with birth and death records and fees for services rendered concerning searches for and copies of those records. Specifically, subdivision (3) of §4174 refers to searches for and the fees for records sought for genealogical or research purposes that may be imposed by "any person authorized" by the State Commissioner of Health, i.e., municipal clerks. That provision states that:

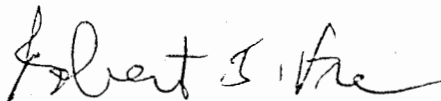
"For any search of the files and records conducted for authorized genealogical or research purposes, the commissioner or any person authorized by him shall be entitled to, and the applicant shall pay, a fee of ten dollars for each hour or fractional part of an hour of time for search, together with a fee of one dollar for each uncertified copy or abstract of such records requested by the applicant or for a certification that a search discloses no record."

An alternative source of the records is likely the State Department of Health. In general, its Bureau of Vital Records maintains duplicates of records of birth, death and marriage regarding all such events occurring outside of New York City. You may call that office at (518)474-3055 or write for further information, including its guidelines concerning access to genealogical records, to the Bureau of Vital Records, New York State Department of Health, Empire State Plaza, Coming Tower, Albany, NY 12237.

Ms. Nancy Coughler
June 19, 2000
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:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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Alexander F. Treadwell

June 19, 2000

Executive Director

Robert J. Freeman

Mr. William Lent
87-T-1369
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. Lent:

I have received your letter of March 2 in which you sought assistance in obtaining records relating to a proceeding that occurred in 1987. It is your view that "documents are being kept from" you, for various entities have indicated that they do not maintain the records of your interest.

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to agency records, and §86(3) of that statute defines the term "agency" to include:

"any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines the term "judiciary" to mean:

"the courts of the state, including any municipal or district court, whether or not of record."

Based on the foregoing, the Freedom of Information Law is applicable to records maintained by a police department or the office of a district attorney; it would not apply, however, to records maintained by a court clerk. That is not suggest that court records are not available, for other statutes may grant broad rights of access to those records (see e.g., Judiciary Law, §255). When seeking court records, it is suggested that requests be made to the clerk of the appropriate court, citing an applicable provision of law as the basis for a request.

Second, when an agency subject to the Freedom of Information Law indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

I point out that in Key v. Hynes [613 NYS 2d 926, 205 AD 2d 779 (1994)], it was found that a court could not validly accept conclusory allegations as a substitute for proof that an agency could not locate a record after having made a "diligent search". However, in another decision, such an allegation was found to be sufficient when "the employee who conducted the actual search for the documents in question submitted an affidavit which provided an adequate basis upon which to conclude that a 'diligent search' for the documents had been made" [Thomas v. Records Access Officer, 613 NYS 2d 929, 205 AD 2d 786 (1994)].

Third, assuming that an agency maintains and can locate records, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Since I am unaware of the contents of 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 subparagraphs (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:

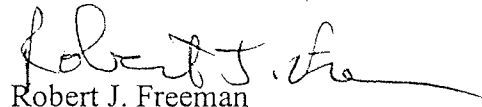
"...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of 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. William Lent
June 19, 2000
Page - 6 -

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-12156

Committee Members

Mary O. Donohue
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June 19, 2000

Executive Director

Robert J. Freeman

Mr. Moses White
92-A-8711 So. Hall 14-15
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. White:

I have received your letter of March 3 in which you asked whether "the F.O.I.L. process differs for an incarcerated person to a person who is not incarcerated."

From my perspective, there is no distinction. In this regard, it has been held that when records are accessible under the Freedom of Information Law, they should be made equally available to any person, regardless of one's status, interest or the intended use of the records [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Moreover, the Court of Appeals, the State's highest court, has held that:

"FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on government decision-making, its ambit is not confined to records actually used in the decision-making process. (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request" [Farbman v. New York City Health and Hospitals Corporation, 62 NY 2d 75, 80 (1984)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FODL-AD-12157

Committee Members

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June 19, 2000

Executive Director
Robert J. Freeman

Mr. Gary L. Rhodes

The staff of the Committee 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. Rhodes:

I have received your letter of May 15. As I understand the matter, you questioned your right to inspect records that may be used in a proceeding before the Town of Henderson Board of Assessment Review. The Town Clerk apparently indicated that you could not inspect them but rather could obtain copies upon payment of a fee.

In this regard, I spoke to the Clerk in relation to the matter. In general, when records are accessible under the Freedom of Information Law, they must be made available for inspection and copying, and no charge may be assessed for inspection. The Clerk informed me that the records were in use by Town employees at the time of your request. As such, two options would be available to you. Disclosure could be delayed until Town employees were no longer actively using the records, at which time you could inspect them at no charge. Or, because they are in use, "a second set" could be copied and made available following payment of the appropriate fee for photocopies.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Clerk



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AJ-12158

Committee Members

Mary O. Donohue
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June 19, 2000

Executive Director

Robert J. Freeman

Mr. David Caryl

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Caryl:

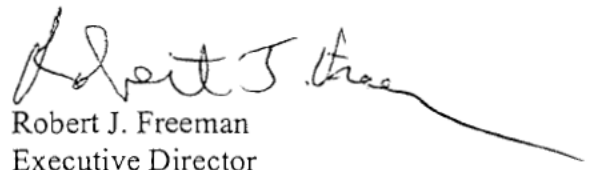
I have received your letter of May 15. You asked whether annual reports required to be submitted to the State Legislature by state agencies must be disclosed.

In this regard, as you aware, §88(2)(g) of the Freedom of Information Law requires the State Legislature to make available "final reports and formal opinions submitted to the legislature." Based on that provision, I believe that a report required by law to be submitted to the State Legislature by a state agency would be available from the Legislature.

In the alternative, a report prepared by a state agency for submission to the State Legislature would, in my view, be available from the agency pursuant to §87(2). From my perspective, none of the grounds for denial would ordinarily be applicable as a basis for withholding such a record.

I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12159

Committee Members

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June 19, 2000

Executive Director

Robert J. Freeman

Mr. Thomas Austin
97-A-2493
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. Austin:

I have received your letter of March 1 in which you indicated that the records access officer at your facility charged you fifty cents for a photocopy of a record. You asked whether that fee is proper.

In this regard, pursuant to §87(1)(b)(iii) of the Freedom of Information Law, an agency may charge a maximum of twenty-five cents per photocopy up to nine by fourteen inches, unless a different statute authorizes a different fee. I do not believe that any other statute would have authorized a fee in excess of twenty-five cents per photocopy. If that is so, the fee that you were charged would have been inconsistent with law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: D. Mangus



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AD-12160

Committee Members

Mary O. Donohue
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Walter W. Grunfeld
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June 19, 2000

Executive Director

Robert J. Freeman

Mr. Marvin J. Pitsley
89-C-1023
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. Pitsley:

I have received your letter of March 3 concerning your unsuccessful requests made to the Office of the Oswego County District Attorney.

As I understand the matter, upon your arrest, various property was taken from you and used as evidence. You sent requests to the District Attorney asking to know "the outcome of the property. Whether it was sold, destroyed, released or held still", when it might have been sold or destroyed. In addition, you asked for any "notices filed" relating to the property, as well as a "detailed list of every item of the property being held and who has possession of the property."

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 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 the Freedom of Information Law or forwarded the request to the proper person, it is suggested that you resubmit your request to the records access officer.

Second, 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. Similarly, an agency official is not required to answer questions in fulfilling a request made under the Freedom of Information Law. That person's responsibility involves disclosing existing records to the extent required by law. In short, rather than seeking answers to questions or seeking a list that may not exist, it is suggested that you seek existing records that may include the information of your interest.

Mr. Marvin J. Pitsley
June 19, 2000
Page - 2 -

Lastly, 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..."

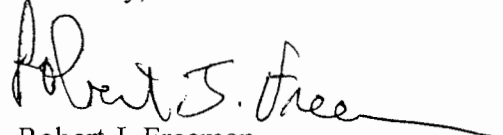
If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: District Attorney



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12161

Committee Members

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Carole E. Stone
Alexander F. Treadwell

June 19, 2000

Executive Director

Robert J. Freentan

Mr. Ronald Johnson
97-A-3849
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. Johnson:

I have received your letter of March 3 in which you sought guidance concerning your ability to request records concerning §722 of the County Law and an "18-B panel."

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 entity or a private attorney, for example. Consequently, my comments will be restricted to situations in the which the Freedom of Information Law does or may apply.

Requests made under the Freedom of Information Law should be directed to the "records access officers" at the agencies that you believe maintain records of your interest. The records access officer has the duty of coordinating an agency's response to requests. Further, when making a request, §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, a request should contain sufficient detail to enable agency staff to locate the record.

Mr. Ronald Johnson

June 19, 2000

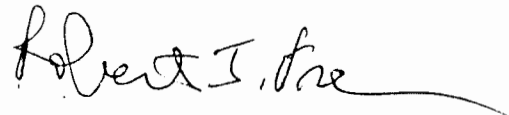
Page - 2 -

You referred to records of an assigned counsel program 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.

While I believe that the records of the governmental entity required to adopt a plan under Article 18-B are subject to the Freedom of Information Law, the records of an individual attorney performing services under Article 18-B may or may not be subject to the Freedom of Information Law, depending upon the nature of the plan. For instance, if a plan involves the services of a public defender, I believe that the records maintained by an office of public defender would fall within the scope of the Freedom of Information Law (see County Law, §716), for that office in my view would constitute an "agency" as defined in §86(3) of the Freedom of Information Law. However, if it involves services rendered by private attorneys or associations, those persons or entities would not in my view constitute agencies subject to the Freedom of Information Law.

I hope that the foregoing serves to clarify your understanding of the issue 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



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOL-AJ-12162

Committee Members

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Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Carole E. Stone
Alexander F. Treadwell

June 19, 2000

Executive Director

Robert J. Freeman

Mr. John Blades
97-A-7453
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. Blades:

I have received your letter of March 7 in which you complained that you requested and paid for copies of records, but that the Freedom of Information Officer at your facility refused to release them or respond to you. You have asked that this office "reverse the decision and return [your] documents."

In this regard, it is noted that the Committee on Open Government is authorized to provide advice and guidance concerning the Freedom of Information Law; the Committee is not empowered to compel an agency to grant or deny access to records or otherwise enforce the Freedom of Information Law.

Notwithstanding the foregoing, if you have not received the records, it is suggested that you consider the request to have been denied and that you appeal the denial pursuant to §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

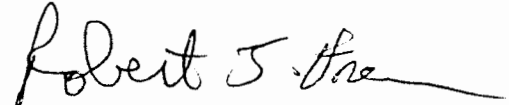
"any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Mr. John Blades
June 19, 2000
Page - 2 -

For your information, the person designated by the Department of Correctional Services to determine appeals is Counsel to the Department, Mr. Anthony J. Annucci.

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

FOIL-AO-12163

Committee Members

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June 20, 2000

Executive Director

Robert J. Freeman

Mr. Antonio Alvarez
85-A-6102
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. Alvarez:

I have received your letter of March 7, as well as the correspondence attached. You have asked that this office "inquire into the status" of requests for records made months ago to the New York City Police Department and a district attorney's office.

In this regard, the Committee on Open Government does not ordinarily contact agencies to ascertain the status of requests; applicants for records generally do so. Nevertheless, having reviewed one of the requests, I offer the following comments.

First, the request involves records relating to an arrest that was made in 1983. Due to the passage of time, I point out that the Freedom of Information Law pertains to existing records. If records prepared in relation to the event have been disposed of or destroyed, the Freedom of Information Law would not apply.

Second, since you cited 5 USC §§552 and 552a, it is noted that they are, respectively, the federal Freedom of Information and Privacy Acts, which pertain only to records maintained by federal agencies. The applicable statute in this instance would be the New York Freedom of Information Law.

Third, pursuant to the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), each agency is required to designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests for records, and a requests should generally be sent to that person. While I believe that the persons in receipt of your requests should have responded directly or forwarded the requests to the proper persons, if you have not received any response to your requests, it is suggested that you resubmit

Mr. Antonio Alvarez

June 20, 2000

Page - 2 -

your requests to the records access officers. The person so designated at the New York City Police Department is Sgt. Richard Evangelista; you did not identify the office of the district attorney to which your other request was made.

Fourth, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Next, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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, potentially 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 subparagraphs (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

Mr. Antonio Alvarez

June 20, 2000

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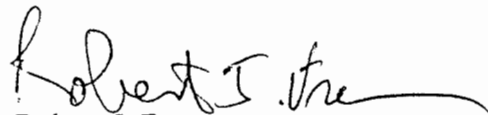
evidence or disclosed during a public judicial proceeding should be available. However, in the same decision, it was also found that:

"...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

FOI-AO-12164

Committee Members

Mary O. Donohue
Alan Jay Gerson
Walter W. Grunfeld
Gary Lewi
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June 20, 2000

Executive Director

Robert J. Freeman

Mr. Hector Chebere
99-A-2842
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. Chebere:

I have received your letter of March 8. You have sought guidance concerning situations in which requests for records have not been answered or responses have resulted in substantial delays.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

Based on the foregoing, an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date indicating when it can be anticipated that a request will be granted or denied. The acknowledgement by the records access officer did not make reference to such a date.

I note that there is no precise time period within which an agency must grant or deny access to records. The time needed to do so may be dependent upon the volume of a request, the possibility that other requests have been made, the necessity to conduct legal research, the search and retrieval techniques used to locate the records and the like. In short, when an agency acknowledges the

Mr. Hector Chebere

June 20, 2000

Page - 2 -

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.

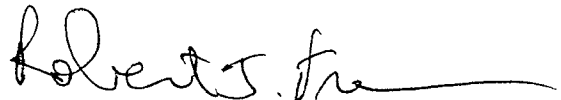
If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively 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,

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-12165

Committee Members

Mary O. Donohue
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June 21, 2000

Executive Director

Robert J. Freeman

Mr. Nathan McCorkle
96-A-2190
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. McCorkle:

I have received your letter of March 9. As I understand the matter, you are interested in obtaining records from your facility that may include the identity of a confidential source or "evaluative", "predecisional" material. You suggested that the records in question relate to a hearing.

In this regard, although I am unfamiliar with the nature of the hearing or the contents of the records, I offer the following general comments.

First, it is my understanding that if a record is used or relied upon during a hearing, it is available to the subject of the hearing based on considerations of due process.

Second, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In view of your remarks, several of the grounds for denial may be pertinent to an analysis of rights of access.

Section 87(2)(b) permits an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." Section 87(2)(e)(iii) authorizes an agency to withhold records "compiled for law enforcement purposes" when disclosure would "identify a confidential source...". Similarly, §87(2)(e) states that an agency may withhold records insofar as disclosure would "endanger the life or safety of any person." Those provisions might be cited to withhold records or portions of records in appropriate circumstances when records identify persons other than yourself.

Third, with respect to predecisional or evaluative materials, the applicable provision 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.

Lastly, you suggested that some of the records of your interest may have been disclosed to your legal representative. Here I point out that based on the decision rendered in Moore v. Santucci [151 AD2d 677 (1989)], if a record was made available to you or your attorney, there must be a demonstration that neither you nor your attorney possesses the record in order to successfully obtain a second copy. Specifically, the decision states that:

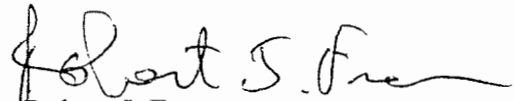
"...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

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.

Mr. Nathan McCorkle
June 21, 2000
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". The signature is fluid and cursive, 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-12166

Committee Members

Mary O. Donohue
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June 21, 2000

Executive Director

Robert J. Freeman

Mr. F. Glenn Hartley



Dear Mr. Hartley:

I have received your letter of June 14, which reached this office today. You requested from the Committee on Open Government copies of "the law pertaining to the rights and responsibilities of picketers..."

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. This office does not maintain custody and control of records generally. In short, I cannot make available the records falling within the scope of your request because this office does not possess them.

As a general matter, requests for records should be directed 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.

I note, too, that from my perspective, a request for a law that may applicable might not be viewed as a request for a record, but rather an interpretation of law that requires a judgment. Depending on the nature of the matter, 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 made, for example, for "section 10 of the Town Ordinances", 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.

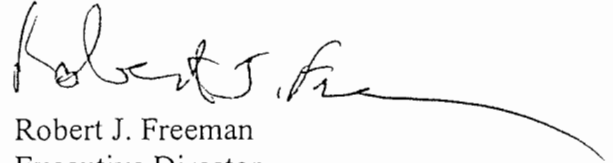
Mr. F. Glenn Hartley

June 21, 2000

Page - 2 -

I hope that the foregoing serves to clarify your understanding of the functions of this office and 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

FOIL-AO-12167

From: Robert Freeman
To: "TamaraOB@aol.com".GWIA.DOS1
Date: 6/23/00 8:08AM
Subject: Re: Freedom of Information, Village of Tuckahoe

Dear Ms. O'Bradovich:

Thank you for your recent letter.

If an agency fails to respond in some manner to a request for records within five business days of its receipt of the request, the request may be considered to have been denied. In that event, the applicant has the right to appeal to the governing body or a person designated by that body. The appeals person or body then has ten business days to grant access to the records or fully explain the reasons for further denial.

If there is a written denial, it should indicate the reasons. If that occurs, you may contact me in order to enable me to advise as to their sufficiency.

Have a good weekend.

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

FOEL-AO-12168

Committee Members

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June 26, 2000

Executive Director

Robert J. Freeman

E-Mail

TO: Molly English <menglish@syracusenewtimes.com>

FROM: Robert J. Freeman, Executive Director

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. English:

I have received your recent letter in which you questioned the propriety of a response to a request for records that you sought from the City of Syracuse.

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.

Ms. Molly English

June 26, 2000

Page - 2 -

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 twenty 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, twenty days, in view of those and perhaps the other kinds of factors mentioned earlier, might be reasonable. On the other hand, if a record or report is clearly public and can be found easily, there would appear to be no rational basis for delaying disclosure for as much as thirty days. In a case in which it was found that an agency's "actions demonstrate an utter disregard for compliance set by FOIL", it was held that "[t]he records finally produced were not so voluminous as to justify any extension of time, much less an extension beyond that allowed by statute, or no response to appeals at all" (Inner City Press/Community on the Move, Inc. v. New York City Department of Housing Preservation and Development, Supreme Court, New York County, November 9, 1993).

I hope that I have been of some assistance.

RJF:jm

cc: Records Access Officer, City of Syracuse



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12169

Committee Members

Mary O. Donohue
Alan Jay Gerson
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June 26, 2000

Executive Director

Robert J. Freeman

Mr. Stephen K. Lee
Attorney at Law
P.O. Box 57
Long Beach, NY 11561

The staff of the Committee on Open 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 recent letter and the correspondence relating to it. You have sought an opinion concerning your right to obtain a copy of a financial disclosure statement filed with the City of Long Beach. The City has permitted inspection of the record, but has refused to permit you to obtain a copy based on a local enactment "purporting to allow inspection only."

In this regard, I am mindful of the decision rendered in John v. New York State Ethics Commission [178 AD2d 51 (1991)] in which it was held that the State Ethics Commission, based on the language of §94(17) of the Executive Law, was not required to make copies of disclosure statements that are available for inspection. That provision, however, pertains to the State Ethics Commission and the statements filed by employees of state agencies. For reasons discussed in the ensuing commentary, neither that statute nor the holding in John are applicable in my opinion in this instance.

From my perspective, the matter involves the Ethics in Government Act as well as the Freedom of Information Law. The provisions of the Act pertaining to municipalities, such as cities, are found in the General Municipal Law. It is noted that those provisions include references to the New York State Temporary Commission on Local Government Ethics ("the Commission"). Although the Commission no longer exists, various provisions concerning its former role are in my view relevant to an analysis of the issue. Further, while the advisory jurisdiction of this office involves the Freedom of Information Law, in this instance, in order to provide advice concerning your question, it is necessary to interpret certain provisions of the General Municipal Law.

The initial and basic issue involves which law applies -- the Freedom of Information Law, the General Municipal Law, or perhaps a local enactment.

Mr. Stephen K. Lee

June 26, 2000

Page - 2 -

As you may be aware, the Freedom of Information Law pertains to all agency records, irrespective of whether they are public, deniable or exempted from disclosure by statute. Section 86(4) of the Freedom of Information Law defines the term "record" expansively to mean:

"any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based upon the foregoing, I believe that financial disclosure statements and related documents constitute "records" that fall within the scope of the Freedom of Information Law. Whether records are available may be dependent upon their contents [i.e., the extent to which disclosure would constitute an unwarranted invasion of personal privacy under §87(2)(b)] or the relationship between the Freedom of Information Law and other statutes.

When a municipality elected to file financial disclosure statements with the Commission when it existed, §813 of the General Municipal Law in my view provided clear direction. Specifically, paragraph (a) of subdivision (18) of that statute states that:

"Notwithstanding the provisions of article six of the public officers law, the only records of the commission which shall be available for public inspection are:

(1) the information set forth in an annual statement of financial disclosure filed pursuant to local law, ordinance or resolution or filed pursuant to section eight hundred eleven or eight hundred twelve of this article except the categories of value or amount which shall remain confidential and any other item of information deleted pursuant to paragraph h of subdivision nine of this section, as the case may be;

(2) notices of delinquency sent under subdivision eleven of this section;

(3) notices of reasonable cause sent under paragraph b of subdivision twelve of this section; and

(4) notices of civil assessments imposed under this section."

As such, §813(18)(a) governed rights of access to records of "the commission".

Notably, in a memorandum prepared by the Commission in April of 1991 and transmitted to me, the Commission wrote that "The Act does not specifically address the public availability of annual financial disclosure statements filed with a municipality's own local ethics board." That

memorandum states, however, that "the Act does authorize a Section 811 Municipality to promulgate rules and regulations, which 'may provide for the public availability of items of information to be contained on such form of statement of financial disclosure'." Section 811(1)(c) authorizes the governing body of a municipality to promulgate:

"rules and regulations pursuant to local law, ordinance or resolution which rules or regulations may provide for the public availability of items of information to be contained on such form of statement of financial disclosure, the determination of penalties for violation of such rules or regulations, and such other powers as are conferred upon the temporary state commission on local government ethics pursuant to section eight hundred thirteen of this article as such local governing body determines are warranted under the circumstances."

In addition, §811(1)(d) states in part that if a local board of ethics is designated to carry out duties that would otherwise be performed by the Commission:

"then such local law, ordinance or resolution shall confer upon the board appropriate authority to enforce such filing requirement, including the authority to promulgate rules and regulations of the same import as those which the temporary state commission on local government ethics enjoys under section eight hundred thirteen of this article."

In turn, §813(9)(c) states in relevant part that the Commission shall "[a]dopt, amend, and rescind rules and regulations to govern procedures of the commission..." As such, it appears from my perspective that the regulatory authority of the Commission was and, therefore, a local board of ethics, is restricted to the procedural implementation of the Ethics in Government Act. In my view, issues concerning rights of access to records do not involve matters of procedure, but rather matters of substantive law that are governed by statute. Moreover, it has been held that regulations cannot serve to exempt records from disclosure. Section 87(2)(a) of the Freedom of Information Law permits an agency to withhold records that are "specifically exempted from disclosure by state or federal statute." It has been held by several courts, including the Court of Appeals, that an agency's regulations or the provisions of an administrative code or ordinance, for example, do not constitute a "statute" [see e.g., Morris v. Martin, Chairman of the State Board of Equalization and Assessment, 440 NYS 2d 365, 82 AD 2d 965, reversed 55 NY 2d 1026 (1982); Zuckerman v. NYS Board of Parole, 385 NYS 2d 811, 53 AD 2d 405 (1976); Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)].

For the foregoing reasons, I believe that rights of access to the Commission's records had been governed by the Ethics in Government Act [§813(18)(a)] but that regulations or local law promulgated by a municipality may implement procedures but cannot determine rights of access to records. If my conclusions are accurate, that neither §813 nor the regulations promulgated by the Commission nor a local enactment would govern rights of access to records maintained by the Board of Ethics, the Freedom of Information Law would govern.

Mr. Stephen K. Lee

June 26, 2000

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This is not to suggest that public rights of access would be significantly different whether the Freedom of Information Law or a different provision of law is applied. For instance, under §813(18)(a)(1), financial disclosure statements filed with the Commission were available, except those portions indicating categories of value or amount or when it is found that reported items "have no material bearing on the discharge of the reporting person's official duties." In my view, the same information that is exempted from disclosure could be deleted from a financial disclosure statement maintained by a municipality under the Freedom of Information Law on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see §87(2)(b) and 89(2)(b)]. Therefore, while the statutes governing rights of access may be different, I believe that the outcome in terms of disclosure to the public would essentially be the same.

I point out that the provision involving access to Commission records, §813(18)(a), refers to certain records "which shall be available for public inspection." Similarly, the regulations promulgated by the Commission concerning the records specify that "[t]he annual statements are not available for photocopying, photographing, or mechanical duplication in any manner [9 NYCRR 9978.6(c)]. As such, if the City's regulations were required to be consistent with those of the Commission, the public could inspect but not seek photocopies of financial disclosure statements.


Consistent with the preceding analysis, while statutes within the Executive Law and the General Municipal Law pertaining to records of the State Ethics Commission and the Temporary State Commission on Local Government Ethics govern access to records of those entities, it is reiterated that the Freedom of Information Law in my opinion is the governing statute with respect to records of local boards of ethics.

Since that is so, an applicant for an available record would have the right to inspect that record and obtain a photocopy upon payment of the appropriate fee, for the Freedom of Information Law states in §87(2) that accessible records must be made available for inspection and copying. Moreover, §89(3) requires that an agency prepare copies of records upon payment of the requisite fee.

In sum, based upon the preceding commentary, I believe a municipality must, on request and on payment of the appropriate fee, provide photocopies of financial disclosure statements.

I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:jm

cc: Bruce Nyman
Joel K. Asarch



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12170

Committee Members

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June 26, 2000

Executive Director

Robert J. Freeman

Mr. Guiseppe D'Alessandro
93-A-3422
Sing Sing Correctional Facility
354 Hunter Street
Ossining, NY 10562-5442

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. D'Alessandro:

I have received your letter of March 13 in which you asked that I review and evaluate a request for records made to the Office of the New York County District Attorney.

In this regard, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. 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 subparagraphs (i) through (iv) of §87(2)(e).

Another possible ground for denial is §87(2)(f), which permits withholding to the extent that disclosure "would endanger the life or safety of any person". The capacity to withhold on that basis is dependent upon the facts and circumstances concerning an event.

Another potentially relevant ground for denial is §87(2)(g). The cited provision permits an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations; or
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government... "

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial applies. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

Records prepared by employees of an agency and communicated within the agency or to another agency would in my view fall within the scope of §87(2)(g). Those records might include opinions or recommendations, for example, that could be withheld.

I 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

Mr. Guiseppe D'Alessandro

June 26, 2000

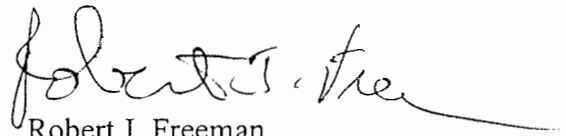
Page - 3 -

Information Law, it was held that "once the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public" [see Moore v. Santucci, 151 AD 2d 677, 679 (1989)]. Based upon that decision, it appears that records introduced into evidence or disclosed during a public judicial proceeding should be available. However, in the same decision, it was also found that:

"...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Gary J. Galperin



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12171

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June 26, 2000

Executive Director

Robert J. Freeman

Mr. Frank Stech
94-B-2637
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. Stech:

I have received your letter of March 12 in which you wrote that you have unsuccessfully attempted to obtain records under the Freedom of Information Law from your attorney. You have sought direction on the matter.

In this regard, the Freedom of Information Law is applicable to agency records, and §86(3) of that statute defines the term "agency" to mean:

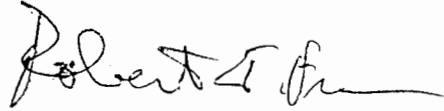
"any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, the Freedom of Information Law generally applies to records of units of state and local government in New York. If the records are not maintained by or an agency, but rather by a private attorney, the Freedom of Information Law would not apply. Assuming that the records are kept by a private attorney not subject to the Freedom of Information Law, it is suggested that you be persistent and continue seek records from the attorney, even though that statute does not apply.

Mr. Frank Stech
June 26, 2000
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I regret that I cannot be of greater 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

FOIL-AO-12172

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June 26, 2000

Executive Director

Robert J. Freeman

Mr. Edward Bennedy
99-B-1303
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. Bennedy:

I have received your letters of March 12 and April 18 in which you raised issues relating to your requests for records and asked whether this office can compel agencies in Cortland County to comply with the Freedom of Information Law.

In this regard, the Committee on Open Government is authorized to offer advice concerning the Freedom of Information Law; it is not empowered to compel an agency to grant or deny access to records otherwise enforce the law. Nevertheless, in an effort to provide guidance, I offer the following comments.

First, the materials indicate that certain entities do not maintain "an indexing of material by subjects or category". As a general matter, the Freedom of Information Law pertains to existing records, and an agency is not required to create a record in response to a request [see §89(3)]. Similarly, if records that once existed have legally been disposed of or destroyed, the Freedom of Information Law would not apply.

An exception that rule relates to the subject of your inquiry. Specifically, §87(3) of the Freedom of Information Law states in relevant part that:

"Each agency shall maintain...

c. a reasonably detailed current list by subject matter, of all records in the possession of the agency, whether or not available under this article."

Mr. Edward Bennedy

June 26, 2000

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The "subject matter list" required to be maintained under §87(3)(c) is not, in my opinion, required to identify each and every record of an agency; rather I believe that it must refer, by category and in reasonable detail, to the kinds of records maintained by an agency. I emphasize that §87(3)(c) does not require that an agency ascertain which among its records must be made available or may be withheld. Again, the Law states that the subject matter list must refer, in reasonable detail, to the kinds of records maintained by an agency, whether or not they are available.

It has been suggested that the records retention and disposal schedules developed by the State Archives and Records Administration at the State Education Department may be used as a substitute for the subject matter list. It is suggested that you ask to review the retention schedule applicable to the College. Alternatively, you could request a copy of the schedule from the State Archives and Records Administration, which is part of the State Education Department.

Second, you referred to a request for a videotape depicting your arrest which has been withheld because, in your words, "they say it is discovery information." The courts have provided direction concerning the Freedom of Information Law as opposed to the use of discovery under the Civil Practice Law and Rules (CPLR) in civil proceedings, and discovery in criminal proceedings under the Criminal Procedure Law (CPL). The principle is that the Freedom of Information Law is a vehicle that confers rights of access upon the public generally, while the disclosure provisions of the CPLR or the CPL, for example, are separate vehicles that may require or authorize disclosure of records due to one's status as a litigant or defendant.

As stated by the Court of Appeals in a case involving a request made under the Freedom of Information Law by a person involved in litigation against an agency: "Access to records of a government agency under the Freedom of Information Law (FOIL) (Public Officers Law, Article 6) is not affected by the fact that there is pending or potential litigation between the person making the request and the agency" [Farbman v. NYC Health and Hospitals Corporation, 62 NY 2d 75, 78 (1984)]. Similarly, in an earlier decision, the Court of Appeals determined that "the standing of one who seeks access to records under the Freedom of Information Law is as a member of the public, and is neither enhanced...nor restricted...because he is also a litigant or potential litigant" [Matter of John P. v. Whalen, 54 NY 2d 89, 99 (1980)]. The Court in Farbman, supra, discussed the distinction between the use of the Freedom of Information Law as opposed to the use of discovery in Article 31 of the CPLR. Specifically, it was found that:

"FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on governmental decision-making, its ambit is not confined to records actually used in the decision-making process (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request.

"CPLR article 31 proceeds under a different premise, and serves quite different concerns. While speaking also of 'full disclosure' article 31

is plainly more restrictive than FOIL. Access to records under CPLR depends on status and need. With goals of promoting both the ascertainment of truth at trial and the prompt disposition of actions (Allen v. Crowell-Collier Pub. Co., 21 NY 2d 403, 407), discovery is at the outset limited to that which is 'material and necessary in the prosecution or defense of an action'" [see Farbman, supra, at 80].

In sum, I believe that the Freedom of Information Law imposes a duty to disclose records, as well as the capacity to withhold them, irrespective of the status or interest of the person requesting them. To be distinguished are other provisions of law that may require disclosure based upon one's status, e.g., as a defendant, and the nature of the records or their materiality to a proceeding.

When records are sought under the Freedom of Information Law, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

I have no knowledge of the nature of the information contained within the tape. However, one or more of the grounds for denial may be pertinent. For instance, §87(2)(b) permits an agency to withhold records when disclosure would constitute "an unwarranted invasion of personal privacy." That provision might be applicable insofar as the tape identifies persons other than yourself. Also relevant may be §87(2)(f), which authorizes an agency to withhold records insofar as disclosure would "endanger the life or safety of any person." The proper assertion of that provision would be dependent on the facts relating to the incident.

Lastly, you questioned what a "Vaughn motion" is. "Vaughn" refers to a requirement imposed by federal courts under the federal Freedom of Information Act involving the preparation of a so-called "Vaughn index" [see Vaughn v. Rosen, 484 F.2d 820 (1973)]. Such an index provides an analysis of each document withheld by an agency as a means of justifying a denial and insuring that the burden of proof remains on the agency. Nevertheless, 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;

Mr. Edward Bennedy

June 26, 2000

Page - 4 -

Matter of Fink v. Lefkowitz, 47 NY 2d 567, 571), did not constitute error. To make such disclosure would effectively subvert the purpose of these statutory exemptions which is to preserve the confidentiality of this information" [Nalo v. Sullivan, 125 AD 2d 311, 312 (1987)].

I hope that the foregoing serves to clarify your understanding of the issues 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: Lawrence Knickerbocker

James Willis

Harold Peacock, Jr.



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12123

Committee Members

Mary O. Donohue
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June 26, 2000

Executive Director

Robert J. Freeman

Mr. Robert DeMaio
92-A-4400 10-2-66
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. DeMaio:

I have received your letter of March 20 in which you sought an opinion concerning rights of access to records that you sought from the Office of the Kings County District Attorney.

In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Since I am unaware of the contents of the records in which you are interested, or the effects of their disclosure, I cannot offer specific guidance. Nevertheless, the following paragraphs will review the provisions that may be significant in determining rights of access to the records in question.

Of potential significance is §87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". That provision might be applicable relative to the deletion of identifying details in a variety of situations, i.e., where a record identifies a confidential source or a witness, for example.

Perhaps the most relevant provision concerning access to records maintained by law enforcement agencies is §87(2)(e), which permits an agency to withhold records that:

"are compiled for law enforcement purposes and which, if disclosed, would:

- i. interfere with law enforcement investigations or judicial proceedings;
- ii. deprive a person of a right to a fair trial or impartial adjudication;
- iii" identify a confidential source or disclose confidential information relating to a criminal investigation; or
- iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in subparagraphs (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.

In view of the nature of certain records that you requested, also relevant is the initial ground for denial in the Freedom of Information Law, §87(2)(a), which pertains to records that "are

specifically exempted from disclosure by state or federal statute." Section 50-b of the Civil Rights Law exempts records identifiable to a victim of a sex offense from disclosure. Consequently, the Freedom of Information Law in my view provides no rights of access to those records. Any authority to disclose or obtain the records in question would be based on the direction provided by the ensuing provisions of §50-b.

In this regard, the introductory language of subdivision (2) provides that "[t]he provisions of subdivision one of this section shall not be construed to prohibit disclosure of information to: a. Any person charged with the commission of a sex offense..." While the Department is not forbidden from disclosing records subject to §50-b to a person charged, I do not believe that §50-b creates a right of access on behalf of such person. Further, subdivision (3) states in relevant part that "The court having jurisdiction over the alleged sex offense may order any restrictions upon disclosure authorized in subdivision two of this section..."

In short, it is my view that issues involving the disclosure of records identifiable to a victim of a sex offense would be governed by §50-b of the Civil Rights Law, rather than the Freedom of Information Law. That being so, it is suggested that you discuss the matter with your attorney.

Lastly, I point out that in a decision concerning a request for records maintained by the office of a district attorney that would ordinarily be exempted from disclosure under the Freedom of Information Law, it was held that "once the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public" [see Moore v. Santucci, 151 AD 2d 677, 679 (1989)]. Based upon that decision, it appears that records introduced into evidence or disclosed during a public judicial proceeding should be available. However, in the same decision, it was also found that:

"...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

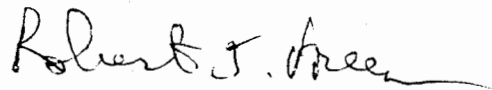
Mr. Robert DeMaio

June 26, 2000

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 has a long, sweeping underline.

Robert J. Freeman
Executive Director

RJF:jm

cc: Jodi Mandel



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO-
FOIL-AO-12174

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June 26, 2000

Executive Director

Robert J. Freeman

Mr. Nathaniel Jay
94-R-0474
Orleans Correctional Facility
3531 Gaines Basin Road
Albion, NY 14411

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Jay:

I have received your letter of March 20. As I understand your comments, it is your belief that there is "an official manner concerning letter structure" that should be used to seek records under the "F.O.I.A. or through P.A."

In this regard, it is noted initially that the two statutes to which you referred are federal laws, the Freedom of Information and Privacy Acts. They apply to federal agencies. The statute that generally governs rights of access to records of state and local government in New York is the New York Freedom of Information Law.

There is no particular form or structure that must be used to seek records under that law. In short, any request made in writing that "reasonably describes" the records sought should suffice. To reasonably describe records of interest, a request should contain sufficient detail to enable agency staff to locate and identify the records. A sample letter of request is included in the enclosed brochure, "Your Right to Know."

While the New York Personal Privacy Protection Law is in some respects an equivalent to the federal Privacy Act, I point out that it excludes "public safety agency" records from rights of access. 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

Mr. Nathaniel Jay

June 26, 2000

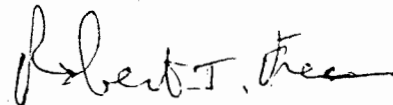
Page - 2 -

function is the enforcement of civil or criminal statutes if such record pertains to investigation, law enforcement, confinement of persons in correctional facilities or supervision of persons pursuant to criminal conviction or court order, and any records maintained by the division of criminal justice services pursuant to sections eight hundred thirty-seven, eight hundred thirty seven-a, eight hundred thirty-seven-c, eight hundred thirty-eight, eight hundred thirty-nine, eight hundred forty-five, and eight hundred forty-five-a of the executive law."

Therefore, rights of access granted by the Personal Privacy Protection Law do not extend to records of agencies or units within agencies whose primary functions involve investigation, law enforcement or the confinement or persons in correctional facilities.

I hope 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



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-A0-12175

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June 26, 2000

Executive Director

Robert J. Freeman

Mr. Andre L. Brooks
98-B-0552
Auburn Correctional Facility
P.O. Box 618
Auburn, NY 13024

Dear Mr. Brooks:

I have received your undated letter, which reached this office on June 22. You have made a request and an appeal concerning a denial of your request by the Organized Crime Task Force for a copy of a "fugitive from justice warrant." The request was denied on the ground that the document in question was made available to your attorney.

In this regard, first, the Committee on Open Government 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 it is not empowered to determine appeals or otherwise compel an agency to grant or deny access to records. For future reference, the provision concerning the right to appeal, §89(4)(a), states in relevant part that:

"any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Second, based on the decision rendered in Moore v. Santucci [151 AD2d 677 (1989)], if a record was made available to you or your attorney, there must be a demonstration that neither you nor your attorney possesses the record in order to successfully obtain a second copy. Specifically, the decision states that:

"...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as

Mr. Andre L. Brooks

June 26, 2000

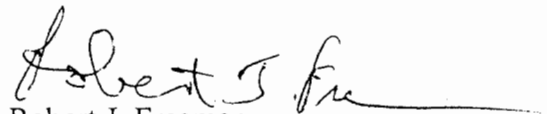
Page - 2 -

academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

Based on the foregoing, it is suggested that you contact your attorney to determine whether he or she continues to possess the record. If the attorney no longer maintains the record, he or she should prepare an affidavit so stating that can be submitted to the office of the district attorney.

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman".

Robert J. Freeman
Executive Director

RJF:jm

cc: David J. Mudd



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-A0-12175A

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June 26, 2000

Executive Director

Robert J. Freeman

Mr. Aaron LeGrand
75-A-0565
Gouverneur Correctional Facility
P.O. Box 480
Scotch Settlement Road
Gouverneur, NY 13642-0370

Dear Mr. LeGrand:

I have received your appeal of June 20 relating to a request directed to your facility.

In this regard, first, based on the material attached to your letter, it appears that the information sought was made available.

Second, the Committee on Open Government is not authorized to determine appeals following denials of access to records. The provision concerning the right to appeal, §89(4)(a) of the Freedom of Information Law, states in relevant part:

"any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

For future reference, the person designated by the Department of Correctional Services to determine appeals is Anthony J. Annucci, Counsel to the Department.

I hope that the foregoing clarifies 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 - 12176

Committee Members

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Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Carole E. Stone
Alexander F. Treadwell

June 26, 2000

Executive Director

Robert J. Freeman

Mr. Charles Mixon
90-B-3069
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. Mixon:

I have received your letter of March 20. As I understand the matter, you have sought guidance in obtaining records from a company in Maryland that has performed tests for the office of a district attorney in New York.

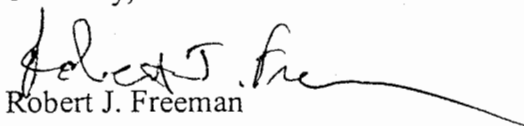
In this regard, if my understanding is accurate, the Freedom of Information Law would not apply. That statute is applicable to agency records, and §86(3) defines the term "agency" to mean:

"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 is generally applicable to entities of state and local government in New York; it does not apply to private organizations or companies or to entities outside of New York. Further, I am unfamiliar with the laws of Maryland that may be pertinent.

I regret that I cannot be of greater assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-A0-12177

Committee Members

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June 26, 2000

Executive Director

Robert J. Freeman

Mr. Anthony Vitiello
96-A-7830
Clinton Correctional Facility
P.O. Box 2002 - Annex
Dannemora, NY 12929

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Vitiello:

I have received your letter of March 16 in which you complained that you paid the appropriate fee for copies of certain records in possession of the Office of the Queens County District Attorney, but that the records had not been made available to you as of the date of your letter to this office.

In this regard, pursuant to §89(3) of the Freedom of Information Law, when it is determined that records are accessible and the applicant has paid the requisite fee for copies, an agency is obliged to make copies available. While this office is not empowered to compel an agency to grant or deny access to records, in an effort to remind the Office of the District Attorney of its responsibilities if it has not already carried them out, a copy of this response will be sent to the records access officer.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Lisa Drury



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12178

Committee Members

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June 28, 2000

Executive Director

Robert J. Freeman

Hon. William J. Keiser, III
Supervisor
Town of New Hartford
Butler Memorial Hall
New Hartford, NY 13413

The staff of the Committee on 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 Keiser:

I have received your letter of May 19, as well as the materials attached to it. You have sought an opinion concerning:

- “1) Interpretation of Town Code Section 27 and the involvement of the Records Advisory Board to review all FOIL requests and responses.”
- 2) The legality of this resolution with respect to the duties and responsibilities of the RMO (Clerk) regarding FOIL’s and responses.”

In this regard, Chapter 27 of the Town Code entitled “Records Management” created a “Records Advisory Board” in subdivision 5. That entity was designated to work with and offer advice to the records management officer. From my perspective, the duties inherent in the position of records management officer are separate from those relating to the implementation of the FOIL.

The position of “records management officer” is a statutory creation and is described in Article 57-A of the Arts and Cultural Affairs Law, which is also known as the “Local Government Records Law.” Section 57.19 of the Arts and Cultural Affairs Law states in relevant part that:

“Each local government shall have one officer who is designated as records management officer. This officer shall coordinate the development of and oversee such program and shall coordinate legal disposition, including destruction of obsolete records. In towns, the town clerk shall be the records management officer.”

Based on the foregoing, the functions of the records management officer do not deal with the kinds of issues that arise in relation to the Freedom of Information Law, i.e., granting or denying access to records. That being so, and in view of its duties described in §27-5, it appears that the Records Advisory Board has no function to perform in relation to the implementation of the Freedom of Information Law.

With respect to the responsibilities imposed by that statute, 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, such as a town, 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...”

In short, the records access officer must "coordinate" an agency's response to requests, and again, the functions of the records access officer are separate and distinct from those of the records management officer.

As indicated earlier, the Arts and Cultural Affairs Law specifies that the records management officer in towns is the town clerk. Under §30(1) of the Town Law, the clerk is also the legal custodian of all town records, irrespective of who physically possesses the records or the location

Hon. William J. Keiser, III

June 28, 2000

Page - 3 -

of the records. Due to these functions, the records access officer in the great majority of towns is also the town clerk.

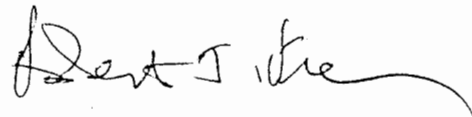
In my opinion, implementation of the resolution may be unnecessarily cumbersome, for there are many instances in which Town officials can respond directly to requests pursuant to the direction given by the Clerk as part of her duty of "coordinating" the Town's response to requests. For instance, there are many records maintained by assessors that are clearly public, such as assessment rolls, data cards and the like, and there may be numerous requests for those records. In my opinion, there is no good reason for requiring the assessor to submit records that are clearly public to the Clerk prior to disclosure. Similarly, the assessor likely maintains tax returns submitted by senior citizens seeking exemptions. It is clear that those records may be withheld under §87(2)(b) of the Freedom of Information Law on the ground that disclosure would constitute "an unwarranted invasion of personal privacy." There is no reason in my opinion to transfer those records, if they are requested, to the Clerk. As part of her responsibility to coordinate responses to requests, I believe that she should have the ability to offer appropriate guidance to an assessor or other Town officials in order to make the process of responding to requests efficient and effective.

I note that the regulations of the Committee on Open Government cited earlier specify that the designation of a records access officer "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 believe that the quoted provision was intended to ensure that the Freedom of Information Law should not be an impediment to prompt responses to requests and a recognition that many officials have routinely and as part of their duties granted direct access to records. Further, in its statement of legislative intent, §84, the Freedom of Information Law states that agencies should make records available "wherever and whenever feasible." It is questionable in my view whether the resolution would enable the Town to act efficiently and in a manner consistent with the intent of the Freedom of Information Law.

Enclosed for your review, are copies of the regulations promulgated by the Committee on Open Government and model regulations designed to enable agencies to meet their responsibilities in complying with the procedural aspects of the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Town Board

Hon. Gail Wolanin Young, Clerk



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 12179

Committee Members

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Alexander F. Treadwell

June 28, 2000

Executive Director

Robert J. Freeman

Mr. A. Thomas Levin
Meyer, Suozzi, English & Klein, P.C.
1505 Kellum Place
Mineola, NY 11501-4824

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Levin:

I have received your letter of May 18. In your capacity as attorney for several villages, you have sought an opinion concerning the obligation of your clients to make available copies of "documents submitted under seal of professionals such as engineers and architects [that] bear a legend that the documents are protected by copyright and many not be reproduced without the permission of the professional."

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to agency records, and §86(4) of the Law defines the term "record" expansively to mean:

"any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, architects plans and similar or related documents in my view clearly constitute agency "records" subject to rights conferred by the Freedom of Information Law.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Mr. A. Thomas Levin

June 28, 2000

Page - 2 -

It has been held that a promise or assertion of confidentiality cannot be upheld, unless a statute specifically confers confidentiality. In Gannett News Service v. Office of Alcoholism and Substance Abuse Services [415 NYS 2d 780 (1979)], a state agency guaranteed confidentiality to school districts participating in a statistical survey concerning drug abuse. The court determined that the promise of confidentiality could not be sustained, and that the records were available, for none of the grounds for denial appearing in the Freedom of Information Law could justifiably be asserted. In a decision rendered by the Court of Appeals, it was held that a state agency's:

"long-standing promise of confidentiality to the intervenors is irrelevant to whether the requested documents fit within the Legislature's definition of 'record' under FOIL. The definition does not exclude or make any reference to information labeled as 'confidential' by the agency; confidentiality is relevant only when determining whether the record or a portion of it is exempt..." [Washington Post v. Insurance Department, 61 NY 2d 557, 565 (1984)].

In short, I do not believe that an assertion of confidentiality would serve to remove from public rights of access records that would otherwise be available. Similarly, whether the professional who prepared the document or the owner of real property described in the document consents to permit access is, in my view, irrelevant; if a record is available under the Freedom of Information Law, the professional or owner as the case may be would not have the ability to control disclosure.

Third, access to plans and surveys that are marked with the seal of an architect or engineer has been the subject of several questions and substantial research. Professional engineers and architects are licensed by the Board of Regents (see respectively, Articles 145 and 147 of the Education Law,). While §7307 of the Education Law requires that an architect have a seal, and that state and local officials charged with the enforcement of provisions relating to the construction or alteration of buildings cannot accept plans or specifications that do not bear such a seal, I am unaware of any statute that would prohibit the inspection of such records under the Freedom of Information Law. Some have contended that an architect's seal, for example, represents the equivalent of a copyright. Having discussed the matter with numerous officials, including officials of the appropriate licensing boards, the seal does not serve as a copyright, nor does it restrict the right to inspect and copy.

Additional considerations become relevant if the records in question bear a copyright, and the question, in my view, involves the effect of a copyright appearing on a document. In order to offer an appropriate response, I have discussed the matter with a representative of the U.S. Copyright Office and the Office of Information and Privacy at the U.S. Department of Justice, which advises federal agencies regarding the federal Freedom of Information Act (5 U.S.C. §552), the federal counterpart of the New York Freedom of Information Law.

It is noted that the Federal Copyright Act, 17 U.S.C. §101 et seq., appears to have supplanted the early case law concerning the Act prior to its amendment in 1976.

Useful to the inquiry is a federal court decision in which the history of copyright protection was discussed, and in which reference was made to notes of House Committee on the Judiciary (Report No. 94-1476) referring to the scope and intent of the revised Act. Specifically, it was stated by the court that:

"The power to provide copyright protection is delegated to the Congress by the United States Constitution. Article 1, section 8, clause 8, of the Constitution grants to Congress the power 'to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.'

Copyright did not exist at common law but was created by statute enacted pursuant to this Constitutional authority. See Mazer v. Stein, 347 U.S. 201, 74 S.Ct. 460, 98 L.ed. 630 (1954); see also MCA, Inc., v. Wilson, 425 F.Supp. 443, 455 (S.D.N.Y. 1976); Mura v. Columbia Broadcasting System, Inc., 245 F.Supp. 587, 589 (S.D.N.Y. 1965), and cases cited therein.

Prior to January 1, 1978, the effective date of the revised Copyright Act of 1976, there existed a dual system of copyright protection which had been in effect since the first federal copyright statute in 1790. Under this dual system, unpublished works enjoyed perpetual copyright protection under state common law, while published works were copyrightable under the prevailing federal statute. The new Act was intended to accomplish 'a fundamental and significant change in the present law by adopting a single system of Federal statutory copyright... (to replace the) anachronistic, uncertain, impractical, and highly complicated dual system.' H.R. Rep. No. 94-1476; 94th Cong. 2d Sess. 129-130, reprinted in [1976] 5 U.S. Code Cong. & Ad. News 5745. This goal was effectuated through the bed-rock provision of 17 U.S.C. subsection 301, which brought unpublished works within the scope of federal copyright law and preempted state statutory and common law rights equivalent to copyright. Id. at 5745-47. Thus, under subsection 301(a), Congress provided that Title 17 of the United States Code, the Federal Copyright Act, preempts all state and common law rights pertaining to all causes of action which arise subsequent to the effective date of the 1976 Act, i.e., January 1, 1978:

(a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified in Section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified in sections 102 and 103, whether published or unpublished, are governed exclusively by this

Mr. A. Thomas Levin

June 28, 2000

Page - 4 -

title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State." [Meltzer v. Zoller, 520 F.Supp. 847, 853 (1981)]

Based upon the foregoing, "common law" copyright appears to be a concept that has been rejected and replaced with the current statutory scheme embodied in the revised Federal Copyright Act.

In view of the language of the Copyright Act, case law and discussions with a representative of the Copyright Office, it is clear in my opinion that architectural plans and similar documents may be copyrighted.

To be copyrighted, 17 U.S.C. §401(b) states that a work must bear a "notice", which:

"shall consist of the following three elements:

(1) the symbol c (the letter C in a circle), or the word 'Copyright,' or the abbreviation 'Copr.:'; and

(2) the year of the first publication of the work; in the case of compilations or derivative works incorporating previously published material, the year date of the first publication of the compilation or derivative work is sufficient. The year date may be omitted where a pictorial, graphic, or sculptural work, with accompanying text matter, if any, is reproduced in or on greeting cards, postcards, stationery, jewelry, dolls, toys, or any useful articles; and

(3) the name of the owner of copyright in the work, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner."

If those elements do not appear on a work, I do not believe that it would be copyrighted, and that it could be reproduced in response to a request made under the Freedom of Information Law.

Assuming that a work is subject to copyright protection, such a work that includes the notice described above is copyrighted. It is noted that such a work may "at any time during the subsistence of copyright" [17 U.S.C. §408(a)] be registered with the Copyright Office. No action for copyright infringement can be initiated until a copyright claim has been registered. As I understand the Act, if a work bears a copyright and is reproduced without the consent of the copyright holder, the holder may nonetheless register the work and later bring an action for copyright infringement.

In terms of the ability of a citizen to use an access law to assert the right to reproduce copyrighted material, the issue has been considered by the U.S. Department of Justice with respect to copyrighted materials, and its analysis as it pertains to the federal Freedom of Information Act is, in my view, pertinent to the issue as it arises under the state Freedom of Information Law.

The initial aspect of its review involved whether the exception to rights of access analogous to §87(2)(a) of the Freedom of Information Law requires that copyrighted materials be withheld. The cited provision states that an agency may withhold records that are "specifically exempted from disclosure by state or federal statute." Virtually the same language constitutes a basis for withholding in the federal Act [5 U.S.C. 552(b)(3)]. In the fall 1983 edition of FOIA Update, a publication of the Office of Information and Privacy at the U.S. Department of Justice, it was stated that:

"On its face, the Copyright Act simply cannot be considered a 'nondisclosure' statute, especially in light of its provision permitting full public inspection of registered copyrighted documents at the Copyright Office [see 17 U.S.C. 3705(b)]."

Since copyrighted materials are available for inspection, I agree with the conclusion that records bearing a copyright could not be characterized as being "specifically exempted from disclosure...by...statute."

The next step of the analysis involves the Justice Department's consideration of the federal Act's exception (exemption 4) analogous to §87(2)(d) of the Freedom of Information Law in conjunction with 17 U.S.C. §107, which codifies the doctrine of "fair use". Section 87(2)(d) permits an agency to withhold records that "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise." Under §107, copyrighted work may be reproduced "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research" without infringement of the copyright. Further, the provision describes the factors to be considered in determining whether a work may be reproduced for a fair use, including "the effect of the use upon the potential market for or value of the copyrighted work" [17 U.S.C. §107(4)].

According to the Department of Justice, the most common basis for the assertion of the federal Act's "trade secret" exception involves "a showing of competitive harm," and in the context of a request for a copyrighted work, the exception may be invoked "whenever it is determined that the copyright holder's market for his work would be adversely affected by FOIA disclosure" (FOIA Update, supra). As such, it was concluded that the trade secret exception:

"stands as a viable means of protecting commercially valuable copyrighted works where FOIA disclosure would have a substantial adverse effect on the copyright holder's potential market. Such use of Exemption 4 is fully consonant with its broad purpose of protecting the commercial interests of those who submit information to government... Moreover, as has been suggested, where FOIA disclosure would have an adverse impact on 'the potential market for or value of [a] copyrighted work,' 17 U.S.C. §107(4), Exemption 4 and the Copyright Act actually embody virtually congruent protection, because such an adverse economic effect will almost

Mr. A. Thomas Levin

June 28, 2000

Page - 6 -

always preclude a 'fair use' copyright defense...Thus, Exemption 4 should protect such materials in the same instances in which copyright infringement would be found" (*id.*).

Conversely, it was suggested that when disclosure of a copyrighted work would not have a substantial adverse effect on the potential market of the copyright holder, the trade secret exemption could not appropriately be asserted. Further, "[g]iven that the FOIA is designed to serve the public interest in access to information maintained by government," it was contended that "disclosure of nonexempt copyrighted documents under the Freedom of Information act should be considered a 'fair use'" (*id.*).

In my opinion, due to the similarities between the federal Freedom of Information Act and the New York Freedom of Information Law, the analysis by the Justice Department could properly be applied when making determinations regarding the reproduction of copyrighted materials maintained by entities of government in New York. In sum, if reproduction of copyrighted architectural plans and similar records would "cause substantial injury to the competitive position of the subject enterprise," i.e., the holder of the copyright, in conjunction with §87(2)(d) of the Freedom of Information Law, it would appear that an agency could preclude reproduction of the work. On the other hand, if reproduction of the work would not result in substantial injury to the competitive position of the copyright holder, it appears that the work would be available for copying under the Freedom of Information Law.

The only other potential basis for withholding would involve records that include reference to alarms, security systems and the like. In those circumstances, it is possible that §87(2)(f) might be asserted. That provision enables an agency to withhold records insofar as disclosure "would endanger the life or safety of any person."

In the only decision of which I am aware that dealt with the issue that you raised, Sagaponack Homeowners Association v. Town of Southampton (Supreme Court, Suffolk County, NYLJ, September 29, 1998), the Court considered the opinions rendered by this office, stressed the presumption of access conferred by the Freedom of Information Law, the burden of proof in defending a denial of access and questioned a claim that competitive harm could arise *via* duplication of the records. Additionally, notwithstanding a finding that exceptions in the Freedom of Information Law might be applicable, the Court found that consideration must be given to the possibility that a request involves a "fair use." Specifically, it was stated that:

"Even if this Court ultimately determines that the subject architectural plans are exempt under §87(2)(d) and (2)(f) other issues will need to be addressed. Inasmuch as the fair use of a copyrighted work includes the use of copyrighted documents by experts in a legal proceeding (see *Religious Technology Ctr. v. Wollersheim*, 971 F.2d 364 [1992]; *Jartech Inc. v. Clancy*, 666 F.2d 403 [1982] cert den 459 US 879 reh den 459 US 1059 second pet reh den 463 US 1237; 17 USC 107) a hearing will need to be conducted for the purpose of establishing the parameters for the nature, purpose and extent of such

Mr. A. Thomas Levin

June 28, 2000

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use and the restriction on access to such materials are to be reproduced for purposes of litigation. In this way distribution of the reproduced portions of the architectural drawings will be to a limited class of persons for a limited purpose so as to constitute, a limited as opposed to a general publication, so as not to interfere with the copyright..."

As such, the intended use of copyrighted materials may have a bearing on the obligation to prepare copies under the Freedom of Information Law.

Lastly, under §87(1)(b)(iii) of the Freedom of Information Law, if a record is greater than nine by fourteen inches in size or cannot be photocopied, an agency may charge based on the actual cost of reproduction. Therefore, when the records in question are available for copying, I believe that an agency could charge based on the charge imposed by a private copying service, as well as any other actual cost, such as postage or transportation.

I hope that I 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 - 12180

Committee Members

Mary O. Donohue
Alan Jay Gerson
Walter W. Grunfeld
Gary Lewi
Warren Mitofsky
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June 28, 2000

Executive Director

Robert J. Freeman

Mr. A. Thomas Levin
Meyer, Suozzi, English & Klein, P.C.
1505 Kellum Place
Mineola, NY 11501-4824

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Levin:

I have received your letter of May 18 in which you described difficulty in obtaining records under the Freedom of Information Law as follows:

“When we seek to inspect and copy an application which has been filed with the municipality on behalf of a property owner, or prospective developer of property, we are often advised by the municipality that the application papers will not be made available for inspection until the municipality has completed its review of the application and (where no public hearing is required for the application) the municipality has made its determination with respect to the application.

“This procedure prevents us, or our clients, from being able to learn the details of pending applications in sufficient time to permit them to have any input, or to organize any opposition to the application, before the municipal decision is made.”

It is your view that the practice described above is inconsistent with law and you have sought an opinion on the matter.

In this regard, I offer the following comments.

First, a key provision in an analysis of the issue is §86(4) of the Freedom of Information Law which defines the term "record" expansively to mean:

"any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes".

The Court of Appeals has construed the definition as broadly as its specific language suggests. In the first decision focusing on the definition of "record", the Court emphasized that the Freedom of Information Law must be construed broadly in order to achieve the goal of government accountability, for the court found that:

"Key is the Legislature's own unmistakably broad declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (emphasis added; Public Officers Law, §84).

"For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objections cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" (Westchester Rockland Newspapers v. Kimball, 50 NY2d 575, 579 (1980)).

In short, based on the language of the definition of "record", it is clear in my view that the materials in question are subject to rights conferred by the Freedom of Information Law as soon as they come into the possession of a municipality.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, it is unlikely that any of the grounds for denial could be asserted to withhold the kinds of records that you described.

It is noted the fact that the records are "predecisional" is not relevant. Such a consideration may be pertinent in the context of §87(2)(g), which enables an agency to withhold portions of "inter-agency and intra-agency materials." However, property owners and developers are neither agency

Mr. A. Thomas Levin

June 28, 2000

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officials nor 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."

Based on the foregoing, the exception pertains to communications between or among state or local government officials at two or more agencies ("inter-agency materials"), or communications between or among officials at one agency ("intra-agency materials"). Since the records at issue consist of records sent to municipalities by members of the public or entities that are not governmental, they would not constitute inter-agency or intra-agency materials, and the exception typically cited to withhold predecisional materials would not apply.

Lastly, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

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:

Mr. A. Thomas Levin

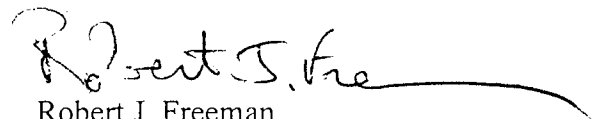
June 28, 2000

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"...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,

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-12181

Committee Members

Mary O. Donohue
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June 28, 2000

Executive Director

Robert J. Freeman

E-Mail

TO: Joseph L. Latwin [REDACTED]

FROM: Robert J. Freeman, Executive Director *RSV*

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Latwin:

I have received your letter of May 19. You wrote that you requested "a planning commission's records showing each instance during the past several years in which it had not exercised its discretion to waive a certain zoning requirement." The secretary of the commission indicated, in your words, that he/she "refused to do [your] research and that [you] could look through all of the planning commission's files". You added that the records of your interest might be contained in "1 or 2 file cabinets" and asked whether the response to your request was proper.

From my perspective, the issue involves whether 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)

Mr. Joseph L. Latwin

June 28, 2000

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(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 planning commission, if the records sought can be located with reasonable effort, I believe that the request would have met the requirement of reasonably describing the records. For instance, if a file folder is marked "waivers", and all the records falling within the scope of your request are contained in that folder, the request would reasonably describe the records. On the other hand, if the records of your interest 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, the request would not in my opinion meet the standard of reasonably describing the records, and the agency would not be required to engage in a search.

An alternative means of gaining the information of your interest might involve a request to review of minutes of meetings of the commission. While there may be numerous minutes, a review of their contents would not involve an effort similar to consideration of the contents of a file cabinet.

I hope that the foregoing serves to clarify your understanding of the matter and that I have been of assistance.

RJF:jm

FOIL-AO-12182

From: Robert Freeman
To: [REDACTED]
Date: 6/29/00 8:09AM
Subject: Dear Mr Perry:

Dear Mr Perry:

I have received your inquiry in which you asked whether correspondence between a member of a village board of trustees who used "his title of Village Trustee" and a state agency is public and should be kept "in the Village filing system."

In brief, if a person prepares or receives correspondence in the performance of his or her governmental duties, which would appear to be so when that person uses his or her governmental title or letterhead, I believe that the correspondence would fall within the coverage of the Freedom of Information and would be subject to rights of access conferred by that statute. The correspondence would also fall within the scope provisions dealing with the management of government records, their retention and disposition (see Arts and Cultural Affairs Law, Article 57-A).

If you would like a more detailed opinion on the matter, please let me know.

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-12183

Committee Members

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Alan Jay Gerson
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June 29, 2000

Executive Director

Robert J. Freeman

Mr. Janusz Muszak

The staff of the Committee on Open 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 correspondence in which you asked whether a court official, a special matrimonial referee, "is exempted from responding to a FOIL request."

In this regard, 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."

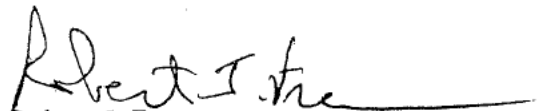
In turn, §86(1) defines the term "judiciary" to mean:

"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.

I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12184

Committee Members

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Alexander F. Treadwell

June 29, 2000

Executive Director

Robert J. Freeman

Aaron Mark Zimmerman, Esq.
117 South State Street
Syracuse, NY 13202

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Zimmerman:

I have received your letter of May 23 and the correspondence attached to it. You referred to a request made to the Workers' Compensation Board on May 8 in which you sought certain records. The receipt of the request was acknowledged on May 17, and you were informed that the request is under review, and that you could anticipate a determination "on or before September 18, 2000."

It is your view that the "Board has been dragging its feet" and you asked that I "intercede." In this regard, I offer the following comments.

First, as you may be aware, the primary function of the Committee on Open Government involves providing advice and opinions concerning the Freedom of Information Law. While the following remarks are not binding and are advisory only, it is my hope that they will be educational and persuasive. Further, 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.

Second, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

Based on the foregoing, an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date indicating when it can be anticipated that a request will be granted or denied. The acknowledgement by the records access officer did not make reference to such a date.

I note that there is no precise time period within which an agency must grant or deny access to records. The time needed to do so may be dependent upon the volume of a request, the possibility that other requests have been made, the necessity to conduct legal research, the search and retrieval techniques used to locate the records and the like. In short, when an agency acknowledges the receipt of a request because more than five business days may be needed to grant or deny a request, so long as it provides an approximate date indicating when the request will be granted or denied, and that date is reasonable in view of the attendant circumstances, I believe that the agency would be acting in compliance with law. Notwithstanding the foregoing, in my view, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, if records are clearly available to the public under the Freedom of Information Law, and if they are readily retrievable, there may be no basis for a lengthy delay in disclosure.

Third, as a general matter, the Freedom of Information Law does not require that an agency create or prepare records. An exception to that general principle involves the records that you requested, which are required to be "maintained" by every agency. Specifically, §87(3) states that:

"Each agency shall maintain:

- (a) a record of the final vote of each member in every agency proceeding in which the member votes;
- (b) a record setting forth the name, public office address, title and salary of every officer or employee of the agency; and
- (c) a reasonably detailed current list by subject matter, of all records in the possession of the agency, whether or not available under this article."

Based on the language quoted above, it is clear in my view that the records sought must be maintained on an ongoing basis. Further, I believe that it is also clear that they must be disclosed, for none of the grounds for denial appearing in §87(2) would be applicable or pertinent. In short, from my perspective, in view of the direction provided in the statute, there would be no valid basis for delaying disclosure for a period of months.

Lastly, paragraphs (b) and (c) of §87(3)(b) involve records that are current in nature. Paragraph (a), however, may involve records of votes of the members of the Board since its creation. It is suggested, therefore, that you contact the Board for the purpose of indicating the time period of

Mr. Aaron Mark Zimmerman

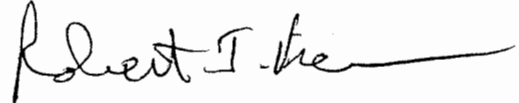
June 29, 2000

Page - 3 -

your interest. It is noted, too, that records of votes of members are typically contained in minutes of meetings, which should be readily retrievable.

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: Workers' Compensation Board
David C. Gannon



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12185

Committee Members

Mary O. Donohue
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June 29, 2000

Executive Director

Robert J. Freeman

Ms. Dorothy Getman

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Getman:

I have received your letter of May 22, as well as the correspondence attached to it. You have questioned a partial denial of a request for records of the Gloversville Enlarged School District relating to an audit. Specifically, the District's records access officer cited §87(2)(g) of the Freedom of Information Law and wrote that "access is not required with respect to inter-agency materials that are not final agency determinations.

The same contention was rejected in a case decided by the Court of Appeals, the state's highest court. In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Second, the provision at issue, §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 arguments 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 of Appeals rejected that finding and stated that:

"...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87(2)(g)](111)). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)..." [Gould et al. v. New York City Police Department, 87 NY2d 267, 276 (1996)].

In short, that a record is predecisional or does not reflect a final determination would not represent an end of an analysis of rights of access or an agency's obligation to review the contents of a record.

The Court also dealt with the issue of what constitutes "factual data" that must be disclosed under §87(2)(g)(i). In its consideration of the matter, the Court found that:

"...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546,

549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][i]). Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182) id., 276-277).]

In my view, insofar as the records at issue consist of recommendations, advice or opinions, for example, they may be withheld; insofar as they consist of statistical or factual information, I believe that they must be disclosed.

I point out that the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the agency contended that complaint follow up reports, also known as "DD5's", could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g). The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276). The Court then stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, directing that:

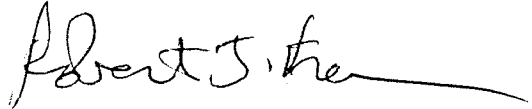
"...to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents (Matter of Fink v. Lefkowitz, *supra*, 47 N.Y.2d, at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material (see, Matter of Xerox Corp. v. Town of Webster, 65 N.Y.2d 131, 133, 490 N.Y.S. 2d, 488, 480 N.E.2d 74; Matter of Farbman & Sons v. New York City Health & Hosps. Corp., *supra*, 62 N.Y.2d, at 83, 476 N.Y.S.2d 69, 464 N.E.2d 437)" (id.).

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. Dorothy Getman
June 29, 2000
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: Paul V. Fiacco
Nelson J. Ronsvalle



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12186

Committee Members

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July 5, 2000

Executive Director

Robert J. Freeman

Mr. Frank Vescera
Common Cents Property Owners
Association, Inc.
1155 Mohawk 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. Vescera:

I have received your letter of June 25 and appreciate your kind remarks. You have questioned the propriety of decisions by the Utica Board of Education not to televise a meeting and to withhold a video recording of a meeting. A news article attached to your letter indicates that the District's attorney contended that "airing the meeting could put the district at risk of litigation."

In this regard, I offer the following comments.

First, there is no requirement that a public body, such as a board of education, tape or video record its meetings or that it broadcast its meetings.

Second, I believe that a video recording of an open meeting must be made available for viewing or copying under the Freedom of Information Law.

That statute 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 school board maintains a video or audio recording of a meeting, the recording would constitute a "record" that falls within the coverage of the Freedom of Information Law, irrespective of the reason for which the recording was prepared.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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].

The fact that any person could have heard the content of the record, in my view, constitutes a waiver of the capacity to withhold what has become part of the public domain. As stated in a decision in which the ability to prohibit the use of audio tape recorders at open meetings was rejected, the Appellate Division determined that:

"[t]hose who attend such meetings, who decide to freely speak out and voice their opinions, fully realize that their comments and remarks are being made in a public forum. The argument that members of the public should be protected from the use of their words, and that they have some sort of privacy interest in their own comments, is therefore wholly specious" [Mitchell v. Board of Education of Garden City School District, 113 AD 2d 924, 925 (1985)].

In like manner, when members of a board of education and the staff of a school district exchange ideas, opinions, and engage in a deliberative process during open meetings, they have, by statute, effectively waived their ability to preclude the public from using their words or capturing their words on audio or video tape. To suggest that a record maintained by a school district that captures what was knowingly expressed in public pursuant to board members' statutory duties should not be disclosed is, in my opinion, unsupportable and clearly inconsistent with law.

Lastly, the possibility that the video recording might be pertinent to or used in litigation is, in my view, largely irrelevant. As stated by the Court of Appeals, the State's highest court, in a case involving a request made under the Freedom of Information Law by a person involved in litigation against an agency: "Access to records of a government agency under the Freedom of Information Law (FOIL) (Public Officers Law, Article 6) is not affected by the fact that there is pending or potential litigation between the person making the request and the agency" [Farbman v. NYC Health and Hospitals Corporation, 62 NY 2d 75, 78 (1984)]. Similarly, in an earlier decision, the Court of Appeals determined that "the standing of one who seeks access to records under the Freedom of Information Law is as a member of the public, and is neither enhanced...nor restricted...because he is also a litigant or potential litigant" [Matter of John P. v. Whalen, 54 NY 2d 89, 99 (1980)]. The Court in Farbman, supra, discussed the distinction between the use of the Freedom of Information

Mr. Frank Vescera

July 5, 2000

Page - 3 -

Law as opposed to the use of discovery in Article 31 of the Civil Practice Law and Rules. Specifically, it was found that:

"FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on governmental decision-making, its ambit is not confined to records actually used in the decision-making process (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request.

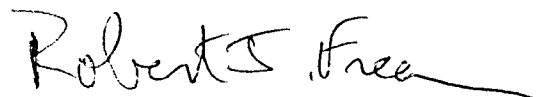
"CPLR article 31 proceeds under a different premise, and serves quite different concerns. While speaking also of 'full disclosure' article 31 is plainly more restrictive than FOIL. Access to records under CPLR depends on status and need. With goals of promoting both the ascertainment of truth at trial and the prompt disposition of actions (Allen v. Crowell-Collier Pub. Co., 21 NY 2d 403, 407), discovery is at the outset limited to that which is 'material and necessary in the prosecution or defense of an action'" [see Farbman, supra, at 80].

Based upon the foregoing, the pendency of litigation would not, in my opinion, affect either the rights of the public or a litigant under the Freedom of Information Law.

In an effort to enhance compliance with and understanding of applicable law, a copy of this opinion will be forwarded to the Board of Education.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

CML-AU-3178
FOIL-AU-12187

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July 5, 2000

Executive Director

Robert J. Freeman

Ms. Anita DiMiceli
Executive Director
Town of Oyster Bay Housing Authority
P.O. Box 351
Plainview, NY 11803

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. DiMiceli:

I have received your letter of May 30 and the materials attached to it. You referred to an opinion addressed to you on May 8 in which it was advised, based on judicial decisions, that any person may use a tape recorder at an open meeting of a public body, so long as the use of the device is not obtrusive or disruptive.

Notwithstanding the opinion, the Authority resolved at a meeting held on May 11 that members of the public could use tape recorders at its meetings so long as the use of the recorders is "neither disruptive nor obtrusive", but that "members, agents, and/or employees of the Housing Authority present at the meeting and acting within the scope of their employment may use a tape recorder upon first obtaining the consent of the Board." You wrote that you and your attorney interpret that opinion of May 8 as advising that you do not need "permission" to record meetings of the Town of Oyster Bay Housing Authority, which you serve as Executive Director, and you asked whether you are "correct."

I believe that you are correct. In my view, a rule that provides members of the Authority or its agents or employees a lesser right than any member of the public would be found to be unreasonable and unsustainable.

The materials attached to your letter also indicate that even though the tape recording device that you used was in full view of all Board members, the tape recording of a meeting was taken from you. Here I direct your attention to the Freedom of Information Law. That statute pertains to agency records, i.e., those of a public housing authority, and §86(4) of the Law defines the term "record" expansively to include:

Ms. Anita DiMiceli
July 5, 2000
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."

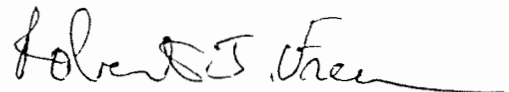
Based on the foregoing, when an agency maintains a tape recording of a meeting, the tape would constitute a "record" that falls within the coverage of the Freedom of Information Law, irrespective of the reason for which the recording was prepared.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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].

In short, assuming that the tape recording is maintained by or for the Housing Authority, I believe that it would be available to you or any person.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Town of Oyster Bay Housing Authority
Jack Tillem
Barry J. Peek



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO-
FOIL-AO-12188

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July 5, 2000

Executive Director

Robert J. Freeman

Ms. Denise Chapman

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Chapman:

As you are aware, I have received your letter of May 20 and a variety of materials relating to it. In brief, you have sought assistance concerning a claim against your employer, the New York City Fire Department, and you wrote that records pertaining to your situation have been lost.

It appears that several entities have been involved in the matter, including the Fire Department, the Division of Public Employee Safety and Health, which is the unit of the New York State Department of Labor to which you have referred as "PESH", the Occupational Safety and Health Administration ("OSHA"), which is a federal agency, and various hospitals and an attorney.

The primary function of this office involves offering opinions and guidance concerning rights of access to government records in New York. The statute that generally pertains to access to records of state and local government in New York is the Freedom of Information Law. That 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."

Based on the foregoing, it is clear that the New York City Fire Department and the New York State Department of Labor are "agencies" required to comply with the Freedom of Information Law. OSHA is subject to a different statute, the federal Freedom of Information Act (5 USC §552). Private hospitals and attorneys not subject to either the state or federal freedom of information provisions.

Also potentially relevant is the Personal Privacy Protection Law, which applies to state agencies, such as the Department of Labor; it does not apply, however, to entities of local government, such as the New York City Fire Department.

To seek records under the Freedom of Information Law, a request should generally be made to the "records access officer." Pursuant to regulations promulgated by the Committee on Open Government, the records access officer has the duty of coordinating an agency's response to requests for records. I have contacted Mr. Perez at PESH on your behalf, and he informed me that your request has been forwarded to the appropriate person and is currently under review. I also contacted Ms. Mary O'Sullivan, Records Access Officer for the Fire Department. She indicated that she was unfamiliar with your case and had no knowledge of any request for records directed to the Department. If you are interested in seeking records from the Department, it is suggested that a request be made to Mary O'Sullivan, Records Access Officer, New York City Fire Department, 9 Metrotech Center, Brooklyn, NY 11201.

I note that §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, when requesting records, there should be sufficient detail to enable agency staff to locate and identify the records.

In brief, 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.

The Personal Privacy Protection Law generally requires that state agencies disclose records about data subjects to those persons. A "data subject" is "any natural person about whom personal information has been collected by an agency" [Personal Privacy Protection Law, §92(3)]. "Personal information" is defined to mean "any information concerning a data subject which, because of name, number, symbol, mark or other identifier, can be used to identify that data subject" [§92(7)]. For purposes of the Personal Privacy Protection Law, the term "record" is defined to mean "any item, collection or grouping of personal information about a data subject which is maintained and is retrievable by use of the name or other identifier of the data subject" [§92(9)].

Under §95 of the Personal Privacy Protection Law, a data subject, a person such as yourself, has the right to obtain from a state agency records pertaining to him or her, unless the records sought fall within the scope of exceptions appearing in subdivisions (5), (6) or (7) of that section or §96, which would deal with the privacy of others.

As suggested earlier, as a "data subject", I believe that you generally enjoy rights of access to records about yourself that are maintained by a state agency. Insofar as the records pertain to or identify others, there may be privacy considerations applicable to them. To the extent that the records identify others, §96(1) of the Personal Privacy Protection Law states that "No agency may disclose any record or personal information", except in conjunction with a series of exceptions that follow. One of those exceptions, §96(1)(c), involves a case in which a record is "subject to article six of this chapter [the Freedom of Information Law], unless disclosure of such information would

Ms. Denise Chapman

July 5, 2000

Page - 3 -

constitute an unwarranted invasion of personal privacy as defined in paragraph (a) of subdivision two of section eighty-nine of this chapter". Section 89(2-a) of the Freedom of Information Law states that "Nothing in this article shall permit disclosure which constitutes an unwarranted invasion of personal privacy as defined in subdivision two of this section if such disclosure is prohibited under section ninety-six of this chapter". Consequently, if a state agency cannot disclose records pursuant to §96 of the Personal Protection Law, it is precluded from disclosing under the Freedom of Information Law; alternatively, if disclosure of a record would not constitute an unwarranted invasion of personal privacy and if the record is available under the Freedom of Information Law, it may be disclosed under §96(1)(c).

In sum, it appears that the records maintained by PESH must be disclosed to you pursuant to the Personal Privacy Protection Law, subject to the qualifications discussed in the preceding commentary. Again, although the Personal Privacy Protection Law does not apply to the City of New York, insofar as that agency maintains records of your interest, they would be subject to rights of access conferred by the Freedom of Information Law.

Since you wrote that records are claimed to have been lost, I point out that when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

I point out that in Key v. Hynes [613 NYS 2d 926, 205 AD 2d 779 (1994)], it was found that a court could not validly accept conclusory allegations as a substitute for proof that an agency could not locate a record after having made a "diligent search". However, in another decision, such an allegation was found to be sufficient when "the employee who conducted the actual search for the documents in question submitted an affidavit which provided an adequate basis upon which to conclude that a 'diligent search' for the documents had been made" [Thomas v. Records Access Officer, 613 NYS 2d 929, 205 AD 2d 786 (1994)].

Lastly, while private hospitals are not subject to the Freedom of Information Law, the subjects of medical records generally have rights of access to the records from hospitals or physicians under §18 of the Public Health Law. That statute pertains to "patient information", which is defined in subdivision (1)(e) to include:

"...any information concerning or relating to the examination, health assessment including, but not limited to, a health assessment for insurance and employment purposes or treatment of an identifiable subject maintained or possessed by a health care facility or health care practitioner who has provided or is providing services for assessment of a health condition including, but not limited to, a health assessment for insurance and employment purposes or has treated or is treating such subject..."

Ms. Denise Chapman

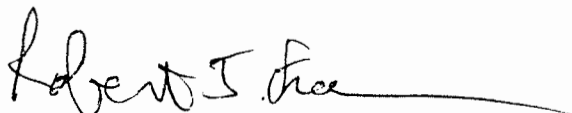
July 5, 2000

Page - 4 -

To obtain additional information on the subject, it is suggested that you might contact the Access Patient Information Coordinator at the New York State Department of Health, Hedley Park Place, 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



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AJ-12189

Committee Members

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July 5, 2000

Executive Director

Robert J. Freeman

Mr. Janusz Muszak

The staff of the Committee on Open 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 May 30. You asked whether an "entity like the Monroe County Water Authority [is] subject of [sic] the Freedom of Information Law."

In this regard, as indicated in previous correspondence, that statute is applicable to agencies, and §86(3) defines the term "agency" to include:

"any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Since the language quoted above makes specific reference to public authorities, a municipal water authority, for example, would constitute an "agency" that falls within the requirements of the Freedom of Information Law.

With respect to your letter of July 3, it appears that you are seeking an opinion concerning the following statement: "...if a person is going to be represented by someone other than himself, that person engaged in representation must be an attorney." I cannot offer an opinion on that subject. The advisory jurisdiction of the Committee on Open Government is limited to matters relating to public access to government information. As such, the issue that you raised is beyond the jurisdiction or expertise of this office.

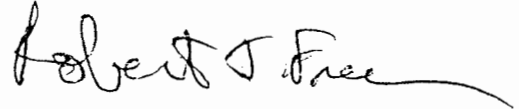
Mr. Janusz Muszak

July 5, 2000

Page - 2 -

I hope that the foregoing clarifies your understanding of the role of this office and the scope of the Freedom of Information Law.

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

FOIL-AO-12190

Committee Members

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July 5, 2000

Executive Director

Robert J. Freeman

Mr. Ken W. Kloeber

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Kloeber:

I have received your letter of May 30 in which you questioned the propriety of a denial of your request by the State Insurance Fund for a copy of its budget. You wrote that the denial was based on a claim that disclosure would give the Fund's competitors "a substantial competitive advantage." It is your view that the Fund is "neither a 'commercial enterprise'[,] nor was its budget submitted by a 'commercial enterprise'[,] nor is the budget a 'trade secret.'"

In this regard, 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), the so-called "trade secret" exception would serve as a potential basis for a denial of access.

As you are aware, the cited 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."

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 decision rendered by the Court of Appeals, the State's highest court, which, for the first time, considered the phrase "substantial competitive injury" [Encore College Bookstores, Inc. v. Auxiliary Service Corporation of the State University of New York at Farmingdale, 87 NY2d 410(1995)]. In that decision, the Court reviewed the legislative history of the Freedom of Information Law as it pertains to §87(2)(d), and due to the analogous nature of equivalent exception in the federal Freedom of Information Act (5 U.S.C. §552), it relied in part upon federal judicial precedent.

In its discussion of the issue, the Court stated that:

"FOIL fails to define substantial competitive injury. Nor has this Court previously interpreted the statutory phrase. FOIA, however, contains a similar exemption for 'commercial or financial information obtained from a person and privileged or confidential' (see, 5 USC § 552[b][4])...

"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)."

Mr. Ken W. Kloeber

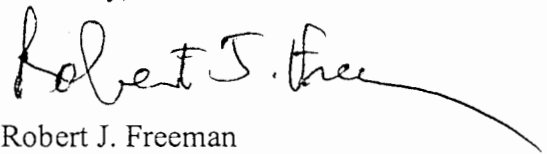
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In sum, I believe that the State Insurance Fund could in the context of the preceding remarks be characterized as a commercial entity and therefore, assert §87(2)(d). This is not to suggest that the Fund's annual budget necessarily could be withheld in its entirety, but rather that those portions that fall within the scope of §87(2)(d) may be withheld in accordance with 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, sweeping underline.

Robert J. Freeman
Executive Director

RJF:jm

cc: Jacob Weintraub, Counsel



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AU-12191

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July 5, 2000

Executive Director

Robert J. Freeman

Bob and Jenny Petrucci
InfoServcies
Resident Golfers Protection Group
100 Lane Crest Avenue
New Rochelle, NY 10805

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence, unless otherwise indicated.

Dear Mr. and Ms. Petrucci:

I have received your letter of May 25, as well as a variety of related correspondence concerning your efforts in obtaining records from Westchester County.

A copy of a response to your appeal rendered by the County Attorney indicates that you requested:

“a compact disc containing in DATABASE FORMAT the names, addresses and phone number of ANY AND ALL Westchester County public park pass holders who are Westchester County resident golfers utilizing Westchester County Public Gold Courses; and

“a compact disc containing in DATABASE FORMAT the names, addresses and phone numbers of ANY AND ALL Westchester County resident golfers utilizing Westchester County Public Golf Courses who are not Westchester County public park pass holders.”

The appeal was denied “on the ground that the Department does not have any records that it can provide in compact disc format”, nor does it “have any records of Westchester County resident golfers who utilize Westchester County golf courses, but do not have Westchester County public park passes.” He added that the Freedom of Information Law does not require that an agency create a record in order to respond to a request.

In this regard, I offer the following comments.

First, I am in general agreement with the County Attorney's statement that an agency need not create a record in response to a request, for the Freedom of Information Law pertains to existing records [see Freedom of Information Law, §89(3)]. Therefore, if, for example, the County maintains no list County residents who use County public golf courses but who do not have passes, the County would not be required to prepare such a list on your behalf.

Second, as I understand the response, while there may be no list of all those County residents who use County golf courses, it was inferred that there is documentation that identifies those who are park pass holders, but that the County does not maintain and cannot produce the documentation on a compact disc. If indeed the County does not have the ability to transfer data onto compact discs, there would be no obligation to develop the capacity to do so on your behalf. However, if the County has the ability to make the data available in a different form or format, such as a printout, a tape or a floppy disc, I believe that it would be required to do so to the extent that the data is accessible under the Freedom of Information Law and you are willing to pay the actual cost of reproduction [see §87(1)(b)(iii)].

As you may be aware, the Freedom of Information Law pertains to agency records, and §86(4) of the Law defines the term "record" to include:

"any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based upon the language quoted above, if information is maintained in some physical form, it would constitute a "record" subject to rights of access conferred by the Law. Further, the definition of "record" includes specific reference to computer tapes and discs, and it was held in the early days of the Freedom of Information Law that "[i]nformation is increasingly being stored in computers and access to such data should not be restricted merely because it is not in printed form" [Babigian v. Evans, 427 NYS 2d 688, 691 (1980); aff'd 97 AD 2d 992 (1983); see also, 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 would merely be retrieving data that it has the capacity to retrieve. Disclosure may be accomplished either by printing out the data on paper or perhaps by duplicating the data on another storage mechanism, such as a computer tape or disk. On the other hand, if information sought can be retrieved from a computer or other storage medium only by means of new programming or the alteration of existing programs, those steps would be the equivalent of creating a new record. As stated earlier, since §89(3) does not require an agency to create a record, an agency is not required to reprogram or develop new programs to retrieve information that would otherwise be available [see Guerrier v. Hernandez-Cuebas, 165 AD 2d 218 (1991)].

Often information stored electronically can be extracted by means of a few keystrokes on a keyboard. While some have contended that those kinds of minimal steps involve programming or reprogramming, and, therefore, creating a new record, so narrow a construction would tend to defeat the purposes of the Freedom of Information Law, particularly as information is increasingly being stored electronically. If electronic information can be extracted or generated with reasonable effort, if that effort involves less time and cost to the agency than engaging in manual deletions, it would seem that an agency should follow the more reasonable and less costly and labor intensive course of action.

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 & Pomerantz v. Records Access Officer, 65 N.Y.2d 294, 296-297, 491 N.Y.S.2d 289, 480 N.E.2d 1071). Under the circumstances presented herein, it is clear that both the statute and its underlying policy require that the DOB comply with Brownstone's reasonable request to have the information, presently maintained in computer language, transferred onto computer tapes" [166 Ad 2d, 294, 295 (1990)].

Additionally, in a more recent decision that cited Brownstone, it was held that: "[a]n agency which maintains in a computer format information sought by a F.O.I.L. request may be compelled to comply with the request to transfer information to computer disks or tape" (Samuel v. Mace, Supreme Court, Monroe County, December 11, 1992).

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. If the County cannot reproduce the data on a compact disc, it may nonetheless be required to reproduce it in/on a different medium.

Further, I believe that there is clearly a distinction between extracting information and creating it. If an applicant knows that an agency's database consists of 10 items or "fields", asks for items 1, 3 and 5, but the agency has never produced that combination of data, would it be "creating" a new record? The answer is dependent on the nature of the agency's existing computer programs; if the agency has the ability to retrieve or extract those items by means of its existing programs, it would not be creating a new record; it would merely be retrieving what it has the ability to retrieve in conjunction with its electronic filing system. An apt analogy may be

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to a filing cabinet in which files are stored alphabetically and an applicant seeks items "A", "L" and "X". Although the agency may never have retrieved that combination of files in the past, it has the ability to do so, because the request was made in a manner applicable to the agency's filing system.

In the context of your request, if the County has the ability to generate the data of your interest, if it has the capacity to segregate that data from items that need not be disclosed, and if you are willing to pay the actual cost of reproduction as envisioned by §87(1)(b)(iii) of the Freedom of Information Law, I believe that it would be obliged to do so.

I note that the regulations promulgated by the Committee on Open Government, which have the force and effect of law, state that an agency's records access officer "is responsible for assuring that agency personnel...Assist the requester in identifying requested records, if necessary" [21 NYCRR §1401.2(b)(2)]. It is suggested, therefore, that you contact the records access officer for the purpose of ascertaining the nature of the information that the County maintains in which you have an interest, to learn of the manner in which it is kept and can be reproduced or generated, and to submit a new request based on the information that you acquire.

Third, assuming that there may be a record or records that contain items of interest, any such records would be presumptively available under the Freedom of Information Law. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

It has consistently been advised that permits or licenses and similar, related kinds of records are available to the public, even though they identify particular individuals. From my perspective, various activities are the subject of permits or licenses 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 having parking spaces in municipal parking lots or passes that enable residents to use municipal facilities. I believe that those kinds of 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 an agency or in which the agency has a significant interest.

Names and addresses of licensees have been found to be available in Kwitny v. McGuire [53 NY 2d 968 (1981)] involving pistol licenses, American Broadcasting Companies v. Siebert [442 NYS 2d 855 (1981)] involving licensed check cashing businesses, Herald Company v. NYS Division of the Lottery [Supreme Court, Albany County, November 16, 1987] involving licensed lottery agents and in New York State Association of Realtors, Inc. v. Paterson [Supreme Court, Albany County, July 15, 1981] involving licensed real estate brokers and salespeople. In short, I believe that records identifiable to licensees or park pass holders, for example, are generally accessible to the public.

The only provision of significance in analyzing rights of access in my view would be §87(2)(b), which permits an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." While I believe that names and addresses of pass or permit holders would be available, I note that you also asked for their telephone

numbers. In my opinion, home telephone numbers may be withheld under the provision cited above. As suggested earlier, if a database includes home phone numbers, if the numbers are contained within a "field" and can be segregated from other items, an agency would be obliged to make the items accessible under the law available after having removed the home numbers. If the agency does not have a program that enables it to separate home numbers from accessible items, a printout could be prepared or other records duplicated from which phone numbers could be deleted to protect personal privacy.

Fourth, as a general matter, when records are accessible under the Freedom of Information Law, it has been held that they should be made equally available to any person, regardless of one's status, interest or the intended use of the records [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Moreover, the Court of Appeals has held that:

"FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on government decision-making, its ambit is not confined to records actually used in the decision-making process. (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request" [Farbman v. New York City Health and Hospitals Corporation, 62 NY 2d 75, 80 (1984)].

Farbman pertained to a situation in which a person involved in litigation against an agency requested records from that agency under the Freedom of Information Law. In brief, it was found that one's status as a litigant had no effect upon that person's right as a member of the public when using the Freedom of Information Law, irrespective of the intended use of the records. Similarly, unless there is a basis for withholding records in accordance with the grounds for denial appearing in §87(2), the use of the records, including the potential for commercial use, is in my opinion irrelevant; when records are accessible, once they are disclosed, the recipient may do with the records as he or she sees fit.

The only exception to the principles described above involves the protection of personal privacy. Section 89(2)(b) of the Law provides a series of examples of unwarranted invasions of personal privacy, one of which pertains to:

"sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes" [§89(2)(b)(iii)].

The provision quoted above represents what might be viewed as an internal conflict in the law. As indicated earlier, the status of an applicant or the purposes for which a request is made are irrelevant to rights of access, and an agency cannot inquire as to the intended use of records. However, due to the language of §89(2)(b)(iii), rights of access to a list of names and addresses, or equivalent records, may be contingent upon the purpose for which a request is made [see

Scott, Sardano & Pomeranz v. Records Access Officer of Syracuse, 65 NY 2d 294, 491 NYS 2d 289 (1985); Federation of New York State Rifle and Pistol Clubs, Inc. v. New York City Police Dept., 73 NY 2d 92 (1989); Goodstein v. Shaw, 463 NYS 2d 162 (1983)].

In a case involving a list of names and addresses in which the agency inquired as to the purpose for which the list was requested, it was found that an agency could make such an inquiry. Specifically, in Golbert v. Suffolk County Department of Consumer Affairs (Supreme Court, Suffolk County, September 5, 1980), the Court cited and apparently relied upon an opinion rendered by this office in which it was advised that an agency may appropriately require that an applicant for a list of names and addresses provide an indication of the purpose for which a list is sought. In that decision, it was stated that:

"The Court agrees with petitioner's attorney that nowhere in the record does it appear that petitioner intends to use the information sought for commercial or fund-raising purposes. However, the reason for that deficiency in the record is that all efforts by respondents to receive petitioner's assurance that the information sought would not be so used apparently were unsuccessful. Without that assurance the respondents could reasonably infer that petitioner did want to use the information for commercial or fund-raising purposes."

Moreover, it was held that:

"[U]nder the circumstances, the Court finds that it was not unreasonable for respondents to require petitioner to submit a certification that the information sought would not be used for commercial purposes. Petitioner has failed to establish that the respondents denial or petitioner's request for information constituted an abuse of discretion as a matter of law, and the Court declines to substitute its judgement for that of the respondents" (id.).

As such, there is precedent indicating that an agency may inquire with respect to the purpose of a request when the request involves a list of names and addresses.

Based on the foregoing, it is suggested that a request for names and addresses include a certification, if it is so, that you will not use the names and addresses for any commercial or fund-raising purposes.

Lastly, in his determination of your appeal, the County Attorney suggested that "the practice of the Executive Director in issuing opinions without being formally authorized to do so in each specific instance by the full Committee on Open Government is in violation of both FOIL and the Open Meetings Law." In this regard, enclosed are copies of a memorandum prepared in October of 1978 in which the matter of delegation of authority to enable me to carry out the day to day duties of the Committee was considered and minutes of a meeting held soon

Bob and Jenny Petrucci

July 5, 2000

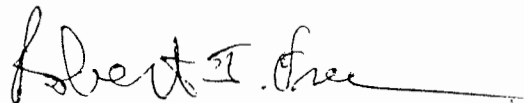
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thereafter in which the Committee authorized me "to do all that is necessary to perform the duties of the Committee."

The County Attorney also wrote that the opinions that I prepare are "entitled to no weight." While the opinions are not legally binding, the reality is that many find the opinions to be educational and persuasive, and that the courts have in numerous instances cited and relied upon the opinions as the basis for their decisions. Further, in a matter unrelated to your request, the County Attorney, as required by law, sent a copy of his determination to this office in which *he cited and apparently relied upon opinions rendered by this office.* In so doing, his action suggests that our opinions, although not binding, may indeed have *some* weight.

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:jm

cc: Alan D. Scheinkman, County Attorney
Neil Rentz



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12192

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July 5, 2000

Executive Director

Robert J. Freeman

Ms. Eileen S. Globus

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Globus:

I have received your letter of May 18, which reached this office on May 30, as well as a variety of material relating to it. The issues involve your attempt to obtain records indicating the names and addresses of students so that you could send them "a flyer supporting a busing proposition", and to obtain information concerning "a project at the Commack Middle School where the school district cut down 2 acres of Huntington Town Parkland in error."

In this regard, first, although the Freedom of Information Law generally governs rights of access to records maintained by entities of state and local government in New York, a federal statute deals with records identifiable to students. Specifically, the Family Educational Rights and Privacy Act (FERPA; 20 USC §1232g) applies to all educational agencies or institutions that participate in grant programs administered by the United States Department of Education. As such, FERPA includes within its scope virtually all public educational institutions and many private educational institutions. The focal point of the Act is the protection of privacy of students. It provides, in general, that any "education record," a term that is broadly defined, that is personally identifiable to a particular student or students is confidential, unless the parents of students under the age of eighteen waive their right to confidentiality, or unless a student eighteen years or over similarly waives his or her right to confidentiality. An "eligible student" is defined in the Code of Federal Regulations to mean "student who has reached 18 years of age or is attending an institution of post-secondary education" (34 CFR §99.3).

An exception to the rule of confidentiality in FERPA involves "directory information", which is defined in the regulations of the Department of Education (§99.3) to include:

"....information contained in an education record of a student which would not generally be considered harmful or an invasion of privacy

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if disclosed. It includes, but is not limited to the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended."

Prior to disclosing directory information, educational agencies must provide notice to parents of students or to eligible students in order that they may essentially prohibit any or all of the items from being disclosed. Specifically, §99.37 of the regulations promulgated pursuant to FERPA state in relevant part that:

"(a) An educational agency or institution may disclose directory information if it has given public notice to parents of students in attendance and eligible students in attendance at the agency or institution of --

(1) The types of personally identifiable information that the agency or institution has designated as directory information;

(2) A parent's or eligible student's right to refuse to let the agency or institution designate any or all of those types of information about the student as directory information; and

(3) The period of time within which a parent or eligible student has to notify the agency or institution in writing that he or she does not want any or all of those types of information about the student designated as directory information."

The regulations also indicate that a consent to disclose can only be given by the parent of a student under the age of eighteen; students have no rights under FERPA until they reach the age of eighteen.

You attached a notice of the Commack Union Free School District's policy concerning the disclosure of directory information. Unless there is an objection to disclosure by parents of students under the age of eighteen or students who have reached age eighteen, the notice indicates that students' names and addresses, as well as other items, will be made available as directory information to:

"parent/teacher associations and representatives of the district's insurance carriers, entities providing educational, occupational or career opportunities, or to publish in the Commack Courier, school student newspapers, magazines, yearbooks or other publications, daily or weekly newspapers, athletic programs, musical or theatrical programs, news releases..."

Ms. Eileen S. Globus

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As I understand the matter, your request was denied, and, in my view, the question is whether the denial was proper. From my perspective, the issue involves whether the District's policy, if you were denied access, is reasonable. Although the policy appears to permit limited disclosure, among those having the capacity to obtain directory information are "daily or weekly newspapers." If newspapers can obtain directory information and freely print or disseminate that information, it is questionable whether a school district could justifiably withhold the same information from the public generally, unless it chooses to deny access in conjunction with an exception appearing in the Freedom of Information Law. For instance, §89(2)(b)(iii) of that statute authorizes an agency to withhold a list of names and addresses if the list would be used for commercial or fund-raising purposes on the ground that disclosure would constitute "an unwarranted invasion of personal privacy." As such, it has been advised that a district's directory information policy could authorize the disclosure of a list of student's names and addresses, unless the list would be used for commercial or fund-raising purposes.

I am unaware of any judicial decision that deals with the issue. However, again, if the names and addresses of students are available to newspapers, which have no special rights of access pursuant to law, a policy of precluding disclosure of the same information to the public generally might, in my opinion, be found to be unreasonable and unjustifiable.

Second, with respect to much of the remainder of the information in which you are interested, it appears that the primary problem may be that the District does not maintain records that contain the information of your interest. As you are 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. In one of the items of correspondence that you forwarded, you indicated that you had received copies of contracts, but that there was no reference in those documents to the project upon which you have focused, and that there is "no breakdown on work being done or costs involved." You added that you "want to know what the original project cost was estimated to cost & what we have actually paid to date (including legal fees) for the tree clearing-drainage project..." In my opinion, insofar as records exist that contain the information sought, they would generally be available. However, if, for example, there is no "breakdown", the District would not be required to prepare records on your behalf that include the information in question.

To the extent that records falling within the scope of your requests exist, I point out that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §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, the leading decision involved a request for "the amount of money paid in 1994" to a particular law firm "for their legal service in representing the County in its landfill expansion suit", as well as "copies of invoices, bills, vouchers submitted to the county from the law firm justifying and itemizing the expenses for 1994" [Orange County Publications v. County of Orange, 637 NYS2d 596 (1995)]. Although monthly bills indicating amounts charged by the firm were disclosed, the agency redacted "the daily descriptions of the

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specific tasks' (the description material) 'including descriptions of issues researched, meetings and conversations between attorney and client'." The County offered several rationales for the redactions; nevertheless, the court rejected all of them, in some instances fully, in others in part.

The first contention was that the descriptive material is specifically exempted from disclosure by statute in conjunction with §87(2)(a) of the Freedom of Information Law and the assertion of the attorney-client privilege pursuant to §4503 of the Civil Practice Law and Rules (CPLR). The court found that the mere communication between the law firm and the County as its client does not necessarily involve a privileged communication; rather, the court stressed that it is the content of the communications that determine the extent to which the privilege applies. Further, the court distinguished between actual communications between attorney and client and descriptions of the legal services provided, stating that:

"...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. 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.

"Consequently, while billing statements which 'are detailed in showing services, conversations, and conferences between counsel and others' are protected by the attorney-client privilege (Licensing Corporation of America v. National Hockey League Players Association, 135 Misc.2d 126, 127-128 [Sup. Ct. N.Y.Co. 1992]; see, De La Roche v. De Law Roche, 209 A.D.2d 157, 158-159 [1st Dept. 1994]), no such privilege attaches to fee statements which do not provide 'detailed accounts' of the legal services provided by counsel..." (id. at 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:

"...it cannot be overlooked that '[n]ot every manifestation of a lawyer's labors enjoys the absolute immunity of work product' (Hoffman v. Ro-San Manor, 73 A.D.2d 207, 211, 425 N.Y.S.2d 619 [1st Dept. 1980]). Indeed, '[t]he exemption should be limited to those materials which are uniquely the product of a lawyer's learning and

professional skills, such as materials which reflect his research, analysis, conclusions, legal theory or strategy.'

"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 [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 as material prepared for litigation, or both" (emphasis added by the court); (id., 604-605).

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..."

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It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

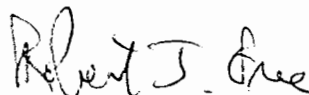
The court found that much of the information would likely consist of factual information available under §87(2)(g)(i) and stated that:

"...the Court concludes that respondent has failed to establish that petitioner should be denied access to the descriptive material as a whole. While it is possible that some of the descriptive material may fall within the exempted category of expressions of opinion, respondent has failed to identify with any particularity those portions which are not subject to disclosure under Public Officers Law §87(2)(g). See, Matter of Dunlea v. Goldmark, supra, 54 A.D.2d 449. Certainly, any information which merely reports an event or factual occurrence, such as a conference, telephone call, research, court appearance, or similar description of legal work, and which does not disclose opinions, recommendations or statements of legal strategy will not be barred from disclosure under this exemption..." (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. As I understand your request, it was not as detailed as the request at issue in Orange County Publications. It appears that your request involves amounts expended. In my view, those aspects of the records would clearly be available.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

James H. Hunderfund

Mary Jane Budde



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3180
FOIL-AO-12193

Committee Members

Mary O. Donohue
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July 6, 2000

Executive Director

Robert J. Freeman

Mr. H. Russell Young



The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Young:

I have received your letter of June 1 and the correspondence attached to it. You have sought assistance in relation to certain activities and practices in the Village of Seneca Falls.

As I understand the issues that you described, many relate to what you what you characterized as the firing of "a capable and efficient Village Administrator without cause or explanation." In this regard, I was recently informed that the Village Administrator, following the initiation of a lawsuit, will be reinstated to her position. While the issues may relate to that incident, several deal generally with the implementation of the Open Meetings and Freedom of Information Laws, and in consideration of the advisory jurisdiction of the Committee on Open Government, the following comments will focus only on those matters.

First, there is nothing in the Open Meetings Law that directly addresses the matter of notice of special meetings. Nevertheless, that statute requires that notice be posted and given to the news media prior to every meeting of a public body, such as a village board of trustees. Specifically, §104 of that statute provides that:

"1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.

2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.

3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

Stated differently, if a meeting is scheduled at least a week in advance, notice of the time and place must be given to the news media and to the public by means of posting in one or more designated public locations, not less than seventy-two hours prior to the meeting. If a meeting is scheduled less than a week an advance, again, notice of the time and place must be given to the news media and posted in the same manner as described above, "to the extent practicable", at a reasonable time prior to the meeting. Although the Open Meetings Law does not make reference to "special" or "emergency" meetings, if, for example, there is a need to convene quickly, the notice requirements can generally be met by telephoning the local news media and by posting notice in one or more designated locations.

I note that 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.

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., Town Law, §63), the courts have found in a variety of contexts that such rules must be reasonable. For example, although a board of education may "adopt by laws and rules for its government and operations", in a case in which a board's rule prohibited the use of tape recorders at its meetings, the Appellate Division found that the rule was unreasonable, stating that the authority to adopt rules "is not unbridled" and that "unreasonable rules will not be sanctioned" [see Mitchell v. Garden City Union Free School District, 113 AD 2d 924, 925 (1985)]. Similarly, if by rule, a public body chose to permit certain citizens to address it for ten minutes while permitting others to address it for three, or not at all, such a rule, in my view, would be unreasonable.

Third, with respect to minutes of meetings, §106 of the Open Meetings Law provides that:

"1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.

2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.

3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be

Mr. H. Russell Young

July 6, 2000

Page - 4 -

available to the public within one week from the date of the executive session."

In view of the foregoing, it is clear in my opinion that minutes of open meetings must be prepared and made available within two weeks of the meetings to which they pertain.

I point out that, as a general rule, a public body may take action during a properly convened executive session [see Open Meetings Law, §105(1)]. If action is taken during an executive session, minutes reflective of the action, the date and the vote must be prepared and made available to the extent required by the Freedom of Information Law within one week of the executive session. If no action is taken, there is no requirement that minutes of the executive session be prepared.

Lastly, since you referred to "untimely responses for public records under the Freedom of Information Law", I point out 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."

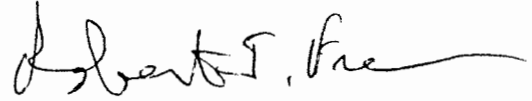
In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge 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)].

In an effort to enhance compliance with and understanding of open government laws, copies of this opinion will be forwarded to Village officials.

Mr. H. Russell Young
July 6, 2000
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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.

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees
Deputy Village Clerk



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-A0-12194

Committee Members

Mary O. Donohue
Alan Jay Gerson
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Wade S. Norwood
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Website Address: <http://www.dos.state.ny.us/coog/coogwww.html>

July 10, 2000

Executive Director

Robert J. Freeman

Mr. Louis Leath
97-A-5249
Green Haven Correctional Facility
Drawer B
Stormville, NY 12582

Dear Mr. Leath:

I have received your recent letter in which you sought the address of an "archive" in which "all records and documents pertaining to [your] case are stored."

While I know of no archive that stores records relating to recent decisions, it is suggested that the records of your interest are likely maintained by the clerk of the court in which your proceeding was conducted and that the records should be available from the clerk.

In this regard, I note 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:

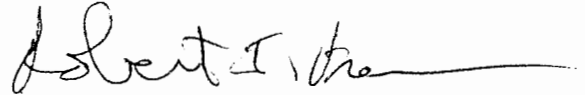
"the courts of the state, including any municipal or district court, whether or not of record."

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.

Mr. Louis Leath
July 10, 2000
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-12195

Committee Members

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Walter W. Grunfeld
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July 10, 2000

Executive Director

Robert J. Freeman

Mr. Paul M. Fitzsimmons



The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Fitzsimmons:

I have received your letter in which you asked that this office "have SCOPED declared subject to FOIA regulations." "SCOPED" is the Schuyler County Partnership for Economic Development, and it consists of "private voting members", individual or business members who pay at least a thousand dollars in annual dues; "non-voting members", persons who have paid annual dues in the amount of at least a hundred but less than a thousand dollars; and "public voting members" who are representatives of various entities of government in Schuyler County. The Board of Directors consists of twelve, five of whom are private voting members, five of whom are representatives of government agencies, and two ex-officio members, one each from the Schuyler County Chamber of Commerce and Cornell Cooperative Extension.

From my perspective, it is unclear whether SCOPED is subject to the Freedom of Information Law. That statute applies to agencies, and §86(3) defines the term "agency" to mean:

"any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, an agency typically is an entity of state or local government; not-for-profit and other corporate entities are generally not subject to the Freedom of Information Law.

There are judicial decisions, however, that indicate that a not-for-profit entity may be an agency, despite its corporate status, if there is substantial governmental control over its operations. For instance, in Westchester-Rockland Newspapers v. Kimball [50 NYS 2d 575 (1980)], a case

Mr. Paul M. Fitzsimmons

July 10, 2000

Page - 2 -

involving access to records relating to a lottery conducted by a volunteer fire company, the Court of Appeals found that volunteer fire companies, notwithstanding their status as not-for-profit corporations, are "agencies" subject to the Freedom of Information Law. In so holding, the Court stated that:

"We begin by rejecting respondent's contention that, in applying the Freedom of Information Law, a distinction is to be made between a volunteer organization on which a local government relies for performance of an essential public service, as is true of the fire department here, and on the other hand, an organic arm of government, when that is the channel through which such services are delivered. Key is the Legislature's own unmistakably broad declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (emphasis added; Public Officers Law, §84).

For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objections cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" (id. at 579).

In the same decision, the Court noted that:

"...not only are the expanding boundaries of governmental activity increasingly difficult to draw, but in perception, if not in actuality, there is bound to be considerable crossover between governmental and nongovernmental activities, especially where both are carried on by the same person or persons" (id., 581).

More recently, in Buffalo News v. Buffalo Enterprise Development Corporation [84 NY 2d 488 (1994)], the Court of Appeals found again that a not-for-profit corporation, based on its relationship to an agency, was itself an agency subject to the Freedom of Information Law. The decision indicates that:

"The BEDC principally pegs its argument for nondisclosure on the feature that an entity qualifies as an 'agency' only if there is

substantial governmental control over its daily operations (see, e.g., Irwin Mem. Blood Bank of San Francisco Med. Socy. v American Natl. Red Cross, 640 F2d 1051; Rocap v Indiek, 519 F2d 174). The Buffalo News counters by arguing that the City of Buffalo is 'inextricably involved in the core planning and execution of the agency's [BEDC] program'; thus, the BEDC is a 'governmental entity' performing a governmental function for the City of Buffalo, within the statutory definition.

"The BEDC's purpose is undeniably governmental. It was created exclusively by and for the City of Buffalo...In sum, the constricted construction urged by appellant BEDC would contradict the expansive public policy dictates underpinning FOIL. Thus, we reject appellant's arguments," (id., 492-493).

Your letter does not include detail concerning the creation of SCOPED, i.e., whether it was created through the interest of the business community, or perhaps by government. Further, the Board of Directors is evenly split between government representatives and representatives of the private sector. Again, five are private voting members and five are public voting members. Of the remaining two, the Chamber of Commerce is private, but the Cooperative Extension is, according to §224(8)(b) of the County Law, "a subordinate governmental agency."

If SCOPED is a creation of government, I believe that it would fall within the coverage of the Freedom of Information Law. However, if there is no substantial control, the conclusion may be different.

Lastly, even if SCOPED is not subject to the Freedom of Information Law, records pertaining to it may nonetheless be available. That statute is applicable to agency records, and §86(4) defines the term "record" expansively to include:

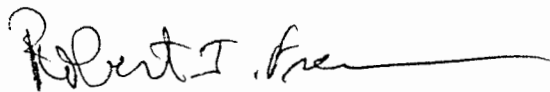
"any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Due to the breadth of the definition, when records involving SCOPED come into the possession of the public voting members or the members of the Board of Directors selected by the public voting members, I believe that they would constitute agency records that fall within the coverage of the Freedom of Information Law.

Mr. Paul M. Fitzsimmons
July 10, 2000
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: SCOPED, Inc.



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12196

Committee Members

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July 10, 2000

Executive Director

Robert J. Freeman

E-Mail

TO: Paulette Glasgow [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. Glasgow:

I have received your letter of June 5. You indicated that the public in the past was given copies of the Town of Lewiston's abstracts of claim prior to Town Board meetings, but that the Town Clerk recently informed you that you can no longer obtain copies until they are approved. You have asked whether there is a legal justification for the change in the Town's practice.

In this regard, first, the Freedom of Information Law pertains to all Town records, for §86(4) of that statute defines the term "record" broadly to include:

"any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, the documents of your interest constitute "records", whether they have been approved or otherwise, as soon as they exist.

Second, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. I note that internal documents are available when they consist of "statistical or factual tabulations or data" [see §87(2)(g)(i)]. Therefore, I believe that the records of your interest would be available.

Ms. Paulette Glasgow
July 10, 2000
Page - 2 -

Third, provisions of the Town Law indicate that the kinds of records at issue must be disclosed. For instance, §29(4) of the Town Law 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.

RJF:jm

cc: Town Board
Town Clerk



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12197

Committee Members

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July 10, 2000

Executive Director

Robert J. Freeman

Mr. Bill McCrorie
Nassau Property Tax Consultant
100 Willis Avenue
Floral Park, NY 11001

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. McCrorie:

I have received your letter of June 2 in which you questioned your right to obtain "computer data in a format other than hard copy..."

In this regard, the Freedom of Information Law pertains to all agency records, and §86(4) of that statute defines the term "record" expansively to include:

"any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based upon the language quoted above, if information is maintained in some physical form, it would in my opinion constitute a "record" subject to rights of access conferred by the Law. Further, the definition of "record" includes specific reference to computer tapes and discs, and it was held 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, *Szikszy v. Buelow*, 436 NYS 2d 558 (1981)].

When information is maintained electronically, in a computer, for example, it has been advised that if the information sought is available under the Freedom of Information Law and may be retrieved by means of existing computer programs, an agency is required to disclose the

Mr. Bill McCrorie

July 10, 2000

Page - 2 -

information. In that kind of situation, the agency in my view would merely be retrieving data that it has the capacity to retrieve. Disclosure may be accomplished either by printing out the data on paper or perhaps by duplicating the data on another storage mechanism, such as a computer tape or disk. On the other hand, if information sought can be retrieved from a computer or other storage medium only by means of new programming or the alteration of existing programs, those steps would, in my opinion, be the equivalent of creating a new record. As stated earlier, since section 89(3) does not require an agency to create a record, I do not believe that an agency would be required to reprogram or develop new programs to retrieve information that would otherwise be available [see Guerrier v. Hernandez-Cuebas, 165 AD 2d 218 (1991)].

In a decision pertinent to your correspondence, Brownstone Publishers Inc. v. New York City Department of Buildings, the question involved an agency's obligation to transfer electronic information from one electronic storage medium to another when it had the technical capacity to do so and when the applicant was willing to pay the actual cost of the transfer. As stated by the Appellate Division, First Department:

"The files are maintained in a computer format that Brownstone can employ directly into its system, which can be reproduced on computer tapes at minimal cost in a few hours time-a cost Brownstone agreed to assume (see, POL [section] 87[1] [b] [iii]). The DOB, apparently intending to discourage this and similar requests, agreed to provide the information only in hard copy, i.e., printed out on over a million sheets of paper, at a cost of \$10,000 for the paper alone, which would take five or six weeks to complete. Brownstone would then have to reconvert the data into computer-usable form at a cost of hundreds of thousands of dollars.

"Public Officers Law [section] 87(2) provides that, 'Each agency shall...make available for public inspection and copying all records...' Section 86(4) includes in its definition of 'record', computer tapes or discs. The policy underlying the FOIL is 'to insure maximum public access to government records' (Matter of Scott, Sardano & Pomerantz v. Records Access Officer, 65 N.Y.2d 294, 296-297, 491 N.Y.S.2d 289, 480 N.E.2d 1071). Under the circumstances presented herein, it is clear that both the statute and its underlying policy require that the DOB comply with Brownstone's reasonable request to have the information, presently maintained in computer language, transferred onto computer tapes" [166 Ad 2d, 294, 295 (1990)].

Further, in a more recent decision that cited Brownstone, it was held that: "[a]n agency which maintains in a computer format information sought by a F.O.I.L. request may be compelled to comply with the request to transfer information to computer disks or tape" (Samuel v. Mace, Supreme Court, Monroe County, December 11, 1992). That decision involved a request for a school district wide mailing list in the form of computer generated mailing labels. Since the district had the ability to generate the labels, the court ordered it to do so.

Mr. Bill McCrorie

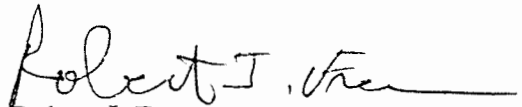
July 10, 2000

Page - 3 -

In short, when the content of a record is accessible under the Freedom of Information Law and an agency has the ability to transfer the content to the information storage medium requested by an applicant, I believe that the agency is required to do, so long as the applicant is willing to pay the actual cost of reproduction.

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: Vincent W. Ang, Village Clerk



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FODL-AO-12198

Committee Members

Mary O. Donohue
Alan Jay Gerson
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Gary Lewi
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Wade S. Norwood
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Carole E. Stone
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Website Address: <http://www.dos.state.ny.us/coog/coogwww.html>

July 10, 2000

Executive Director

Robert J. Freeman

Mr. Scott Wyszomirski



The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Wyszomirski:

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 offer advice and opinions concerning the Freedom of Information Law.

Having been charged with speeding by an officer in the Town of Gates, you wrote that you are interested in obtaining the calibration and maintenance records for the radar unit used by the officer, a calibration certificate, the Town's FCC license, a "list of models, makes and serial numbers of all radar units being used by the agency," and the officer's radar training certificate. You also indicated that you would like to request the tuning fork used to calibrate the radar unit and to have the unit present during your proceeding.

In this regard, first, I point out that the Freedom of Information Law pertains to agency records, and that §86(4) of that statute defines the term "record" to mean:

"any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, a tuning fork, for example, would not constitute a "record". Any request to see, use or present the tuning fork or the radar unit would involve matters outside the coverage of the Freedom of Information Law.

Mr. Scott Wyszomirski

July 10, 2000

Page - 2 -

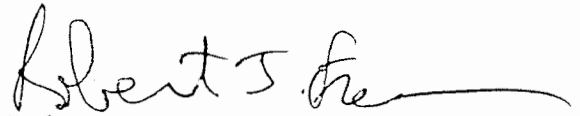
Second, in a related vein, that statute pertains to existing records, and §89(3) states in part that an agency is not required to create a record in response to a request. Therefore, if the Town does not maintain a "list" of its radar units with the information of your interest, it would not be required to prepare a new record on your behalf that contains the information sought.

Third, as it relates to existing records, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. With one exception, insofar as your request involves existing records, it appears that they should be disclosed for none of the grounds for denial would be applicable.

The exception involves the officer's radar training certificate. Relevant with respect to access to a police officer's personnel records 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, which prohibits the disclosure of personnel records of police officers that are used "to evaluate performance toward continued employment or promotion" absent a court order the consent of the officer. It appears that §50-a would be applicable regarding a training certificate.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Richard Warner, Town Clerk



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12199

Committee Members

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July 10, 2000

Executive Director

Robert J. Freeman

Hon. Samuel D. Catholdi
Trustee

The staff of the Committee on 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 Catholdi:

I have received your letter of June 1, as well as the correspondence relating to it. You wrote that, in your capacity as a member of the Board of Trustees of the Village of Lyons, you requested records concerning "compensation time that has been accrued by all Village of Lyons employees." All departments within the Village complied, except the Police Department. The Chief of Police denied the request, stating that "a police officer's personnel records are protected against such arbitrary request by the Civil Rights Law", and that "comp time is part of an employee's attendance record and as such is part of the personnel file."

You have asked whether the Chief's position is consistent with law. From my perspective, it is not. In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. The initial ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by statute." The provision to which the Chief referred, §50-a of the Civil Rights Law, exempts certain records from disclosure, but in my opinion, not those that you requested.

Section 50-a 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..." In my view, there is nothing in records indicating comp time that involves an evaluation of performance. In the decision to which the Chief referred in a letter to the Clerk-Treasurer, the Court of Appeals, the state's highest court, sustained a denial of access to reprimands of police officers. However, the Court emphasized that:

Mr. Samuel D. Catholdi

July 10, 2000

Page - 2 -

"...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, 93NY2d 145, 157-158 (1999)].

Because the records reflective of comp time do not evaluate performance, and because those records are "neutral", §50-a of the Civil Rights Law would not in my opinion serve to authorize the Village to deny access to you or anyone else.

Second, several judicial decisions, most notably, the case cited in Daily Gazette in the passage quoted above, indicate that the records sought must be disclosed. In Capital Newspapers v. Burns [67 NY2d 562 (1986)], the Court of Appeals unanimously affirmed a decision granting access to records indicating the days and dates of sick leave claimed by a named police officer. Those documents, like those that you requested, might be found in a police officer's personnel file, but they are not the kind of records that fall within the coverage of §50-a of the Civil Rights Law.

While tangential to the matter, I point out that §87(3) 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..."

Although §87(2)(b) of the Freedom of Information Law authorizes an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy", the courts have provided substantial direction regarding the privacy of public employees. First, it is clear that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. Second,

with regard to records pertaining to public employees, the courts have found that, as a general rule, records that are relevant to the performance of a public employee's official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

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. As indicated earlier, 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, and in granting access, the Court of Appeals found that the public has both economic and safety reasons for knowing when public employees perform their duties and whether they carry out those duties when scheduled to do so. As such, attendance records, including those involving overtime work, are in my opinion clearly available, for they are relevant to the performance of public employees' official duties. Similarly, I believe that records reflective of payment of overtime must be disclosed, for the public has an economic interest in obtaining those records and because the records are relevant to the performance of public employees' official duties.

Lastly, 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).

Mr. Samuel D. Catholdi

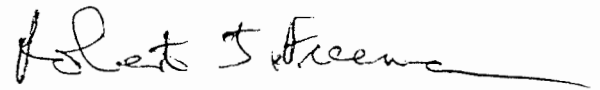
July 10, 2000

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Based on the preceding analysis, it is clear in my view that the records at issue are not exempt from disclosure under the Civil Rights Law, but rather that they must be disclosed under 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, and it is suggested that you raise the issue before the Board of Trustees.

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: Board of Trustees
Chief Stephen Van Duyne
Diana Marro, Clerk-Treasurer



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3181
FOIL-AO-12200

Committee Members

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July 11, 2000

Executive Director

Robert J. Freeman

Mrs. Susan Jordan



The staff of the Committee on 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. Jordan:

I have received your letter of May 30, as well as the materials attached to it. You have raised a series of questions and sought my opinion relating to the implementation of the Open Meetings Law by the Owen D. Young Board of Education.

First, you wrote that you were "told that boards of education are protected under 'Sunshine Laws'" and asked for an explanation of the "basis of these laws" and whether school boards are exempt from the open meetings laws. "Sunshine Laws" is a phrase generally used to describe provisions that require government to be accountable to the public and to disclose information, either through records or by conducting meetings open to the public. In New York, they are embodied in the Freedom of Information Law and the Open Meetings Law, both of which are based on presumptions of openness. Stated differently, government records are presumed to be accessible, except to the extent that one or more grounds for denial of access may be asserted under §87(2) of the Freedom of Information Law; similarly, meetings of government bodies, such as school boards, town boards, village boards of trustees, legislative bodies and the like, must be conducted open to the public, unless there is a basis for entry into an executive session. An executive session is defined in §102(3) to mean a portion of an open meeting during which the public may be excluded.

Boards of education are clearly subject to the requirements of both the Freedom of Information Law and Open Meetings Law. Therefore, they may not withhold records as they see fit, and they may not hold executive sessions to discuss the subject of their choice; on the contrary, the grounds for entry into executive session are specified and limited in paragraphs (a) through (h) of §105(1) of the Open Meetings Law. With respect to one of your questions, "a concern for alienating the public" would not constitute a valid reason for holding an executive session.

Enclosed for your review is "Your Right to Know", which describes both statutes. Additional information is available either from this office or via the Committee's website.

Second, the Open Meetings Law does not distinguish between regular and special meetings, and it requires that notice be given to the news media and posted prior to every meeting. Specifically, §104 of that statute provides that:

- "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

Stated differently, if a meeting is scheduled at least a week in advance, notice of the time and place must be given to the news media and to the public by means of posting in one or more designated public locations, not less than seventy-two hours prior to the meeting. If a meeting is scheduled less than a week 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.

However, 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.

The reference to a "waiver" of notice appears to deal with the ability of members of a board of education to waive notice that they must receive, as members, in the event that there is need to meet quickly. However, there is no authority to waive the notice requirements imposed by the Open Meetings Law.

Third, the Open Meetings Law requires that a public body, including a board of education, accomplish a specified procedure prior to entry into executive session. Section 105(1) states in relevant part that:

"Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

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.

Further, 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, an alternative method of achieving the desired result that would comply with the letter of the law has been suggested in conjunction with similar situations. 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. Reference to a motion to conduct an executive session would not represent an assurance that an executive session would ensue, but rather that there is an intent to enter into an executive session by means of a vote to be taken during a meeting.

Fourth, the provision pertaining to litigation, §105(1)(d), permits a public body to enter into executive session to discuss "proposed, pending or current litigation." While the courts have not sought to define the distinction between "proposed" and "pending" or between "pending" and "current" litigation, they have provided direction concerning the scope of the exception. It has been determined that the mere possibility, threat or fear of litigation would be insufficient to conduct an executive session. Specifically, it was held that:

"The purpose of paragraph d is 'to enable a public body to discuss pending litigation privately, without baring its strategy to its adversary through mandatory public meetings' (Matter of Concerned Citizens to Review Jefferson Val. Mall v. Town Bd. Of Town of Yorktown, 83 AD 2d 612, 613, 441 NYS 2d 292). The belief of the town's attorney that a decision adverse to petitioner 'would almost certainly lead to litigation' does not justify the conducting of this public business in an executive session. To accept this argument

Mrs. Susan Jordan
July 11, 2000
Page - 5 -

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. Again, §105(1)(d) would not permit a public body to conduct an executive session due to a possibility or fear of litigation. As the court in Weatherwax suggested, if the possibility or fear of litigation served as a valid basis for entry into executive session, there could be little that remains to be discussed in public, and the intent of the Open Meetings Law would be thwarted.

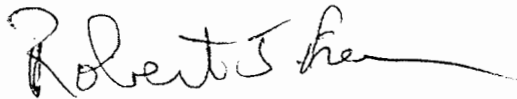
Next, with respect to the role of the clerk, there is nothing in the Open Meetings Law that deals with that issue. However, there may be policies or rules adopted by a board that address the matter.

Lastly, you asked how residents can "be sure that the board of education is discussing only those items noted in the motion to go into executive session and not other subjects that the board trustees find uncomfortable discussing in open session." In short, there may be no way to compel a board to prove that it complied with law. However, certainly you or any other person may ask board members whether they discussed only those subjects identified in motions to conduct executive sessions. I note, too, that there is nothing in the Open Meetings Law that would generally or uniformly prohibit a board member from describing what occurred during an executive session.

In an effort to enhance compliance with and understanding of "sunshine laws", a copy of this opinion will be forwarded to the Board of Education.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Board of Education



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 12201

Committee Members

Mary O. Donohue
Alan Jay Gerson
Walter W. Grunfeld
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July 11, 2000

Executive Director

Robert J. Freeman

Mary C. Wilson, Esq.
Assistant Town Attorney
Town of Southold
P.O. Box 1179
Southold, NY 11971-0959

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Wilson:

I have received your letter of June 7. You wrote that the Southold Town Board has designated an "Anti-Bias Task Force that serves "as a community resource to which the public is encouraged to turn with complaints about bias-related incidents." The Task Force "would like to maintain a logbook in order to keep a record of incidents by date, facts, names, etc.", and you asked whether "the information in such a logbook [would] be available to the public, including the individual complainant's name and type of bias incident reported." You added that the Task Force is "concerned for individual privacy rights as they relate to bias issues such as race, sexual orientation, religion, marital status, nationality."

In this regard, first, the logbook or any documentation maintained in relation to the matter would fall within the scope of the Freedom of Information Law. As you may be aware, that statute pertains to agency records, and §86(4) defines the term "record" broadly to include:

"any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

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 note that the introductory language of §87(2) refers to the ability to withhold "records or portions thereof" that fall within the grounds for denial that follow. The phrase quoted in the preceding sentence indicates that there may be instances in which a single record includes both accessible and deniable information, and that an agency is required to review a record that has been requested to determine which portions, if any, may properly be withheld.

Third, as you inferred, the exception to rights of access of primary significance pertains to the protection of privacy, and §87(2)(b) permits an agency to deny access to records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." In the context of your inquiry, irrespective of whether a complaint is made by an adult or a minor, it has generally been advised that those portions of a complaint or other record 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 person who made the complaint is often irrelevant to the work of the agency, and in most circumstances, I believe that identifying details may be deleted.

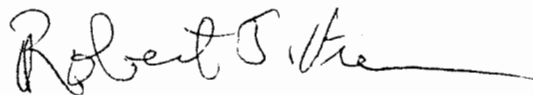
If a complaint is directed at an individual and that person is accused of bias or misconduct, I believe that his or her privacy may merit protection as well. When a complaint is made against an individual, and the complaint has not been substantiated, identifying details pertaining to the person against whom the complaint is made may, in my opinion, also be withheld or deleted.

It is suggested that a logbook or similar document be formatted in a way that enables Town officials to identify and separate those items which typically may be withheld from other aspects of the records, such as a description of an event or incident, the status of investigation, and other elements that do not include personally identifying details, that should be disclosed.

Mary C. Wilson, Esq.
July 11, 2000
Page - 3 -

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 extends to the right with a long horizontal stroke.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AU-12202

Committee Members

Mary O. Donohue
Alan Jay Gerson
Walter W. Grunfeld
Gary Lewi
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July 11, 2000

Executive Director

Robert J. Freeman

E-Mail

TO: Frank Castagna [REDACTED]

FROM: Robert J. Freeman, Executive Director *RJF*

Dear Mr. Castagna:

I have received your letter of June 7 in which you referred to §255 of the Judiciary Law and asked whether that statute "mention[s] the fees guidelines for photocopies of court records."

In this regard, §255 states in relevant part that: "A clerk of a court must, upon request, and upon payment of, or offer to pay, the fees allowed by law, or, if no fees are expressly allowed by law, fees at the rate allowed to a county clerk for a similar service...." Based on the foregoing, it is my understanding that certain courts assess fees based on provisions particular to those courts. In those instances in which fees may be charged "at the rate allowed to a county clerk for a similar service", I believe that the fees would likely be based on the provisions of Article 80 of the Civil Practice Law and Rules beginning at §8019.

If questions arise concerning the basis for a fee for court records, it is suggested that you ask the court clerk or other proper official to indicate the basis.

I hope that I have been of assistance.

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-A0-12203

Committee Members

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July 11, 2000

Executive Director

Robert J. Freeman

Mr. Paul Priore

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Priore:

I have received your letter of June 3 in which you referred to my response to you of May 26. In brief, it was advised that the Freedom of Information Law does not require agency officials to answer questions, but rather to disclose existing records to the extent required by law. In relation to the foregoing, you wrote: "Concerning the types of questions which Susan H. Simon is not required to answer, would records which contain substantially the answers to my questions be available for public inspection under the Freedom of Information Law?"

It is assumed that you are referring to a series of questions raised in a letter of April 25 addressed to Ms. Laura LaVelle. Assuming that records exist that contain the information sought via the questions and that a proper request could be made for any such records, I believe that two of the grounds for denial would be pertinent to an analysis of rights of access.

First, it appears that any such records 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..."

Mr. Paul Priore
July 11, 2000
Page - 2 -

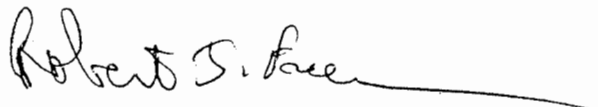
It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations 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.

Many of the records or the aspects of them in which you are interested would consist of statistical or factual information accessible under §87(2)(g)(i), unless a separate exception could validly be asserted.

Second, of potential significance would be §87(2)(b), which enables an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." In brief, it has been advised that most items pertaining to public employees that are relevant to the performance of their duties would be accessible, for disclosure would result in a permissible rather than an unwarranted invasion of privacy. Conversely, if an item is irrelevant to the performance of one's duties or is intimate in nature, it can likely be withheld. In the context of your questions, by means of example, records identifying records access and appeals officers, a person who approved a letter, a person's supervisor and the like would be available; a portion of a record indicating a person's medical condition as the reason for a resignation could, in my opinion, be withheld.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Susan H. Simon
Laura LaVelle

FOIL-AO - 17204

From: Robert Freeman
To: Internet:DOWen@SpringvilleGl.wnyric.org
Date: 7/12/00 9:25AM
Subject: Dear Ms. Owen:

Dear Ms. Owen:

I have received your email regarding the ability of a school district to disclose the attendance records of a former student to a prospective employer.

In brief, under the federal Family Educational Rights and Privacy Act (20 USC §1232g), an educational agency cannot release records or information derived from records identifiable to a student without the consent of a parent of a student under the age of eighteen or the student himself or herself who has reached that age. An exception that would permit disclosure would involve a district's "directory information" policy authorizing disclosure. Absent such a policy, the district, in my opinion, could not disclose without the consent of the student.

If you need additional information or would like to discuss the matter, 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
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FUJL-AD-12205

Committee Members

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July 12, 2000

Executive Director

Robert J. Freeman

E-Mail

TO: Wallace S. Nolen [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. Nolen:

As you are aware, I have received your letter of June 9 concerning a contention by the New York City Conflicts of Interest Board that is not required to disclose the payroll record required to be maintained by agencies pursuant to §87(3)(b) of the Freedom of Information Law. An attorney for the Board cited provisions of the City Charter and the General Municipal Law as the basis for his response.

In this regard, first, the provision of the General Municipal Law to which he referred, §813, expired and is no longer operative. That statute dealt with the filing of financial disclosure statements by municipal employees and the functions of the Temporary Commission on Local Government Ethics, which is now defunct.

Section 2602(k) of the Charter states that:

“Except as otherwise provided in this chapter, the records, reports, memoranda and files of the board shall be confidential and shall not be subject to public scrutiny.”

I am unaware of the legislative history or intent of the language quoted above. However, it appears that it would preclude disclosure if it can be characterized as a statute. When confidentiality is conferred by a statute, records fall outside the scope of rights of access pursuant to §87(2)(a) of the Freedom of Information Law, which states that an agency may withhold records that "are specifically exempted from disclosure by state or federal statute". If there is no statute upon which an agency can rely to characterize records as "confidential" or exempted from disclosure, the records are subject to whatever rights of access exist under the Freedom of Information Law [see Doolan v. BOCES, 48 NY 2d 341 (1979); Washington Post v. Insurance Department, 61 NY 2d 557 (1984); Gannett News Service, Inc. v. State Office of Alcoholism and Substance Abuse, 415 NYS 2d 780 (1979)].

Mr. Wallace S. Nolen

July 12, 2000

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It is noted that several courts, including the Court of Appeals, have held that an agency's regulations or the provisions of a local enactment, such as an administrative code, local law, charter or ordinance, for example, do not constitute a "statute" [see e.g., Morris v. Martin, Chairman of the State Board of Equalization and Assessment, 440 NYS 2d 365, 82 Ad 2d 965, reversed 55 NY 2d 1026 (1982); Zuckerman v. NYS Board of Parole, 385 NYS 2d 811, 53 AD 2d 405 (1976); Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)]. For purposes of the Freedom of Information Law, a statute would be an enactment of the State Legislature or Congress. Therefore, a local enactment cannot ordinarily confer, require or promise confidentiality.

In the case of the New York City Charter, some of its provisions are purely local enactments, while others were approved and enacted by the State Legislature. Therefore, if §2603(k) is part of an enactment of the State Legislature, it would constitute a statute that would exempt the Board's records from disclosure. If it is a local enactment, I believe that the Board's records would be subject to rights conferred by the Freedom of Information Law. This not to suggest that, in that event, all Board records would be available, for the grounds for denial appearing in §87(2) could be asserted in appropriate circumstances.

I hope that I have been of assistance.

RJF:jm

cc: Wayne G. Hawley



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12206

Committee Members

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Alan Jay Gerson
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July 12, 2000

Executive Director

Robert J. Freeman

Sergeant Robert C. Gabriel
Central Records
County of Suffolk Police Department
30 Yaphank Avenue
Yaphank, NY 11980

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Sergeant Gabriel:

I have received your letter of June 9 in which you asked that I confirm a conversation that we had concerning a request made under the Freedom of Information Law to the Suffolk County Police Department.

The request involves all motor vehicle accident reports handled by the Department on a weekly basis, and you indicated that there are approximately 800 reports prepared each week. The applicant for the records informed you that he is an attorney representing an "Internet News Media Organization that is based in Colorado" and that, "in his capacity as a news media representative", he contends that the Department must provide him with all accident reports within "five days of his request", despite the volume of his request and the number of other requests received by the Department. You also wrote that he has refused to disclose the reasons for his request.

You have raised a series of questions in relation to the foregoing, and I will attempt to deal with each of them.

First, under §89(3) of the Freedom of Information Law, an agency may require that a request be made in writing. It is unclear whether the applicant requests records on a weekly basis or whether the request is prospective. In this regard, there is no provision in the Freedom of Information Law concerning prospective applications for records, i.e., requests for records that may be prepared, but which do not exist at the time a request is made. An agency can choose to agree to such an arrangement. However, in my view, because it pertains to existing records, the Freedom of Information Law does not require that an agency agree to supply records that do not yet exist.

Sergeant Robert C. Gabriel

July 12, 2000

Page - 2 -

In a somewhat related vein, although you did not raise the issue, I note that it has been held that an agency may require payment in advance of preparing copies of records (see Sambucci v. McGuire, Supreme Court, New York County, November 4, 1982).

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..."

I emphasize 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.

Third, the Freedom of Information Law generally does not distinguish among applicants for records, and members of the news media and their representatives enjoy no special rights. Therefore, I believe that you may deal with the applicant's requests in the same manner or order as any others. Similarly, in all but one instance, the reasons for which a request is made and an applicant's potential use of records are irrelevant, and it has been held that if records are accessible, they should be made equally available to any person, without regard to status or interest [see e.g., M. Farbman & Sons v. New York City, 62 NYS 2d 75 (1984) and Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Therefore, if the records are available by law, the intended use of the records ordinarily has no effect on rights of access. As stated by the Court of Appeals, the State's highest court:

"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

Sergeant Robert C. Gabriel

July 12, 2000

Page - 3 -

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." Further, §89(2)(b) of the Law provides a series of examples of unwarranted invasions of personal privacy, one of which pertains to:

"sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes" [§89(2)(b)(iii)].

The provision quoted above represents what might be viewed as an internal conflict in the law. As indicated earlier, the status of an applicant 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 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, as a condition precedent to disclosure, I believe that you could require the applicant to certify in writing that the records in question, which include names and addresses and could be used to develop a list for a commercial use, will not be used for any commercial or fund-raising purpose. It is noted that Scott, Sardano & Pomeranz, supra, dealt with a request by a law firm for all accidents reports maintained by the City of Syracuse so that it could solicit accident victims. Although the Court held that accident reports are generally public, it found that the names and addresses of the accident victims could be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy. In that case, the request did not involve a list of names and addresses *per se*, but it involved the equivalent: an array of records that could be used to develop a mailing list.

If the applicant has certified that he would not use the records for a commercial purpose and you learn that he has done so, it is likely that various provisions of the Penal Law would have been violated. If prosecution is not an option, in view of the breach of an agreement or understanding, it is suggested that you may refuse to make any further disclosures of the same kinds of records to him.

Fourth, except in unusual circumstances, accident reports prepared by police agencies are in my opinion available under both the Freedom of Information Law and §66-a of the Public Officers Law. Section 66-a was enacted in 1941 and states that:

"Notwithstanding any inconsistent provisions of law, general, special of local or any limitation contained in the provision of any city charter, all reports and records of any accident, kept or maintained by the state police or by the police department or force of any county, city, town, village or other district of the state, shall be open to the inspection of any person having an interest therein, or of such person's attorney or agent, even though the state or a municipal corporation or other subdivision thereof may have been involved in the accident; except that the authorities having custody of such reports or records may prescribe reasonable rules and regulations in regard to the time and manner of such inspection, and may withhold from inspection any reports or records the disclosure of which would interfere with the investigation or involved in or connected with the accident."

The Freedom of Information Law is consistent with the language quoted above, for while accident reports are generally available, §87(2)(e)(i) of that statute states in relevant part that records compiled for law enforcement purposes may be withheld to the extent that disclosure would "interfere with law enforcement investigations or judicial proceedings." Therefore, unless disclosure would interfere with a criminal investigation, an accident report would be available to any person, including one who had no involvement in an accident.

I point out that, prior to the enactment of the Freedom of Information Law, it was held that photographs made during the course of an investigation of an accident and other records comprising a police department's investigation of an accident are part of the accident report and are therefore available under §66-a of the Public Officers Law [see Fox v. New York, 28 AD 2d (1967); Romanchuk v. County of Westchester, 42 AD 2d 783, aff'd 34 NY 2d 906 (1973)].

Since §89(6) of the Freedom of Information Law preserves rights of access conferred by other statutes, I do not believe that the grounds for denial appearing in that law could be cited to withhold what is available under §66-a.

Lastly, it has been held 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, which includes Suffolk County. 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

Sergeant Robert C. Gabriel

July 12, 2000

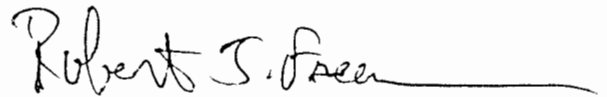
Page - 6 -

Law..." [Murtha v. Leonard, 620 NYS 2e 101 (1994), 210 AD 2d 411].

Notwithstanding the foregoing, I do not believe 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.

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 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 - 12207

Committee Members

Mary O. Donohue
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July 14, 2000

Executive Director

Robert J. Freeman

Ms. Patricia Meisenburg

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Meisenburg:

I have received your letter of June 8 in which you indicated that you have encountered difficulty in obtaining records from the Town of Wheatfield. Specifically, you indicated that Town officials indicated that I informed them "that they can impose an up-front fee for the time spent retrieving these public records for review."

In this regard, although it has been advised that an agency may require advance or "up-front" payment for copies of records, it has never been suggested that a fee may be assessed for the time spent in locating or retrieving records.

By way of background, §87(1)(b)(iii) of the Freedom of Information Law stated until October 15, 1982, that an agency could charge up to twenty-five cents per photocopy 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."

Ms. Patricia Meisenburg

July 14, 2000

Page - 2 -

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 Gandin, Schotsky & Rappaport v. Suffolk County, 640 NYS2d 214, 226 AD2d 339 (1996); Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)].

The specific language of the Freedom of Information Law and the regulations promulgated by the Committee on Open Government indicate that, absent statutory authority, an agency may charge fees only for the reproduction of records. Section 87(1)(b) of the Freedom of Information Law states:

"Each agency shall promulgate rules and regulations in conformance with this article...and pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the availability of records and procedures to be followed, including, but not limited to...

(iii) the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by statute."

The regulations promulgated by the Committee states in relevant part that:

"Except when a different fee is otherwise prescribed by statute:

(a) There shall be no fee charged for the following:

(1) inspection of records;

(2) search for records; or

(3) any certification pursuant to this Part" (21 NYCRR section 1401.8).

As such, the Committee's regulations specify that no fee may be charged for personnel time, for inspection of or search for records, except as otherwise prescribed by statute.

Lastly, although compliance with the Freedom of Information Law involves the use of public employees' time, the Court of Appeals has found that the Law is not intended to be given effect "on a cost-accounting basis", but rather that "Meeting the public's legitimate right of access to

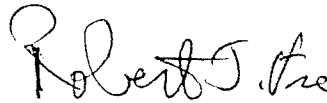
Ms. Patricia Meisenburg
July 14, 2000
Page - 3 -

information concerning government is fulfillment of a governmental obligation, not the gift of, or waste of, public funds" [Doolan v. BOCES, 48 NY 2d 341, 347 (1979)].

In an effort to clarify their 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,

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: Town Board
Town Clerk



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12208

Committee Members

Mary O. Donohue
Alan Jay Gerson
Walter W. Grunfeld
Gary Lewi
Warren Mitofsky
Wade S. Norwood
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July 14, 2000

Executive Director

Robert J. Freeman

Ms. Marie A. Corrado
Associate Attorney
NYS Department of Transportation
State Campus
Albany, NY 12232

The staff of the Committee 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. Corrado:

As you are aware, I have received your letter of May 30 and a variety of materials relating to it. At issue are requests made under the Freedom of Information Law for copies of the "Agreement of Lease between the State of New York, acting by and through the New York State Department of Transportation, and SWF Airport Acquisition, Inc." involving the Stewart International Airport in Orange County. The tenant, SWF Airport Acquisition, Inc. ("SWF") prepared a memorandum expressing the belief that certain aspects of the Lease should be withheld pursuant to §87(2)(d) of the Freedom of Information Law. You have sought an opinion concerning "whether any or all of the Lease should be protected from disclosure under FOIL."

Because I am not involved in the privatization of airports, I have sought guidance and information from those experienced in the process. Consequently, the matter will be considered in light of the contentions offered by SWF through its attorney, the language of the Freedom of Information Law and its judicial construction, as well as information obtained from the Federal Aviation Administration ("FAA") and others.

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. 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..."

Therefore, 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 considered the phrase "substantial competitive injury" in 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 consideration of the foregoing and the contentions offered by Ms. Joanne Feil, the attorney for SWF, it is unlikely in my view that the Agreement could be withheld, absent a more substantial demonstration of damage to its competitive position with respect to particular elements of the Agreement. As Ms. Feil indicated, in demonstrating the likelihood of substantial competitive injury, there must be an evidentiary showing of "specific factual support and not...mere conclusory allegations." From my perspective, that kind of demonstration has not been and cannot be made in as extensive a fashion as Ms. Feil has suggested.

In this regard, first, contracts, leases and similar agreements between government agencies and commercial entities are typically public, whether they are concluded through public bidding, requests for proposals or through negotiations. Disclosure of those kinds of instruments is critical to the understanding of the operation of government and as a means of ensuring accountability. Public access to those records enables taxpayers to ascertain whether tax dollars are being used optimally and in the public interest. In an early decision rendered under the Freedom of Information Law, it was determined that a bid accepted by an agency was accessible, despite the objections of the successful bidder, and that, in view of the existence and thrust of that statute, "the successful bidder had no reasonable expectation of not having its bid open to the public" [Contracting Plumbers Cooperative Restoration Corp. v. Ameruso, 430 NYS2d 196, 198 (1989)]. While this situation is different from that considered in Contracting Plumbers, I believe that the principle is the same: that a person or entity that contracts with the government can have no reasonable of expectation of privacy or that the result of a successful bid or negotiation can be shielded from public scrutiny.

I note that Ms. Feil wrote that "SWF invested a great deal of time to learn how to properly lease and operate an airport in the United States." As a foreign corporation, it is possible that SWF had to overcome more obstacles and expend more time and effort than American firms to learn to do so and to develop knowledge regarding the array of laws, rules and regulations, both federal and state, pertinent to its goal of operating an airport. It is possible, too, that SWF generally functions in a nation, Great Britain, that has not yet enacted a general statute that provides the public with rights of access to government records, and that, therefore, secrecy, or in this context, an absence of public rights of access to those records, is the general rule with which it is familiar. In my view, its relative lack of knowledge or experience concerning the operation of airports in the United States,

Ms. Marie A. Corrado
July 14, 2000
Page - 5 -

or similarly, the lack of experience in dealing with governments that routinely disclose records, should not have a bearing upon rights of access to the Agreement. That such a record might be withheld in another jurisdiction due to the absence of a statute that confers rights of access to government records should be of no moment.

Second, because I am not an expert regarding the industry, I contacted the FAA to confer with an authority on the privatization of airports, Mr. Kevin Willis, a Program Analyst for that agency who has possession of the documentation at issue and has been involved in the FAA's decision making process pertaining to the Agreement. Mr. Willis indicated that other agreements involving the private management of public airports are "customarily disclosed." He added that many aspects of the Agreement are "standard" in the industry. That being so, it would appear that crucial aspects of the tests for sustaining the assertion of §87(2)(d) could not be met.

In a related vein, Mr. Willis informed me that the application filed with the FAA by SWF is accessible to the public and that several portions of the Agreement for which SWF seeks confidentiality consist of information reflected in the application. In my opinion, any aspect of the Agreement that is accessible to the public through another document would be equally available; very simply, it would not be secret.

I also spoke with Mr. Ken Cushine, a consultant with international experience in airport privatization who, as you know, served as advisor and consultant for the Department of Transportation and the Empire State Development Corporation through the entirety of the process culminating in the Agreement. Mr. Cushine expressed general concurrence with Mr. Willis's views, stating that the Agreement is not unique in terms of its features, scope or financial structure, and that he considered the process to be analogous to that typically pertinent to a real estate transaction. Having been involved in or familiar with airport privatization in Bolivia, Melbourne and Cancun and being currently involved in the privatization of airports in Puerto Rico and Niagara Falls, he contended that there is nothing in the Agreement that would give an advantage to competitors if disclosed to them. Mr. Cushine noted that he was informed by the Niagara Frontier Transportation Authority ("NFTA"), for which he is currently serving as a consultant in its privatization negotiations, that the Authority intends to disclose its agreement upon signature by the parties, prior to approval of the Agreement by the FAA. As such, it appears that the NFTA does not anticipate any deleterious effects associated with disclosure of its agreement.

You indicated, and the Agreement in §13.01 specifies that a Capital Improvement Plan (a "CIP") must be filed with the FAA and that it is accessible to the public. The CIP is intended to be implemented over a period of five years, and new CIP's are to be prepared through the life of the Agreement. As I understand its content, the CIP is a detailed explanation in both financial and programmatic terms of SWF's plans for the airport and describes critical elements of the operation of the airport applicable to an extended period of time. Since the CIP must be made public, its disclosure effectively diminishes the ability of the Department of Transportation (DOT) to justify a denial of access to the Agreement under §87(2)(d). Stated differently, the more that is publicly known about the operation of the airport, the less likely is the capacity to justifiably withhold the Agreement or portions thereof.

Ms. Marie A. Corrado

July 14, 2000

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Third, several of the contentions offered by Ms. Feil cannot, in my view, be accepted or justified.

She wrote, for example, that "actual competition is apparent." Having discussed the matter with you and others, I believe that competition is *conjectural* or perhaps *possible*, but that at this juncture, it is neither "actual" nor "apparent." Ms. Feil also stated that it has been "reported" that "two other airports in close proximity to the Airport are currently being actively considered for privatization." The possibility of the privatization of those airports, which you and Mr. Willis identified as JFK and LaGuardia, cannot in my view be equated with "actual competition." Any such development would likely come to fruition only after the passage of a significant period of time.

More importantly, even as an outsider, it is clear that there are myriad distinctions that can be made between Stewart Airport and entities of the size and scale of JFK or LaGuardia. Issues involving the cost of real estate and labor, ground and air traffic, financing, general economic conditions, incentives, environmental concerns and many others pertaining to Stewart would likely be largely irrelevant when considering the privatization of larger facilities or those located in other states. In like manner, those aspects of the Agreement that are unique to Stewart, due, for example, to the ecology of the area and the application of provisions of the Environmental Conservation Law and the regulations of the State Department of Environmental Conservation, would be little or no relevance or value to others in a different context or in consideration of a different location.

In discussing the issue with Mr. Cushine, he confirmed that any unusual or unique elements of the Agreement would be particular to Stewart and simply would not be applicable to or useful in negotiations involving other airports. He specified that, in his view, there are no "innovative" features of the Agreement that would be useful to others considering privatization elsewhere. That being so, I do not believe that a claim could be made that disclosure would "cause substantial injury" to SWF's competitive position.

Ms. Feil wrote that many aspects of the Agreement "were the result of trading point for point", that disclosure of the lease to others would enable them to "be able to distinguish between items that are and are not negotiable" and that in future negotiations "SWF would be required to negotiate from a previously negotiated document and faced with the constant response of 'you gave it then, so we want you to give it now' or 'you did not get it then, so you are not getting it now.'" While it may be so that elements of the Agreement were the result of "trading point for point", disclosure of the Agreement itself in no way indicates what was "traded", or the "points" that were offered or rejected by either party. Nothing in the Agreement identifies those portions that were the result of compromise, minimal negotiation, or extensive negotiation, or which may involve requirements imposed by federal or state law. How a recipient of the Agreement could conclude that certain items, in the words of Ms. Feil, "are or are not negotiable" is beyond my understanding, for disclosure of the Agreement merely indicates the result of negotiations; it would not indicate the *nature* of the negotiations or the extent to which particular aspects of the Agreement were negotiated. Further, as suggested earlier, elements of the Agreement unique to Stewart may have no relevance to negotiations carried on by competitors or SWF.

In short, the Agreement, in my opinion, is analogous to other negotiated contracts, and those contracts are typically and routinely disclosed, and for the reasons expressed above, particularly

those shared by experts, it does not appear that the Department could meet its burden of proving that there is "actual competition and the likelihood of substantial competitive injury" (Encore, supra, 421); on the contrary, it appears that the Agreement must be disclosed.

I emphasize 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 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)].

Moreover, in the same decision, in a statement regarding the intent and utility of the Freedom of Information Law, it was found that:

"The Freedom of Information Law expresses this State's strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies (see, Matter of Farbman & Sons v New York City Health and Hosps. Corp., 62 NY 2d 75, 79). The statute, enacted in furtherance of the public's vested and inherent 'right to know', affords all citizens the means to obtain information concerning the day-to-day functioning of State and local government thus providing the electorate with sufficient information 'to make intelligent, informed choices with respect to both the direction and scope of governmental activities' and

Ms. Marie A. Corrado

July 14, 2000

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with an effective tool for exposing waste, negligence and abuse on the part of government officers" (id., 565-566).

Lastly, 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 in the decision cited above held that the agency is not obliged to do so and may choose to disclose, stating that:

"...while an agency is permitted to restrict access to those records falling within the statutory exemptions, the language of the exemption provision contains permissible rather than mandatory language, and it is within the agency's discretion to disclose such records...if it so chooses" (id., 567).

The only situations in which an agency cannot disclose would involve those instances in which a statute other than the Freedom of Information Law prohibits disclosure, and I know of none that would apply in this instance. The same principle would be applicable under the federal Freedom of Information Act (5 USC §552). While a federal agency *may* withhold records in accordance with the grounds for denial, it has discretionary authority to disclose.

Based on judicial decisions involving exceptions to rights of access in both the state and federal freedom of information statutes, the record at issue would not be "specifically exempted from disclosure by...statute pursuant to §87(2)(a) of the New York Freedom of Information Law or pursuant to its counterpart in the federal Act, the "(b)(3)" exception. Both the Court of Appeals and federal courts in construing access statutes have determined that the characterization of records as "confidential" or "exempted from disclosure by statute" must be based on statutory language that specifically confers or requires confidentiality. As stated by the Court of Appeals:

"Although we have never held that a State statute must expressly state it is intended to establish a FOIL exemption, we have required a showing of clear legislative intent to establish and preserve that confidentiality which one resisting disclosure claims as protection" [Capital Newspapers v. Burns, 67 NY2d 562, 567 (1986)].

Similarly, in construing the "(b)(3)" exception to rights of access in the federal Act, it has been found that:

"Exemption 3 excludes from its coverage only matters that are:

specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

Ms. Marie A. Corrado

July 14, 2000

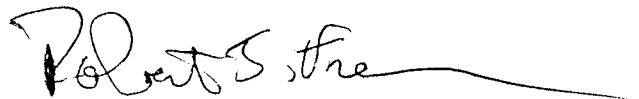
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“5 U.S.C. § 552(b)(3) (1982) (emphasis added). Records sought to be withheld under authority of another statute thus escape the release requirements of FOIA if – and only if – that statute meets the requirements of Exemption 3, including the threshold requirement that it specifically exempt matters from disclosure. The Supreme Court has equated ‘specifically’ with ‘explicitly.’ *Baldrige v. Shapiro*, 455 U.S. 345, 355, 102 S. Ct. 1103, 1109, 71 L.Ed.2d 199 (1982). ‘[O]nly *explicitly* non-disclosure statutes that evidence a congressional determination that certain materials ought to be kept in confidence will be sufficient to qualify under the exemption.’ *Irons & Sears v. Dann*, 606 F.2d 1215, 1220 (D.C.Cir.1979) (emphasis added). In other words, a statute that is claimed to qualify as an Exemption 3 withholding statute must, on its face, exempt matters from disclosure”[Reporters Committee for Freedom of the Press v. U.S. Department of Justice, 816 F.2d 730, 735 (1987); modified on other grounds, 831 F.2d 1184 (1987); reversed on other grounds, 489 U.S. 789 (1989); see also British Airports Authority v. C.A.B., D.C.D.C.1982, 531 F.Supp. 408; Inglesias v. Central Intelligence Agency, D.C.D.C.1981, 525 F.Supp. 547; Hunt v. Commodity Futures Trading Commission, D.C.D.C.1979, 484 F.Supp. 47; Florida Medical Ass’n, Inc. v. Department of Health, Ed. & Welfare, D.C.Fla.1979, 479 F.Supp. 1291].

In short, to be “exempted from disclosure by statute”, both state and federal courts have determined that a statute must leave no discretion to an agency: it must withhold such records. From my perspective, there is no state statute that would prohibit disclosure of the Agreement.

I hope that I have been of assistance. If you would like to discuss the matter, please feel free to contact me.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Joanne Feil
Kevin Willis
John Dearstyne
Ken Cushine



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-A0-12209

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July 17, 2000

Executive Director

Robert J. Freeman

Mr. Howard E. Hopkins
Field Supervisor
Foundation for Fair Contracting
P.O. Box 386
Greenfield Center, NY 12833

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Hopkins:

I have received your letter of June 8, in which you indicated that the foundation that you represent "is a not for profit organization whose mission is to provide resources, education and assistance to employees and/or contractors who are working on public works construction projects."

As we discussed last year, it has been advised by this office and held judicially that personally identifying details that appear on payroll records pertaining to employees of private entities, such as names, addresses and social security numbers, may be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b); Joint Industry Board of Electrical Industry v. Nolan, 159 AD2d 241 (1990)]. That being so, you asked whether it "would be appropriate for the Foundation for Fair Contracting to request the distribution of [y]our literature by the owner of public works jobs with any expenses being borne by the Foundation."

From my perspective, an agency subject to the Freedom of Information Law is not required to provide a means of distributing information to persons whose identities may be protected. However, there have been circumstances in which it has been recommended that a person or entity supply materials (i.e., literature, stamped envelopes, etc.) to an agency to enable the agency to distribute the materials, and in which, in the spirit of cooperation, the agency has agreed to do so.

Based on those previous instances in which agencies have agreed to cooperate in an effort to provide material of interest to the recipients while concurrently protecting the recipients' privacy, I believe that it would be fully appropriate to make a request in the manner you described.

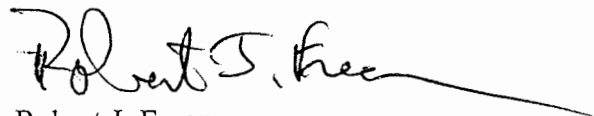
Mr. Howard F. Hopkins

July 17, 2000

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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 flourish extending to the right.

Robert J. Freeman

Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
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FOIL-AD-12210

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July 17, 2000

Executive Director

Robert J. Freeman

Peter Henner, Esq.
P.O. Box 326
Clarksville, NY 12041-0326

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Henner:

I have received your letter of June 8 in which you requested an advisory opinion.

You referred to a situation in which the State Department of Health granted a request to your client to engage in outside employment as a freelance writer, but with the following restriction: "The employee may not use or disclose any information from agency sources, including his employment, which would not be required to be disclosed under the NYS Freedom of Information Law." You have questioned the propriety of the restriction.

In this regard, I believe that a response would be more appropriately made by the State Ethics Commission, for the issue does not involve rights of access to records, but rather the use of information in one's outside employment. Consequently, it is suggested that your client seek guidance from that agency.

Notwithstanding the foregoing, I offer the following comments concerning the restriction.

First, it may be difficult if not impossible to know the extent to which records may be available under the Freedom of Information Law at a given time. As you are aware, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Most of the grounds for denial are based on potentially harmful effects disclosure, which may change or diminish due to the passage of time or the occurrence of certain events; records or portions of records might justifiably be withheld today, but they may become available at some point in the future. For example, a recommendation offered by staff concerning a change in policy may withheld under §87(2)(g); but if the change is adopted by the decision maker, it becomes policy that would be available under subparagraph (iii) of the cited provision. Similarly, a charge that has not been proven in a disciplinary action against a public employee may be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [§87(2)(b)]; if the charge is later sustained and the employee is found to have

Peter Henner, Esq.
July 17, 2000
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engaged in misconduct, the charge would likely be accessible. In short, an agency's ability to withhold records may change over time.

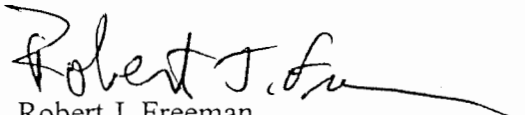
Second, information about our jobs and our work is routinely disclosed, especially verbally, even though the information communicated may be beyond the scope of public rights of access conferred by the Freedom of Information Law. Relating that a person is tall or short, young or old would, in my view, if contained in a record, constitute an unwarranted invasion of personal privacy if disclosed. Nevertheless, that kind of disclosure is typical and routine. A statement, such as: "I think our new system is great", that it "needs work", or that "it will never work" is made often in the course of communicating; however, if those opinions appeared in memoranda, they could be withheld, again under §87(2)(g). Further, when information is obtained via oral communication or observation, the Freedom of Information Law is, in my view, inapplicable.

Third, a restriction concerning the use of confidential information would, in my opinion, be justifiable. However, "confidential" and "unavailable" or "deniable" under the Freedom of Information Law, do not have the same meanings. When records are "confidential", they cannot be disclosed, for a statute would forbid disclosure. In those instances, the first ground for denial, §87(2)(a), would apply. As you are aware, that provision pertains to records that "are specifically exempted from disclosure by state or federal statute." In contrast, there are other situations in which records *may* be withheld, but where there is nothing that would prohibit disclosure. As stated by the Court of Appeals, the agency is not obliged to do so and may choose to disclose. As stated in that unanimous decision: "...while an agency is permitted to restrict access to those records falling within the statutory exemptions, the language of the exemption provision contains permissive rather than mandatory language, and it is within the agency's discretion to disclose such records, with or without identifying details, if it so chooses" [Capital Newspapers v. Burns, 67 NY2d 562, 567 (1986)]. By means of example, while opinions and recommendations contained in intra-agency materials *may* be withheld, there is no obligation to withhold them or to require that they be shielded from public view.

Lastly, it is reiterated that the validity of the kind of restriction at issue is beyond the scope of the expertise of this office. However, enclosed is a copy of a decision rendered by the U.S. Court of Appeals for the Second Circuit that may be pertinent to the matter (Harman v. City of New York).

I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:jm

cc: John Conroy
Gene Therriault



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-A-12211

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July 18, 2000

Executive Director

Robert J. Freeman

Ms. Casey Myers

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Myers:

I have received your letter of June 7, as well as the materials attached to it, which reached this office on June 13. You have sought assistance in obtaining records from the Village of Whitehall Police Department, specifically, the names and badge numbers of the officers involved in your arrest and records indicating "training they have had."

The nature of the assistance you seek is unclear, for the materials indicated that the Chief of Police sent to you a copy of the incident report, which includes the names and identification numbers of the arresting officer and the assisting officer. With respect to an officer's training records, I believe that they may be withheld.

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 with respect to access to a police officer's personnel records 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, which prohibits the disclosure of personnel records of police officers that are used "to evaluate performance toward continued employment or promotion" absent a court order the consent of the officer. It appears that §50-a would be applicable regarding a training certificate.

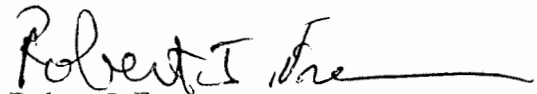
Ms. Casey Myers

July 18, 2000

Page - 2 -

I hope that the foregoing serves to clarify your understanding of the matter. 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, horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm



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FOIL-AJ-12212

Committee Members

Mary O. Donohue
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July 18, 2000

Executive Director

Robert J. Freeman

Ms. Marilyn J. Slaatten
General Counsel
Westchester Medical Center
19 Bradhurst Avenue - 3rd Floor
Hawthorne, NY 10532

Dear Ms. Slaatten:

I have received your determination of an appeal rendered on June 15 under the Freedom of Information Law relating to a request by Alisa D. Cagle of the CSEA. While I concur with most aspects of the determination, one element, in my view, may have resulted in an inappropriate denial of access to certain portions of a record.

Specifically, you upheld a denial of access to certain "work analysis log results and recommendations" on the ground that those records consist of "intra-agency materials which are not final agency policy or determinations. See Public Officers Law §87(2)(g)(iii)."

In this regard, as you are aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

The provision to which you referred, §87(2)(g), enables an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations; or
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

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 in their entirety because they are not final and because they relate to incidents for which no final determination had been made. The Court of Appeals rejected that finding and stated that:

"...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87(2)(g)](111)). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)..." [Gould et al. v. New York City Police Department, 87 NY2d 267, 276 (1996)].

In short, that a record is "predecisional" or does not reflect "final agency policy or determinations" 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,

Ms. Marilyn J. Slaatten
July 18, 2000
Page - 3 -

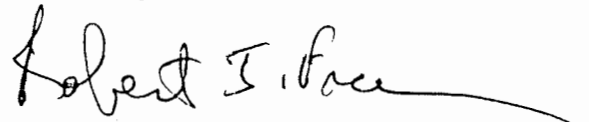
therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182) id., 276-277).]

In my view, insofar as the records at issue consist of recommendations, advice or opinions, for example, they may be withheld; insofar as they consist of statistical or factual information, I believe that they must be disclosed.

I point out that the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the agency contended that complaint follow up reports, also known as "DD5's", could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g). The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276). The Court then stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275).

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: Alisa D. Cagle



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AD-3185
FOIL-AD-12213

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July 18, 2000

Executive Director

Robert J. Freeman

Ms. Mary Lee Lasota

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Lasota:

I have received your letter of June 12, which reached this office on June 19. You questioned the propriety of "retreats" held by the Hilton Central School District Board of Education. Those gatherings, according to your letter, are not open to the public, and the agenda pertaining to one such retreat indicated that its focus would involve "roles and responsibilities of the President and Vice President (transition) and board committees."

You asked whether "this type of retreat [is] allowed under the Open Meetings Law", particularly in view of your belief that "decisions made during this retreat will affect how the board operates...and clarify the roles and responsibilities of board committees", whether records of the retreat should be made available under the Freedom of Information Law, and whether Board members are "free to discuss with the public details of what was talked about or decided at the retreat."

In this regard, I offer the following comments.

First, the Open Meetings Law applies to meetings of public bodies, and a board of education clearly constitutes a public body required to comply with that statute. Section 102(1) of the Open Meetings Law defines the term "meeting" to mean "the official convening of a public body for the purpose of conducting public business". It is emphasized that the definition of "meeting" has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

Inherent in the definition and its judicial interpretation is the notion of intent. If there is an intent that a majority of a public body will convene for the purpose of conducting public business, such a gathering would, in my opinion, constitute a meeting subject to the requirements of the Open Meetings Law.

I point out that the decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that so-called "work sessions" and similar gatherings held for the purpose of discussion, but without an intent to take action, fell outside the scope of the Open Meetings Law. In discussing the issue, the Appellate Division, whose determination was unanimously affirmed by the Court of Appeals, stated that:

"We believe that the Legislature intended to include more than the mere formal act of voting or the formal execution of an official document. Every step of the decision-making process, including the decision itself, is a necessary preliminary to formal action. Formal acts have always been matters of public record and the public has always been made aware of how its officials have voted on an issue. There would be no need for this law if this was all the Legislature intended. Obviously, every thought, as well as every affirmative act of a public official as it relates to and is within the scope of one's official duties is a matter of public concern. It is the entire decision-making process that the Legislature intended to affect by the enactment of this statute" (60 AD 2d 409, 415).

The court also dealt with the characterization of meetings as "informal," stating that:

"The word 'formal' is defined merely as 'following or according with established form, custom, or rule' (Webster's Third New Int. Dictionary). We believe that it was inserted to safeguard the rights of members of a public body to engage in ordinary social transactions, but not to permit the use of this safeguard as a vehicle by which it precludes the application of the law to gatherings which have as their true purpose the discussion of the business of a public body" (*id.*).

Based upon the direction given by the courts, when a majority of a public body gathers to discuss public business, in their capacities as members of the body, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law.

From my perspective, a retreat that dealt with the roles and responsibilities of Board officers and committees constituted a "meeting" that should have been conducted open to the public in accordance with the Open Meetings Law and preceded by notice given pursuant to §104 of that statute.

Second, if indeed decisions were made, I believe that they would have been made in a manner inconsistent with law. Stated differently, a public body has the authority to make decisions

only at meetings held in compliance with the Open Meetings Law. Further, if decisions were made involving policy, i.e., regarding the duties and functions of officers and committees, I believe that those issues should have been discussed in public, for there would have been no basis for conducting an executive session (see §105), and that any action must be memorialized in minutes.

Assuming that the retreat should have been open to the public and decisions were made, minutes should have been prepared pursuant to §106 of the Open Meetings Law, which provides what might be characterized as minimum requirements concerning the contents of minutes and states in relevant part that:

"1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon...

3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

Based upon the foregoing, although minutes must be prepared and made available within two weeks, it is clear that minutes need not consist of a verbatim account of every comment that was made.

If other records of the proceedings were prepared, such as notes or summaries, they would be subject to rights of access conferred by the Freedom of Information Law. That statute pertains to agency records, and §86(4) defines the term "record" to mean:

"any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

In view of the breadth of the definition of "record", notes or summaries, for example, would fall within the scope of rights of access.

The Freedom of Information Law is based on a presumption of access; all agency records are accessible, except to the extent that they may be withheld in accordance with one or more of the grounds for denial appearing in paragraphs (a) through (i) of §87(2). In my view, one of the grounds for denial would be pertinent in ascertaining rights of access to summaries or notes. Specifically, §87(2)(g) enables an agency to deny access to records that:

Ms. Mary Lee Lasota

July 18, 2000

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"are inter-agency or intra-agency materials which are not:

- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations; or
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

To the extent that notes or summaries consist of a factual rendition of what transpired, I believe that they would be available. Again, if action was taken, minutes, in my opinion, must be prepared indicating the nature of the action and the vote of the members.

Lastly, I am unaware of any statute that would prohibit Board members from discussing the events that occurred during a retreat. 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 kinds of issues described in your correspondence.

Ms. Mary Lee Lasota

July 18, 2000

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In a case in which the issue was whether discussions occurring during an executive session held by a school board could be considered "privileged", it was held that "there is no statutory provision that describes the matter dealt with at such a session as confidential or which in any way restricts the participants from disclosing what took place" (Runyon v. Board of Education, West Hempstead Union Free School District No. 27, Supreme Court, Nassau County, January 29, 1987).

In short, I believe that Board members are free to share details of the retreat with the public, especially since it appears that the retreat constituted a "meeting" that should have been held open to the public.

In an effort to enhance compliance with and understanding of open government laws, a copy of this opinion will be sent to the Board of Education.

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



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3186
FOIL-AO-12214

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July 18, 2000

Executive Director

Robert J. Freeman

E-Mail

TO: Robert F. Reninger [REDACTED] RRF

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. Reninger:

I have received your correspondence of June 18, 19 and 22, all of which pertains to minutes of meetings of the Town of Greenburgh Planning Board.

In the first, you indicated that the Board meets at least once a month, but that it has not published minutes of its meetings since March 15. In the second, you wrote that you were informed that "minutes are lost, cannot be found and it is unknown who recorded the minutes and/or whether any minutes were taken." In the third, you referred to a recent meeting of the Board during which the Secretary to the Board said that "there were some gaps" in the minutes of an earlier meeting and that an effort would be made to "reconstruct from memory or guess what happened at that meetings."

You have sought my views concerning the foregoing, and in this regard, I offer the following comments.

First, 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.

Mr. Robert F. Reninger

July 18, 2000

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2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.

3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

Based upon the foregoing, although it is clear that minutes need not consist of a verbatim account of every comment made at a meeting, it is equally clear that minutes must be prepared and made available within two weeks of a meeting. From my perspective, to comply with the Open Meetings Law, a public body, such as a planning board, must ensure that a person is designated to take notes in order that appropriate minutes may later be prepared.

It is also noted that there is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. Nevertheless, as a matter of practice or policy, many public bodies approve minutes of their meetings. In the event that minutes have not been approved, to comply with the Open Meetings Law, it has consistently been advised that minutes be prepared and made available within two weeks, and that they may be marked "unapproved", "draft" or "non-final", for example. By so doing within the requisite time limitations, the public can generally know what transpired at a meeting; concurrently, the public is effectively notified that the minutes are subject to change.

With respect to the possibility that minutes cannot be found, it emphasized that minutes serve as the official record of the actions of a public body. If they cannot be found, the Board and the Town may be unable, in the near or especially in the distant future, to know what actions were taken. That failure could result in serious consequences in relation to the possibility that certain actions may be required to be justified or proven.

Pertinent 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. 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

Mr. Robert F. Reninger

July 18, 2000

Page - 3 -

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 must be preserved and 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, and I believe that the provision pertaining to the retention of minutes requires that those records be kept and preserved permanently.

In an effort to enhance compliance with and understanding of applicable law, a copy of this opinion will be forwarded to the Planning Board.

I hope that I have been of assistance.

RJF:jm

cc: Planning Board



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-A0-12215

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July 20, 2000

Executive Director

Robert J. Freeman

Mr. Thomas W. Stetz



The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Stetz:

I have received your letter of June 13, as well as the materials attached to it.

You wrote that you contacted this office by phone on May 16 and indicated that the Town of Allegany would not permit you to copy a title search that it had in its possession. It was advised, in brief, that the documentation in question would constitute a Town record when it came into the possession of the Town. You also referred to a telephone call made to this office by the Town Attorney, Mr. Paul B. Kelly, in which he indicated that the documentation was sent erroneously to the Town and was no longer in its possession. It is your belief that the Town Attorney's rendition of the facts is inaccurate, and you enclosed documents that appear to bolster your contention. One is dated March 6 and is addressed to the Town Attorney by the Empire State Search Company, in which that entity thanked the Town Attorney "for [his] recent order", which included a "completed abstract" relating to the Dorothy Stetz estate. Another dated April 5 appears on the Town's "facsimile transmission form" sent by Ms. Mary Peck, the Town Clerk that includes the following request to E & M Engineers and Surveyors: "Per the Request of Paul Kelly, could you send me a copy of the survey map and description of Cinema Drive and a copy of the search?" The third is on the letterhead of Mr. J. Michael Shane, an attorney for the Brubet Corporation, is dated April 17 and is an acknowledgement that he "Received from Mary Peck - Town of Allegany - Empire Search Company's Title Search #2K-1236 Dorothy M. Stetz Estate..." That number is the same that appears on the letter of March 6 thanking Mr. Kelly for his order.

Based on the foregoing, it appears that the Town purposefully acquired the documentation at issue. If that is so, it is reiterated that it constituted a "record" subject to inspection and copying under the Freedom of Information Law. In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to agency records, §86(4) defines the term "record" expansively to include:

Mr. Thomas W. Stetz

July 20, 2000

Page - 2 -

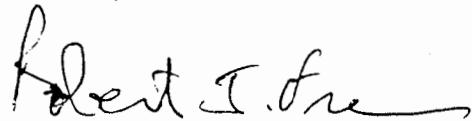
"any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, if the documentation at issue was ordered by a Town official and is kept or held by or for any Town official, I believe that it would constitute a "record" that falls within the coverage of the Freedom of Information Law.

Second, insofar as records are maintained by or for an agency, such as a town, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, assuming that the record is maintained by or for the Town, it would, in my view, be accessible, for none of the grounds for denial would apply.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Mary Peck
Paul B. Kelly

FOIL-AO-12216

From: Robert Freeman
To: Internet:jgrau@syracuse.com
Date: 7/21/00 9:27AM
Subject: Dear Mr. Grau:

Dear Mr. Grau:

In brief, members of public bodies cannot take action by means of secret ballot voting. The Freedom of Information Law, §87(3)(a) specifies that an agency is required to maintain "a record of the final vote of each member in every agency proceeding in which the member votes." That provision has been construed by the courts to preclude government bodies from voting by means of secret ballot, even when electing their officers.

If you need a more detailed explanation of the matter, the index to opinions rendered under the Open Meetings Law accessible via our website includes opinions on the subject. When you reach the index, click on to "s" and scroll down to "secret ballot voting". The highest numbers represent the most recent opinions. Those opinions are available online in full text.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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STATE OF NEW YORK
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FUJL-A-12217

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July 21, 2000

Executive Director

Robert J. Freeman

Ms. Mary Ules

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Ules:

I have received your letter concerning a request directed to the Oneida County Department of Health for a copy of a "re-inspection" report pertaining to your apartment building. According to your letter, an assistant county attorney denied the request on the ground that it "was only written on memo form & not an official document" and that, therefore, you had no right to obtain it. Further, you indicated that he questioned the purpose of your request and suggested that the record sought was not relevant to litigation in which you are involved.

You have sought an advisory opinion concerning the propriety of the rejection of your request. In this regard, I offer the following comments.

First, that a document is prepared in "memo form" has no impact on its status under the Freedom of Information Law. That statute pertains to all 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, a memorandum, or any information in "any physical form" maintained by or for an agency, such as the County, would constitute a "record" that falls within the coverage of the Freedom of Information Law.

Ms. Mary Ules

July 21, 2000

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. It appears that one of the grounds for denial is relevant in analyzing rights of access to the record sought.

Specifically, §87(2)(g) permits an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations; or
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

Lastly, the possibility that records might be pertinent to or used in litigation is, in my view, largely irrelevant. As stated by the Court of Appeals, the State's highest court, in a case involving a request made under the Freedom of Information Law by a person involved in litigation against an agency: "Access to records of a government agency under the Freedom of Information Law (FOIL) (Public Officers Law, Article 6) is not affected by the fact that there is pending or potential litigation between the person making the request and the agency" [Farbman v. NYC Health and Hospitals Corporation, 62 NY 2d 75, 78 (1984)]. Similarly, in an earlier decision, the Court of Appeals determined that "the standing of one who seeks access to records under the Freedom of Information Law is as a member of the public, and is neither enhanced...nor restricted...because he is also a litigant or potential litigant" [Matter of John P. v. Whalen, 54 NY 2d 89, 99 (1980)]. The Court in Farbman, supra, discussed the distinction between the use of the Freedom of Information Law as opposed to the use of discovery in Article 31 of the Civil Practice Law and Rules. Specifically, it was found that:

"FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on governmental decision-making, its ambit is not confined to records actually used in the decision-making process (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d

Ms. Mary Ules
July 21, 2000
Page - 3 -

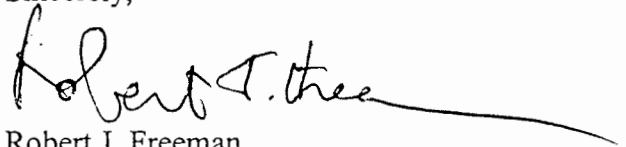
575, 581.) Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request.

"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 consideration of the foregoing, the pendency of litigation would not, in my opinion, affect either the rights of the public or a litigant under the Freedom of Information Law.

I hope that I have been of 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: Robert Barry



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12218

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July 24, 2000

Executive Director

Robert J. Freeman

Mr. Peter J. Mack

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Mack:

I have received your letter of June 12, as well as the materials attached to it. You have raised a series of questions concerning your requests for records directed to the Division of State Police. In consideration of your questions, I offer the following comments.

First, although I do not believe that an agency must identify each record or item within a record that it has withheld, an agency must in my view indicate in response to a request that records or portions of records have been withheld, including the reason for the denial of access [see 21 NYCRR §1401.2(b)]. If an appeal is denied, §89(4)(a) of the Freedom of Information Law requires that the agency "fully explain in writing to the person requesting the record the reasons for further denial."

Second, when records are accessible in their entirety, an applicant may inspect or copy the records. If the applicant chooses to inspect them, no fee can be charged. 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.

Third, with respect to records maintained electronically, I point out that the Freedom of Information Law pertains to existing records. Section 89(3) of that statute provides in part that an agency is not required to create a record in response to a request. 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,

Mr. Peter Mack
July 24, 2000
Page - 2 -

forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

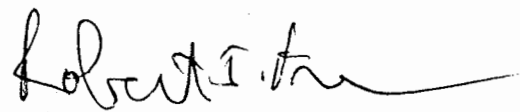
Based upon the language quoted above, if information is maintained in some physical form, it would in my opinion constitute a "record" subject to rights of access conferred by the Law. Further, the definition of "record" includes specific reference to computer tapes and discs, and it was held some fifteen years ago that "[i]nformation is increasingly being stored in computers and access to such data should not be restricted merely because it is not in printed form" [Babigian v. Evans, 427 NYS 2d 688, 691 (1980); aff'd 97 AD 2d 992 (1983); see also, Szikszay v. Buelow, 436 NYS 2d 558 (1981)].

When information is maintained electronically, it has been advised that if the information sought is available under the Freedom of Information Law and may be retrieved by means of existing computer programs, an agency is required to disclose the information. In that kind of situation, the agency in my view would merely be retrieving data that it has the capacity to retrieve. Disclosure may be accomplished either by printing out the data on paper or perhaps by duplicating the data on another storage mechanism, such as a computer tape or disk. On the other hand, if information sought can be retrieved from a computer or other storage medium only by means of new programming or the alteration of existing programs, those steps would, in my opinion, be the equivalent of creating a new record. As stated earlier, since §89(3) does not require an agency to create a record, I do not believe that an agency would be required to reprogram or develop new programs to retrieve information that would otherwise be available [see Guerrier v. Hernandez-Cuebas, 165 AD 2d 218 (1991)].

Insofar as the information sought does not exist or cannot be retrieved or extracted without significant reprogramming, an agency would not, in my opinion, be obliged to develop new programs or modify its existing programs in an effort to generate the data of your interest.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: William J. Callahan
Lt. Laurie M. Wagner



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FUEL-AO-12219

Committee Members

Mary O. Donohue
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July 24, 2000

Executive Director

Robert J. Freeman

Mr. Randolph Drakes



The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Drakes:

I have received your letter of June 19 in which you questioned the propriety of a delay by the Banking Department in determining to grant or deny 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:

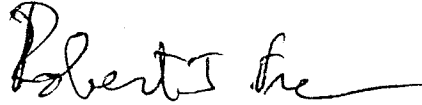
"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

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. Randolph Drakes
July 24, 2000
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: Wendy Austin



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-A0-12220

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David A. Schulz
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Carole E. Stone
Alexander F. Treadwell

July 24, 2000

Executive Director

Robert J. Freeman

Ms. Tamara O'Bradovich

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. O'Bradovich:

I have received your letter of June 21, as well as the materials relating to it. You wrote that you have experienced difficulty in your efforts in "obtaining information from the public records in the Village of Tuckahoe." For instance, despite having directed requests to the Village Clerk, who apparently serves as records access officer, the requests are routinely sent to and reviewed by the Village Attorney, who responds. You asked whether that kind of practice is "customary." Further, having sought information indicating the dates that certain ordinances were adopted, you were informed that such a request "does not specify or identify...records which can be located", and that "[a] municipality is not required to answer questions, conduct research or create files or records in response to a Freedom of Information Law Request."

In this regard, I offer the following comments.

First, by way of background, I note that §89(1) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural implementation of that statute (21 NYCRR Part 1401). In turn, §87(1) requires the governing body of a public corporation, such as a village, to adopt rules and regulations consistent those promulgated by the Committee and with the Freedom of Information Law. Further, §1401.2 of the regulations provides in relevant part that:

"(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty

of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so."

Section 1401.2(b) of the regulations describes the duties of a records access officer and states in part that:

"The records access Officer is responsible for assuring that agency personnel...

- (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. When a request is routine, the records access officer typically, in my experience, responds directly to the applicant. If a request raises questions concerning the extent to which records must be disclosed or, conversely, may be withheld, the advice of an attorney or another person acting in a consultative function may be sought.

Second, I agree with the Village Attorney's statement that the Freedom of Information Law does not require municipal officials to answer questions or create new records in response to a request [see §89(3)]. Nevertheless, in this instance, it does not appear that you sought information by raising questions or that would involve the preparation of new records. Rather, if my understanding of the matter is accurate, you requested portions of existing records, specifically, those portions indicating the dates of the approval of certain ordinances by the Village.

Moreover, the Freedom of Information Law does not require, as the response to your request suggests, that an applicant specify or identify the records in which he or she may be interested. When that statute was initially enacted in 1974, it required that an applicant request "identifiable" records. Therefore, if an applicant could not name the record sought or "identify" it with particularity, that person could not meet the standard of requesting identifiable records. In an effort to enhance its purposes, when the Freedom of Information Law was revised, the standard for requesting records was altered. Since 1978, §89(3) has stated that an applicant must merely "reasonably describe" the records sought. I point out that it has been held by the Court of Appeals that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [*Konigsberg v. Coughlin*, 68 NY 2d 245, 249 (1986)].

Ms. Tamara O'Bradovich
July 24, 2000
Page - 3 -

The Court in Konigsberg found that the agency could not reject the request due to its breadth and also stated that:

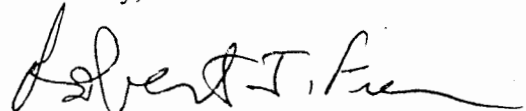
"respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal 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, it seems unlikely that staff could not locate dates that certain ordinances were approved. I would conjecture that the dates would appear in minutes of meetings. If the contents of the minutes are not indexed by subject matter, based on Konigsberg, I believe that you could properly request minutes for the years 1985 and 1998 so that, upon review, you might locate the information of your interest.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Philip A. White
Susan Ciamarra
Leslie B. Maron



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-A-12221

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July 24, 2000

Executive Director

Robert J. Freeman

Ms. Alethia 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 June 12. As I understand the matter, you are interested in obtaining complaints and similar records pertaining to you from the New York City Board of Education.

In this regard, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. When an allegation or complaint is made to an agency, §87(2)(b) of the Freedom of Information Law is generally most pertinent. 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 such information is not relevant to the work of the agency requesting or maintaining it; or

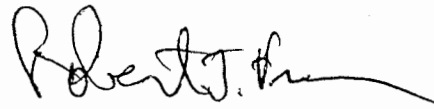
v. disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency."

Ms. Alethia West
July 24, 2000
Page - 2 -

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. As such, again, I believe that identifying details pertaining to a complainant may be deleted. If identifying details can be deleted in a manner that reasonably assures the protection of privacy of those identified, the remainder of the record must, in my view, be disclosed.

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: Michael Valenti

NO

FOIL-AO-

12222



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12223

Committee Members

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July 26, 2000

Executive Director

Robert J. Freeman

David A. Goldstein, Esq.
230 Park Avenue
New York, NY 10169

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Goldstein:

As you are aware, I have received your letter of June 26 and a variety of materials pertaining to your attempts to gain access to records from the Division of State Police. The records sought relate to a speeding ticket issued to you on October 23, 1999 and a trial scheduled for February 1 of this year, at which time the case against you was dismissed.

You have raised a series of questions concerning matter, and in this regard, I offer the following comments.

First, I believe that your requests for records were made in conformity with the Freedom of Information Law. In view of their specificity, in my opinion, they met the requirement imposed by §89(3) that they "reasonably describe" the records sought.

Second, notwithstanding the dismissal, in a response to your request rendered by the Division on February 16, you were informed that the records sought would be withheld, for "the case is still pending court adjudication" and "were compiled for law enforcement purposes and which, if disclosed, would interfere with judicial proceedings. I agree with your contention that learning of the status of your case could likely have been readily accomplished, and that an inappropriate denial of access could have been avoided.

In brief, as you may be aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. While §87(2)(e)(i) permits an agency to withhold records compiled for law enforcement purposes insofar as disclosure would "interfere with law enforcement investigations or judicial proceedings", the authority to deny access pursuant to that provision is, in my view, limited to those situations in which the harm envisioned by its language would indeed arise by means of disclosure.

In the circumstance that you presented, since the case was dismissed, there appears to have been no possibility that disclosure would have interfered with an investigation or a judicial proceeding. Even if the matter had not been dismissed, it is questionable whether or how disclosure of the records sought could have "interfered" in a case involving a speeding ticket. If no "investigation" occurred following the issuance of the ticket, if no witnesses were to be called, if the case was typical of those involving speeding tickets, it is unlikely in my view that a denial of access could have been justified.

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:

"...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.*).

Again, demonstrating that the disclosure of records relating to a speeding ticket would interfere with an investigation or a judicial proceeding or endanger life or safety would, in my opinion, be difficult if not impossible in most circumstances.

Additionally, although the courts are not subject to the Freedom of Information Law, court records are generally available pursuant to other statutes. In this instance, I believe that many of the records sought would have been available from the court in accordance with §2019-a of the Uniform Justice Court Act. To the extent that the records would be have been available from the court, I believe that the ability of the Division of State Police to deny access to the same records would have been eliminated.

Third, following a response indicating that records could not be found, you requested a certification to that effect pursuant to §89(3), and Lt. Laurie M. Wagner wrote that "the Division of State Police certifies that, after a diligent search, it either does not have possession of the records you requested or that such records can not be found." Based on judicial decisions, unless Lt. Wagner personally made the search, the certification was inadequate. As you are aware, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect, for §89(3) provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search."

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)]. More recently, in a situation that may have been somewhat similar to that presented here, the court wrote that:

"Although respondent provided access to some of the records petitioner originally requested under the Freedom of Information Law ["FOIL"], Public Officers Law § 84 *et seq.*), respondent's form letter to petitioner dated June 12, 1998 alleged that it was unable to locate several others. These records were not subsequently produced and their non-production was never addressed with the requisite certification as to the performance of an extensive, diligent search (*see*, Public Officers Law § 89[3]; Qayyum v. NYPD, 227 A.D.2d 188, 642 N.Y.S.2d 28). Therefore, petitioner's claims remain viable. The counsel's affirmation and the above-mentioned form letter, submitted by respondent in support of its claim that a diligent search had been made for the requested records, were an insufficient basis for the motion court to determine, without a hearing, whether respondent had in fact conducted a diligent search. The affirmation was made without any apparent direct knowledge of the alleged

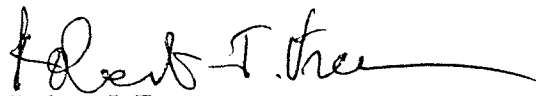
David A. Goldstein, Esq.
July 26, 2000
Page - 4 -

search effort (*see, Key v. Hynes*, 205 A.D.2d 779, 781, 613 N.Y.S.2d 926), and both submissions lacked the requisite detail required under the circumstances to constitute a sufficient basis for the court's determination (*Id.*)" [Rattley v. New York City Police Department, 706 NYS2d 26, ___AD2d___(2000)].

Lastly, because the Committee on Open Government is not a court and I am not a judge, I cannot appropriately comment on or effectively gauge whether the Division acted in "bad faith."

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: William Callahan
Lt. Laurie M. Wagner



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AU-12224

Committee Members

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July 26, 2000

Executive Director

Robert J. Freeman

Ms. Linda Pew

The staff of the Committee on Open 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 June 20, as well as the materials attached to it. You indicated that you appealed a denial of access to records by the Suffolk County Department of Civil Service on May 7, but that, as of the date of your letter to this office, you had received no response. You asked what "the guidelines [are] if an agency does not respond to an appeal." Additionally, you sought my opinion concerning your right to obtain the records, specifically, records relating to leaves of absences granted to certain employees of the Town Brookhaven, including the reasons for the leaves and the dates for which the leaves were granted.

In this regard, I offer the following comments.

First, §89(4)(a) of the Freedom of Information Law pertains to right to appeal a denial of a request for records and states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

It has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Second, from my perspective, those portions of records reflective of the dates for which leave was granted would clearly be accessible; other aspects of the records containing the reasons for seeking leave may or may not be available, depending on the nature of the reasons.

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. In my view, two of the grounds for denial are pertinent to an analysis of rights 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.

The records at issue would consist of inter-agency or intra-agency material. However, portions reflective of dates or figures concerning the times that employees arrive at or leave work, or for which a leave of absence was granted 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)].

Ms. Linda Pew
July 26, 2000
Page - 3 -

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:

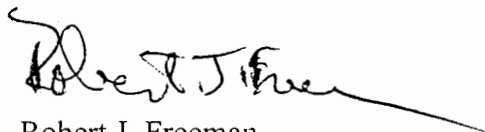
"One of the most basic obligations of any employee is to appear for work when scheduled to do so. Concurrent with this is the rights of an employee to properly use sick leave available to him or her. In the instant case, intervenor had an obligation to report for work when scheduled along with a right 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).

Although the decision cited above dealt with the dates for which sick leave was claimed, the principle, in my view, would be equally applicable here, that the public has the right to obtain records indicating the dates for which leaves of absence were granted or used.

With respect to the reasons for leave, if a leave of absence was requested for medical reasons, for example, I believe that a disclosure of that information would constitute an unwarranted invasion of personal privacy and that a denial of access would be appropriate. In short, in situations in which the reason for seeking leave may be intimate or personal, I believe that it may be withheld. In others, depending on the nature of the reason, it is possible that disclosure may be required.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Florence Dimino, Department of Civil Service
Derrick Robinson, Office of the County Attorney



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-A0-12225

Committee Members

Mary O. Donohue
Alan Jay Gerson
Walter W. Grunfeld
Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
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Website Address: <http://www.dos.state.ny.us/coog/coogwww.html>

July 27, 2000

Executive Director

Robert J. Freeman

Mr. Franklin Loving
99-A-3250
Clinton Correctional Facility Annex
Box 2002
Dannemora, NY 12929

Dear Mr. Loving:

Your appeal under the Freedom of Information Law of July 24 addressed to the Department of State has been forwarded to the Committee on Open Government. The Committee, a unit of the Department, is authorized to provide advice concerning the Freedom of Information Law. In this regard, I offer the following comments concerning the appeal.

First, the Department of State does not maintain possession or control of the records of your interest. Further, neither the Department nor the Committee on Open Government is empowered to require that other entities disclose records or otherwise comply with law.

Second, 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:

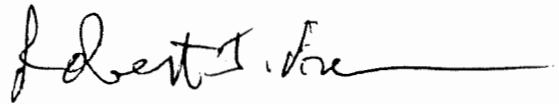
"the courts of the state, including any municipal or district court, whether or not of record."

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. Franklin Loving
July 27, 2000
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 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-12226

Committee Members

Mary O. Donohue
Alan Jay Gerson
Walter W. Grunfeld
Gary Lewi
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July 27, 2000

Executive Director

Robert J. Freeman

Ms. Susan O'Neill

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. O'Neill:

I have received your letter of June 23 in which you sought an advisory opinion concerning a denial of your request made under the Freedom of Information Law to the Berlin School District.

Specifically, you wrote that you requested "the credentials of the person providing most of the counseling" in the District, and that the individual who is the subject of your request "is independently contracted to provide counseling full-time in the three elementary schools." It is your belief that she does not have the requisite certification and you "want to see a resume or something that tells [you] what credentials she holds." In response to the request, you were informed that "such records are not maintained by the school district" and you asked whether "there are certain records that are expected to be kept and therefore made available."

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to records maintained by *or for* an agency, such as a school district, 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, if a resume or similar document is not maintained on the District's premises, but rather is in the possession of a Board member at his or her home, for example, or by the District's attorney at his or her office, any such materials would constitute agency records that fall within the coverage of the Freedom of Information Law, irrespective of the location where they are kept.

Ms. Susan O'Neill

July 27, 2000

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Second, assuming that the District may have had possession of the record of your interest, I note that Article 57-A of the Arts and Cultural Affairs Law, the "Local Government Records Law", requires that school districts and other local governmental entities must retain records for specified periods before the records may be disposed of or destroyed. I am unaware of the retention period applicable to the kind of record in which you are interested. However, the State Archives and Records Administration (SARA), a unit of the State Education Department, develops schedules indicating the minimum periods of retention for certain kinds of records, and a representative of that office can likely inform you of the retention period applicable to the record in question. SARA can be reached at 474-6926.

Third, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

I point out that in Key v. Hynes [613 NYS 2d 926, 205 AD 2d 779 (1994)], it was found that a court could not validly accept conclusory allegations as a substitute for proof that an agency could not locate a record after having made a "diligent search". However, in another decision, such an allegation was found to be sufficient when "the employee who conducted the actual search for the documents in question submitted an affidavit which provided an adequate basis upon which to conclude that a 'diligent search' for the documents had been made" [Thomas v. Records Access Officer, 613 NYS 2d 929, 205 AD 2d 786 (1994)].

Fourth, insofar as records are kept by or for an agency, they are subject to rights of access. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Pertinent to an analysis of rights of access 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, as well as those performing duties for agencies, 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 those persons 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.

Ms. Susan O'Neill

July 27, 2000

Page - 3 -

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 a judicial decision that focused on the kinds of records at issue, Kwasnik v. City of New York (Supreme Court, New York County, September 26, 1997), the court quoted from and relied upon an opinion rendered by this office and held that portions of resumes must be disclosed in accordance with the previous commentary. The Committee's opinion stated that:

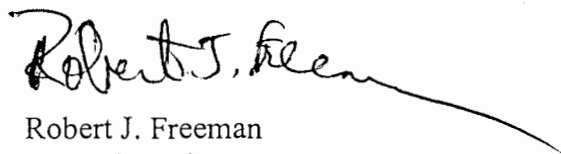
"If, for example, an individual must have certain types of experience, educational accomplishments or certifications as a condition precedent to serving in [a] particular position, those aspects of a resume or application would in my view be relevant to the performance of the official duties of not only 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."

I note that Kwasnik was affirmed by the Appellate Division [691 NYS2d 525, ___AD2d___ (1999)]. Based on that decision and others dealing involving analogous principles, those portions of a resume that are relevant to the performance of one's duties, including certification, must be disclosed. In addition, it has been held that those portions of records indicating one's general education background must be disclosed [Ruberti, Girvin and Ferlazzo v. NYS Division of State Police, 218 AD2d 494 (1996)].

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:jm

cc: Board of Education
Superintendent



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-A-12227

Committee Members

Mary O. Donohue
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July 27, 2000

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 June 24 and the materials that accompanied it. As indicated on many occasions, it would be appreciated if you kept your facsimile transmissions as brief as possible. Inclusion of the Committee's regulations, for instance, with your letter was unnecessary and wasteful.

Your first area of inquiry pertains to the time given to an applicant to inspect records. Although you attempted to develop a formula based on the average amount of time that it takes people to read, I do not believe that the adoption of a formula based on a statistical analysis would be appropriate. Individuals read and digest information at different rates, and some records consist of columns of numbers, spreadsheets, maps and other kinds of materials that do not involve a review of information presented in narrative form. In short, I believe that the Freedom of Information Law, like every other provision of law, should be implemented in a manner that gives reasonable effect to its intent; providing a reasonable amount of time in view of the attendant facts and circumstances is, in my opinion, the requirement imposed by the law.

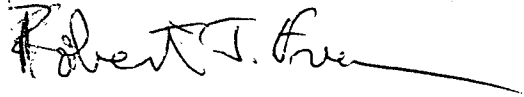
Second, there is nothing in the Freedom of Information Law that would require that agency officials meet with you to discuss your requests. Again, however, agency officials must act reasonably in carrying out their duties in implementing the Freedom of Information Law.

The remaining area of inquiry deals with the application of paragraphs (b) and (g) of §87(2) of the Freedom of Information Law. Since matters relating to those provisions have been the subject of numerous opinions addressed to you over the course of many years, there is no need to revisit them.

Mr. Harvey M . Elentuck
July 27, 2000
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: Ron LeDonni
Christine J. Kicinski



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AJ-
FOIL-AO-12228

Committee Members

Mary O. Donohue
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July 28, 2000

Executive Director

Robert J. Freeman

Peter Henner, Esq.
P.O. Box 326
Clarksville, NY 12041-0326

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Henner:

I have received your letter of June 23, as well as the materials attached to it. The attachments involve requests by your client for records pertaining to himself made under the Freedom of Information and Personal Privacy Protection Laws. The initial request was directed to the Research Foundation of the State University, and because that entity "ignored his request", a second request was made to the State University (SUNY), which "referred [your client] back to the Research Foundation." You view SUNY's response as a constructive denial of the request and asked whether SUNY has an obligation to respond to the request directly, rather than forwarding the request to the Research Foundation. You also asked whether the records sought should be disclosed.

From my perspective, there are two potential responses to your initial area of inquiry. If the Research Foundation is an "agency" subject to the Freedom of Information and Personal Privacy Protection Laws, I believe that it would be required to respond and disclose records to the extent required by those statutes. If it is not an agency, due to its relationship with SUNY, its records would, in essence, be SUNY's records, and I believe that SUNY would be required to respond. In this regard, I offer the following comments.

First, your client referred to an opinion prepared in 1988, FOIL AO-5214 (see attached) in which it was advised that the Research Foundation is an "agency" required to comply with the Freedom of Information Law. My opinion has not changed; if anything, it has been bolstered by the Court of Appeals in Buffalo News v. Buffalo Enterprise Development Corporation [84 NY 2d 488 (1994)], in which the Court found that a not-for-profit corporation, based on its relationship to an agency, was itself an agency subject to the Freedom of Information Law. The decision indicates that:

"The BEDC principally pegs its argument for nondisclosure on the feature that an entity qualifies as an 'agency' only if there is

substantial governmental control over its daily operations (see, e.g., Irwin Mem. Blood Bank of San Francisco Med. Socy. v American Natl. Red Cross, 640 F2d 1051; Rocap v Indiek, 519 F2d 174). The Buffalo News counters by arguing that the City of Buffalo is 'inextricably involved in the core planning and execution of the agency's [BEDC] program'; thus, the BEDC is a 'governmental entity' performing a governmental function for the City of Buffalo, within the statutory definition.

"The BEDC's purpose is undeniably governmental. It was created exclusively by and for the City of Buffalo...In sum, the constricted construction urged by appellant BEDC would contradict the expansive public policy dictates underpinning FOIL. Thus, we reject appellant's arguments," (id., 492-493).

As suggested in the 1988 opinion, the Research Foundation would not exist but for its relationship with SUNY, it carries out its functions, powers and duties for SUNY, and §53-a of the State Finance Law treats the Research Foundation as a "state agency". In consideration of the factors reviewed in 1988 and since that time, I believe that a court would determine that the Research Foundation is an "agency" with a responsibility to comply with the Freedom of Information Law.

Even if that conclusion is not reached, the outcome, in terms of rights of access to records, would be the same, for the alternative would involve a finding that the records maintained by the Research Foundation are SUNY's records. 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 relationship between SUNY and the Research Foundation, which is described in detail in the 1988 opinion, the breadth of the language quoted above and its judicial interpretation [see Encore College Bookstores, Inc. v. Auxiliary Service Corporation of the State University, 87 NY2d 410 (1995)], again, even it is determined that the Research Foundation is not an agency, the materials sought would be SUNY's records subject to rights of access.

It has been long established the SUNY is an "integral part" of the government of the state and, therefore, is a state agency [see e.g., State University of New York v. Syracuse University 285 AD 59 (1954)]. Consequently, I believe that it is subject to the Personal Privacy Protection Law. For purposes of that statute, the term "agency" is defined in §92(1) to mean:

"any state board, bureau, committee, commission, council, department, public authority, public benefit corporation, division, office or any other governmental entity performing a governmental or proprietary function for the state of New York, except the judiciary or the state legislature or any unit of local government and shall not include offices of district attorneys."

Based on the foregoing, if the Research Foundation is part of SUNY, its records pertaining to "data subjects" would fall within the scope of the Personal Privacy Protection Law; if it is independent of SUNY, it would, in my view, fall within the coverage of that statute due to its statewide authority and functions. It is reiterated that the State Finance Law treats the Research Foundation as a state agency.

Second, with respect to rights of access, I point out that both the Freedom of Information Law, §89(3) and the Personal Privacy Protection Law, §95(1), require that an applicant "reasonably describe" the records sought. The first two aspects of your client's request involve all memoranda written or received by him as an employee of the Research Foundation and any records involving his performance, and an issue potentially involves the extent to which the standard in those laws has been met. 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 Research Foundation, 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.

Insofar as the request has reasonably described the records, I believe the Personal Privacy Protection Law would serve as the primary source of rights of access by your client to records pertaining to himself. In general, that statute requires that state agencies disclose records about data subjects to those persons. A "data subject" is "any natural person about whom personal information has been collected by an agency" [Personal Privacy Protection Law, §92(3)]. "Personal information" is defined to mean "any information concerning a data subject which, because of name, number, symbol, mark or other identifier, can be used to identify that data subject" [§92(7)]. For purposes of the Personal Privacy Protection Law, the term "record" is defined to mean "any item, collection or grouping of personal information about a data subject which is maintained and is retrievable by use of the name or other identifier of the data subject" [§92(9)].

Under §95 of the Personal Privacy Protection Law, a data subject has the right to obtain from a state agency records pertaining to him or her, unless the records sought fall within the scope of exceptions appearing in subdivisions (5), (6) or (7) of that section or §96.

To the extent that the records identify others, §96(1) of the Personal Privacy Protection Law states that "No agency may disclose any record or personal information", except in conjunction with a series of exceptions that follow. One of those exceptions, §96(1)(c), involves a case in which a record is "subject to article six of this chapter [the Freedom of Information Law], unless disclosure of such information would constitute an unwarranted invasion of personal privacy as defined in paragraph (a) of subdivision two of section eighty-nine of this chapter". Section 89(2-a) of the Freedom of Information Law states that "Nothing in this article shall permit disclosure which constitutes an unwarranted invasion of personal privacy as defined in subdivision two of this section if such disclosure is prohibited under section ninety-six of this chapter". Consequently, if a state agency cannot disclose records pursuant to §96 of the Personal Protection Law, it is precluded from disclosing under the Freedom of Information Law; alternatively, if disclosure of a record would not constitute an unwarranted invasion of personal privacy and if the record is available under the Freedom of Information Law, it may be disclosed under §96(1)(c).

The remainder of the request involves records concerning the relationship between the Research Foundation and RWD Technologies, Inc. and includes contracts, proposals, bids, purchase orders, invoices and the like, as well as correspondence between the Research Foundation and RWD. Again, a possible issue involves the extent to which the request reasonably describes the records. To the extent that it does, 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.

Peter Henner, Esq.
July 28, 2000
Page - 5 -

I am unaware of the nature of the records, the business in which RWD is involved, or whether bids or awards remain under review. However, if contracts have been awarded, I believe that they would be accessible, for none of the grounds for denial would be applicable. Similarly, records in the nature of invoices, purchase orders and similar materials reflective of the purchase or expenditure of public monies would be accessible.

If contracts have not yet been awarded, of potential relevance is §87(2)(c), which 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 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)].

Depending on the nature of bids or proposals, also potentially relevant may be §87(2)(d), the so-called "trade secret" exception. The scope and parameters of that exception were discussed in an opinion addressed to you on October 14, 1999, and it is suggested that you might review that opinion.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm
Enc.

cc: Randy Symansky
James R. Dennehey
L. Jeffrey Perez



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12229

Committee Members

Mary O. Donohue
Alan Jay Gerson
Walter W. Grunfeld
Gary Lewi
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David A. Schulz
Joseph J. Seymour
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July 31, 2000

Executive Director

Robert J. Freeman

Mr. Cesar Martinez
98-A-4892
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. Martinez:

I have received your letter and apologize for the delay in response. You complained that an appeal made under the Freedom of Information Law to the New York City Police Department was not answered.

In this regard, §89(4)(a) of the Freedom of Information Law pertains to right to appeal a denial of a request for records and states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

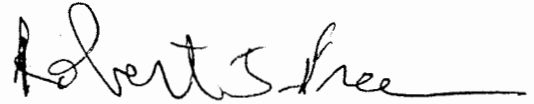
It has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [*Floyd v. McGuire*, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Also, for your information, the person designated by the Department to determine appeals is William Tesler, Special Counsel.

Ms. Cesar Martinez
July 31, 2000
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 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-12230

Committee Members

Mary O. Donohue
Alan Jay Gerson
Walter W. Grunfeld
Gary Lewi
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July 31, 2000

Executive Director

Robert J. Freeman

Mr. Raymond Ferrari
95-R-6002
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. Ferrari:

I have received your letter and apologize for the delay in response. You have sought guidance concerning access to certain records of the New York City Department of Buildings and a "non-response" to a request for records of the New York City Police Department.

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 be made to the records access officer or officers at the agency or agencies that maintain the records of your interest.

Second, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges

Mr. Raymond Ferrari
July 31, 2000
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."

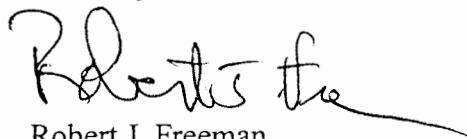
In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge 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 am unaware of the identity of the appeals officer at the Department of Buildings. As such, it is suggested that you appeal to the Commissioner, and if he does not determine appeals, ask that your appeal be forwarded to the proper person. The person designated by the Police Department to determine appeals is William Tesler, Special Counsel.

Third, under the New York City Charter, the Department of Records and Information Services develops schedules indicating the length of time that various record must be kept by City agencies before the records may be destroyed. It is suggested that you contact that agency to determine the length of time that the records of your interest must be retained by writing to the Department's Municipal Records Management Division, 31 Chambers Street, Suite 105, New York, NY 10007.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12231

Committee Members

Mary O. Donohue
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July 31, 2000

Executive Director

Robert J. Freeman

Mr. William Pitt
98-R-6473
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. Pitt:

I have received your letter and apologize for the delay in response. You complained that you requested a tape recording of a hearing conducted at your facility, but that you received no response. Further, you wrote that the hearing officer indicated that you "will never hear these tapes."

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. William Pitt
July 31, 2000
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)].

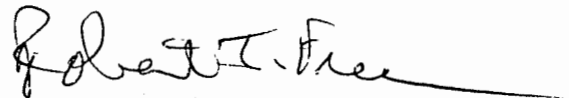
For your information, the person designated by the Department of Correctional Services to determine appeals is Anthony J. Annucci, Counsel to the Department.

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.

If you were present during the hearing, I believe that you would have a right to listen to or obtain a copy of the tape recording upon payment of the appropriate fee. If you were not present, there is a possibility that one or more grounds for denial might apply. For instance, under §87(2)(b), an agency may withhold records when disclosure would result in "an unwarranted invasion of personal privacy"; §87(2)(e) permits an agency to withhold records "compiled for law enforcement purposes" in certain circumstances; and §87(2)(f) authorizes 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,



Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-A - 12232

Committee Members

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July 31, 2000

Executive Director

Robert J. Freeman

Mr. Jose Gonzalez
99-A-6068
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. Gonzalez:

I have received your letter and apologize for the delay in response. You have asked whether you can use the Freedom of Information Law to request court records.

In this regard, 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:

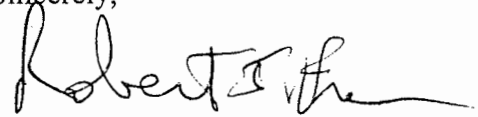
"the courts of the state, including any municipal or district court, whether or not of record."

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. Jose Gonzalez
July 31, 2000
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". 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-A0-12233

Committee Members

Mary O. Donohue
Alan Jay Gerson
Walter W. Grunfeld
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July 31, 2000

Executive Director

Robert J. Freeman

Mr. Charles Leahey

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Leahey:

I have received your letter and apologize for the delay in response. You have complained that the New York City Police Department has failed to respond to your request for records. In this regard, I offer the following comments.

First, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) require that each agency designate one or more persons as "records access officer". The records access officer has the duty of coordinating an agency's response to requests for records, and requests should ordinarily be sent to that person.

Second, 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:

Mr. Charles Leahey

July 31, 2000

Page - 2 -

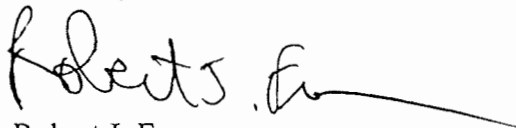
"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, 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)].

Lastly, the person designated by the Department to determine appeals is William Tesler, 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

cc: William Tesler



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-A-12234

Committee Members

Mary O. Donohue
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Gary Lewi
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Wade S. Norwood
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Carole E. Stone
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July 31, 2000

Executive Director

Robert J. Freeman

Mr. James Rizzo
95-A-3842
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. Rizzo:

I have received your letter and apologize for the delay in response. You complained with respect to an appeal directed to the New York City Police Department that was not answered.

In this regard, §89(4)(a) of the Freedom of Information Law pertains to right to appeal a denial of a request for records and states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

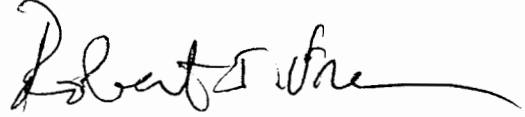
It has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [*Floyd v. McGuire*, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

For your information, the person designated by the Department to determine appeals is William Tesler, Special Counsel.

Mr. James Rizzo
July 31, 2000
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 flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: William Tesler



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL - A0 - 12235

Committee Members

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Carole E. Stone
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July 31, 2000

Executive Director

Robert J. Freeman

Mr. Christopher Burton
99-A-2392
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. Burton:

I have received your letter and apologize for the delay in response. You have questioned what may be done in relation to a delay in responding 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 acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

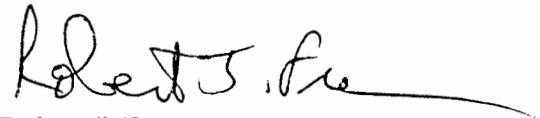
Mr. Christopher Burton
July 31, 2000
Page - 2 -

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 New York City Police Department to determine appeals is William Tesler, Special Counsel.

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-A0-12236

Committee Members

Mary O. Donohue
Alan Jay Gerson
Walter W. Grunfeld
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Wade S. Norwood
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July 31, 2000

Executive Director

Robert J. Freeman

Mr. James F. Gesualdi
Lamb & Barnosky, LLP
534 Broadhollow Road
CS 9034
Melville, NY 11747-9034

The staff of the Committee on Open 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:

As you are aware, I have received your letter of June 29 in which you sought an advisory opinion on behalf of the Village of Huntington Bay. The matter relates to a request made under the Freedom of Information Law for "all building permit applications denied by the Village of Huntington Bay within the last fifteen years (years 1985 through 2000)." You indicated that "in order to identify the requested documents, of any, it would be necessary to review every one of seven hundred plus property files in the possession of the Village."

In this regard, the issue in my view involves whether 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

Mr. James F. Gesualdi
July 31, 2000
Page - 2 -

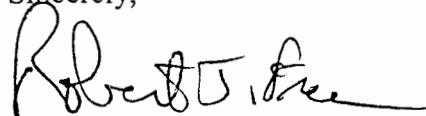
'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency']" (id. at 250).

In my opinion, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping system. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number.

If the Village maintained a separate file containing building permit applications that had been denied, or even if building permits were maintained chronologically, locating the records sought might be a relatively easy task. However, if the records are kept by parcel, and there is no way of locating of the records sought without reviewing the files relating to each and every parcel, it would appear that the request would not have met the standard of reasonably describing the records.

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-Ad-12237

Committee Members

Mary O. Donohue
Alan Jay Gerson
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Gary Lewi
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July 31, 2000

Executive Director

Robert J. Freeman

Hon. Barbara Elmore
Town Justice
Town of Davenport Court
P.O. Box 131
Davenport Center, NY 13751

The staff of the Committee on 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 Elmore:

I have received your letter of June 26 and the materials attached to it. By way of background, on May 16, you transmitted a request to the Town of Davenport's records access officer and sought six items. Having received no response, you appealed on June 6, and in response, you were informed that items one through four were not in the possession of the Town Clerk or the Supervisor and that they were not "stored at Town Hall." Item five was disclosed, and no reference was made to item six. You have sought "determination" concerning 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 is not empowered to render a determination that is binding. Nevertheless, I offer the following comments pertaining to the situation that you described.

First, since your initial request was not answered, I point out that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Since no reference was made to two of the items requested, it appears that the determination of your appeal was incomplete and inconsistent with the requirements imposed by §89(4)(a) of the Freedom of Information Law.

Second, if it can be assumed that the records that you requested exist, even though they are not in the possession of the Town Clerk or the Supervisor and are not kept at the Town Hall, I believe that they would fall nonetheless 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 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, 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 Town, I believe that the Town would be required to direct the custodian of the records to disclose them in accordance with the Freedom of Information Law, or obtain them in order to disclose them to you to the extent required by law. I note, too, that §30 of the Town Law states that the Town Clerk is the legal custodian of all town records.

Third, Article 57-A of the Arts and Cultural Affairs Law, the "Local Government Records Law", requires that towns and other local governmental entities must retain records for specified periods before the records may be disposed of or destroyed. I am unaware of the retention period applicable to the kinds of records in which you are interested. However, the State Archives and Records Administration (SARA), a unit of the State Education Department, develops schedules indicating the minimum periods of retention for certain kinds of records, and a representative of that office can likely inform you of the retention period applicable to the record in question. SARA can be reached at (518) 474-6926. Alternatively, the Town Clerk, who is designated in Article 57-A as the "records management officer", should have the schedule applicable to towns.

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 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

Hon. Barbara Elmore
July 31, 2000
Page - 4 -

the 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, although one of the grounds for denial may be pertinent to an analysis of rights of access to the records sought, due to its structure, it would likely require disclosure. That provision, §87(2)(g) permits an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

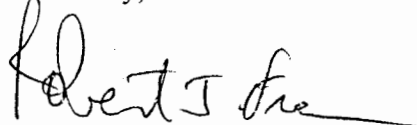
- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations; or
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. It appears that the records consist of statistical or factual information that must be disclosed pursuant to §87(2)(g)(i).

In an effort to enhance compliance with and understanding of applicable law, copies of this opinion will be forwarded to Town officials.

I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Hon. Margaret Bonney, Town Clerk



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12238

Committee Members

Mary O. Donohue
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July 31, 2000

Executive Director

Robert J. Freeman

Ms. Claire M. Gallagher

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Gallagher:

I have received your letters of June 24 and July 7, as well as the materials attached to them.

By way of background, you requested records "in the possession of the City of New Rochelle pertaining to any proposal to build an IKEA store..." in the City, correspondence between the City and IKEA and "drafts of the Draft Environmental Impact Statement." The drafts were apparently prepared by a consultant retained by IKEA. Although some documentation was made available, you were informed that "correspondence between the developer and the City is forwarded to the City's special counsel...and that it was therefore 'privileged' and that [you] could not view it."

You have asked "whether correspondence between a developer (including a draft of a Draft Environmental Impact Statement, if one exists) and a City are accessible to the public even if they have been forwarded to the City's special counsel and/or its law department." From my perspective, the records in question, insofar as they exist, must be disclosed. In this regard, I offer the following comments.

First, the site where the records are kept has no bearing on rights of access. The Freedom of Information Law pertains to agency records, and §86(4) of the Freedom of Information Law defines the term "record" expansively to include:

"any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Ms. Claire M. Gallagher
July 31, 2000
Page - 2 -

Based upon the language quoted above, documents need not be in the physical possession of an agency, such as a city, 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, with or for an agency'" [see Encore College Bookstores, Inc. v. Auxiliary Services Corporation of the State University of New York at Farmingdale, 87 NY 2d 410, 417 (1995)].

In short, insofar as the records sought are maintained for the City, I believe that the City 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.

Second, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, none of the grounds for denial could properly be asserted to withhold the records in question.

Although one of the grounds for denial may frequently be cited to withhold records or portions of records characterized as "draft" or "preliminary", for example, that provision would not be applicable in the situation that you described. Specifically, §87(2)(g) deals with "inter-agency and intra-agency materials." Section 86(3) of the Freedom of Information Law defines the term "agency" to mean:

"any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, the exception pertains to communications between or among state or local government officials at two or more agencies ("inter-agency materials"), or communications between or among officials at one agency ("intra-agency materials"). If the records sought consist of communications sent to the City or its attorney or exchanged between IKEA, the developer or their consultant and City or its attorney, they would not constitute inter-agency or intra-agency materials, and the exception to which reference was made, in my view, would not apply. In short, neither IKEA nor its consultant would be an agency, and their communications with City or its attorney would be neither inter-agency nor intra-agency materials.

Lastly, the transmittal or possession of records by the City's special counsel would not alter the character of the records or bring them within the scope of the attorney-client privilege. By way of background, the first ground for denial in the 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 may be 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.

Nevertheless, the records in question, although in possession of the City's special counsel, do not consist of privileged communications. In a discussion of the parameters of the attorney-client relationship and the conditions precedent to its initiation, it has been held that:

"In general, 'the privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client'" [People v. Belge, 59 AD 2d 307, 399 NYS 2d 539, 540 (1977)].

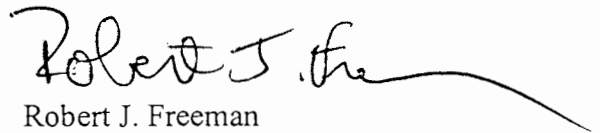
The City of New Rochelle is the client of the special counsel; neither IKEA nor a developer or their consultant would be his client. Consequently, communications in possession of the special

Ms. Claire M. Gallagher
July 31, 2000
Page - 4 -

counsel that were prepared or transmitted by the IKEA, the developer or their consultant would not fall within the coverage of the attorney-client privilege. On the contrary, for reasons discussed earlier, I believe that they would constitute agency records that must be disclosed, for 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: Dorothy Allen
Mark Stellato
Michael Zarin

FOIL-AO-12239

From: Robert Freeman
To: [REDACTED]
Date: 7/31/00 10:10AM
Subject: Dear Mr. Payne:

Dear Mr. Payne:

I have received your letter. If I understand the matter, you asked whether a the chair of a zoning board of appeals would be "in dereliction of his duty" by not answering your questions within a certain time, or whether you could assume the answers due to his failure to respond..

In this regard, there is no law that generally requires government officials to answer questions, and I do not believe that you could assume that silence represents an admission. Further, if your request was made under the Freedom of Information Law, I note that that statute pertains to existing records; it does not require that agency officials answer questions or prepare new records in order to respond to requests for information. Rather than seeking information by asking questions, it is suggested that you seek existing records.

I note, too, that the "records access officer" in most towns is the town clerk. 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.

Lastly, although you have the ability to seek changes in minutes of meetings, the Board would not be obliged to make such changes.

I hope that I have been of assistance. Should further questions arise, 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
Website - www.dos.state.ny.us/coog/coogwww.html



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12240

Committee Members

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July 31, 2000

Executive Director

Robert J. Freeman

Mr. Joseph Benbow
89-A-4921
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. Benbow:

I have received your letter and apologize for the delay in response. You have sought guidance in relation to a request made under the Freedom of Information Law. Having read your request, it appears that you misunderstand the thrust of that statute.

It is noted that the title of the Freedom of Information Law may be misleading, for it is a vehicle under which a person may seek records; it does not require that government officials answer questions or provide information in response to questions. Further, that statute pertains to existing records, and §89(3) states in part that an agency is not required to create a record in response to a request.

In short, rather than seeking information by asking questions, it is suggested that you request existing records. Further, if there are no records indicating why certain courses of treatment were not followed or administered, the Freedom of Information Law would not apply.

I hope that the foregoing serves to clarify your understanding of the matter and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12241

Committee Members

Mary O. Donohue
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July 31, 2000

Executive Director

Robert J. Freeman

Mr. Thomas Williams
96-A-3374 C-3-17
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. Williams:

I have received your letter and apologize for the delay in response. You have raised a series of questions concerning the Freedom of Information Law.

First, a request should be made to the "records access officer" at the agency that you believe would maintain the records of your interest. 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. The request can be made by citing the Freedom of Information Law and by reasonably describing the records sought in accordance with §89(3) of the Law. Stated differently, a request should contain sufficient detail to enable agency staff to locate and identify the records of your interest.

Second, if both a request and an appeal are denied, you may seek judicial review of the denial by initiating a proceeding under Article 78 of the Civil Practice Law and Rules.

Lastly, as you requested, enclosed are "Your Right to Know", which summarizes the Freedom of Information Law and includes a sample letter of request, and the Committee's latest annual report.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
Encs.



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-A0 - 12242

Committee Members

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July 31, 2000

Executive Director

Róbert J. Freeman

Mr. Jose Antonio Vargas
97-R-8974
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. Vargas:

I have received your letter and apologize for the delay in response. You have asked that I "look into" the failure by the Albany Medical Center to respond to your requests made under the Freedom of Information Law.

In this regard, 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."

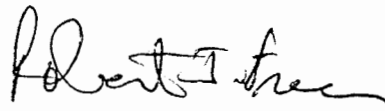
Based on the foregoing, the Freedom of Information Law generally applies to records maintained by state and local government in New York; it does not apply to private entities, such as the Albany Medical Center.

It is noted that medical records maintained by hospitals or physicians are generally accessible to the subjects of those records pursuant to §18 of the Public Health Law. It is suggested, therefore, that medical records be requested on the basis of that statute.

Mr. Jose Antonio Vargas
July 31, 2000
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 the first name "Robert" being the most prominent.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FUJL-AU-12243

Committee Members

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Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Carole E. Stone
Alexander F. Treadwell

July 31, 2000

Executive Director

Robert J. Freeman

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 and apologize for the delay in response. You have sought guidance concerning the meaning of the phrases "instructions to staff that affect the public" and "final agency policy or determinations", which are generally available, respectively, under subparagraphs (ii) and (iii) of §87(2)(g) of the Freedom of Information Law.

In this regard, there is little decisional law that deals directly with those provisions. However, in a letter addressed to me dated July 21, 1977 by the sponsor of the revised Freedom of Information Law, former Assemblyman Mark Siegel indicated that §87(2)(g) is intended to insure that "any so-called 'secret law' of an agency be made available", such as the policy "upon which an agency relies" in carrying out its duties. Typically, agency guidelines, procedures, staff manuals and the like provide direction to an agency's employees regarding the means by which they perform their duties. Some may be "internal", in that they deal solely with the relationship between an agency and its staff. Others may provide direction in terms of the manner in which staff performs its duties in relation to or that affects the public, which would ordinarily be public. To be distinguished would be advice, opinions or recommendations that may be accepted or rejected. An instruction to staff, a policy or a determination each would represent a matter that is mandatory or which represents a final step in the decision making process.

While instructions to staff that affect the public and final agency policies or determinations are generally accessible, there may be instances in which those records or portions thereof may be withheld.

Perhaps most relevant would be §87(2)(e)(iv). The leading decision concerning that provision is Fink v. Lefkowitz, which involved access to a manual prepared by a special prosecutor that investigated nursing homes in which the Court of Appeals held that:

"The purpose of this exemption is obvious. Effective law enforcement demands that violators of the law not be apprised the nonroutine procedures by which an agency obtains its information (see Frankel v. Securities & Exch. Comm., 460 F2d 813, 817, cert den 409 US 889). However beneficial its thrust, the purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution.

"To be distinguished from agency records compiled for law enforcement purposes which illustrate investigative techniques, are those which articulate the agency's understanding of the rules and regulations it is empowered to enforce. Records drafted by the body charged with enforcement of a statute which merely clarify procedural or substantive law must be disclosed. Such information in the hands of the public does not impede effective law enforcement. On the contrary, such knowledge actually encourages voluntary compliance with the law by detailing the standards with which a person is expected to comply, thus allowing him to conform his conduct to those requirements (see Stokes v. Brennan, 476 F2d 699, 702; Hawkes v. Internal Revenue Serv., 467 F2d 787, 794-795; Davis, Administrative Law [1970 Supp], section 3A, p 114).

"Indicative, but not necessarily dispositive of whether investigative techniques are nonroutine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel (see Cox v. United States Dept. of Justice, 576 F2d 1302, 1307-1308; City of Concord v. Ambrose, 333 F Supp 958)."

In applying those criteria to specific portions of the manual, which was compiled for law enforcement purposes, the Court found that:

"Chapter V of the Special Prosecutor's Manual provides a graphic illustration of the confidential techniques used in a successful nursing home prosecution. None of those procedures are 'routine' in the sense of fingerprinting or ballistic tests (see Senate Report No. 93-1200, 93 Cong 2d Sess [1974]). Rather, they constitute detailed, specialized methods of conducting an investigation into the activities of a

Mr. Christopher Lue-Shing

July 31, 2000

Page - 3 -

specialized industry in which voluntary compliance with the law has been less than exemplary.

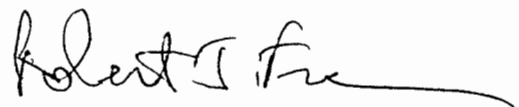
"Disclosure of the techniques enumerated in those pages would enable an operator to tailor his activities in such a way as to significantly diminish the likelihood of a successful prosecution. The information detailed on pages 481 and 482 of the manual, on the other hand, is merely a recitation of the 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).

As the Court of Appeals has suggested, to the extent that the records in question include descriptions of investigative techniques which if disclosed would enable potential lawbreakers to evade detection or endanger the lives or safety of law enforcement personnel or others [see also, Freedom of Information Law, §87(2)(f)], a denial of access would be appropriate. I would conjecture, however, that not all of the investigative techniques or procedures contained in the records sought incident and the ensuing investigation could be characterized as "non-routine", and that it is unlikely that disclosure of each aspect of the records would result in the harmful effects of disclosure described above.

The other provision that may be pertinent as a basis for denial is §87(2)(f). Again, that provision permits an agency to withhold records insofar as disclosure "would endanger the life or safety of any person." If, for example, disclosure of an instruction to staff or policy would jeopardize the lives or safety of public employees or others, the cited provision might be 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



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12,244

Committee Members

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David A. Schulz
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Carole E. Stone
Alexander F. Treadwell

August 1, 2000

Executive Director

Robert J. Freeman

Mr. Robert McKeown
96-R-7281
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. McKeown:

I have received your letter and apologize for the delay in response. You asked what step may be taken if an agency does not respond in a timely manner to an appeal made under the Freedom of Information Law.

In this regard, §89(4)(a) of the Freedom of Information Law pertains to right to appeal a denial of a request for records and states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

It has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-A0-12,245

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August 1, 2000

Executive Director

Robert J. Freeman

Mr. Robert Hudson

Dear Mr. Hudson:

Your letter addressed to the Secretary of State (and others) has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State, is authorized to provide advice and opinions concerning the Freedom of Information Law. As I understand the matter, the issue involves your ability to obtain court records from the Dutchess County Clerk.

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."

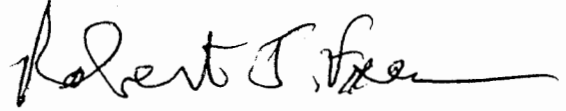
Based on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law (see e.g., Judiciary Law, §255) may grant broad public access to those 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 any request for court records be made based on an applicable provision of law rather than the Freedom of Information Law.

Mr. Robert Hudson
August 1, 2000
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-12,246

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Alexander F. Treadwell

August 1, 2000

Executive Director

Robert J. Freeman

Mr. Lamonte Tate Coles
96-A-0340
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. Coles:

I have received your letter and apologize for the delay in response. While I am sympathetic to the situations that you described, I do not believe that I can offer substantial assistance. Nevertheless, I offer the following comments.

First, the Committee on Open Government is authorized to offer guidance concerning the New York Freedom of Information Law, which applies to records maintained by agencies of state and local government in this state. Each state has enacted a different statute pertaining to access to government records, and the federal Freedom of Information Act is applicable to records of federal agencies. I am unaware of the specific provisions enacted in other states.

Both the New York and federal Freedom of Information statutes include provisions that enable agencies to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." Social security numbers may generally be withheld on that basis. It is suggested, however, that you might explain your situation and contact the freedom of information officer at the Social Security Administration, which is located at Room 3-A-6 Operations, 6401 Security Building, Baltimore, MD 21235-6401.

Both of those statutes also require that an applicant must "reasonably describe" the records of interest. As such, a request should include sufficient detail to enable agency staff to locate and identify the records. Absent that detail, it may be difficult if not impossible to make an appropriate request that meets the standard of reasonably describing the records.

Mr. Lamonte Tate Coles

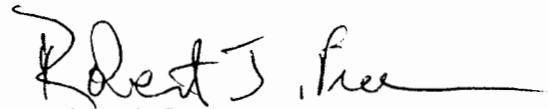
August 1, 2000

Page - 2 -

If your child attends a public school, unless there is a court order or agreement to the contrary, you would have rights of access, as a parent, to education records identifiable to the child pursuant to the federal Family Educational Rights and Privacy Act (20 USC §1232g). Therefore, if, for example, you learn that your child attends a public school in Charleston, a request might be made to that school district for records pertaining to him or her.

The remaining issues that you raised are beyond the scope of the jurisdiction or expertise of this office. I regret that I cannot be greater 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

FOIL-AO-12247

Committee Members

Mary O. Donohue
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August 1, 2000

Executive Director

Robert J. Freeman

Mr. Kenneth Nowlin
84-A-6472
Wallkill Correctional Facility
P.O. Box G
Wallkill, NY 12589-0286

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Nowlin:

I have received your letter and apologize for the delay in response. You have sought assistance in relation to two requests made under the Freedom of Information Law.

The first involves a request made to the New York City Police Department for a copy of a certificate prepared pursuant to §4540 of the Civil Practice Law and Rules that 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:

Mr. Kenneth Nowlin

August 1, 2000

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."

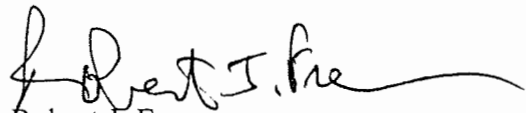
In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge 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 William Tesler, Special Counsel.

The second issue involves your request for records relating to an incident that occurred at your high school in 1968. Insofar as records regarding the matter continue to exist, most pertinent is the federal Family Educational Rights and Privacy Act ("FERPA"; 20 USC §1232g). In brief, that statute provides rights of access to parents of students under the age of eighteen or the students themselves when they reach eighteen to records identifiable to the students. As such, as a general matter, I believe that you would have rights of access to records maintained by your high school about yourself. I note that FERPA prohibits disclosure to the public of records identifiable to students without the consent of the students. Therefore, insofar as records identifiable to you may identify other students, those portions pertaining to the other students may be withheld absent their consent to disclosure. In addition, FERPA provides that the subject of a record may attempt to amend or correct such a record if he or she believes that the record is inaccurate.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12248

Committee Members

Mary O. Donohue
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August 1, 2000

Executive Director

Robert J. Freeman

Mr. Douglas E. Lee
75-A-1894
Shawangunk Correctional Facility
P.O. Box 700
Wallkill, NY 12589-0700

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Lee:

I have received your letter, as well as the materials attached to it. Please accept my apologies for the delay in response. You have sought an advisory opinion concerning the propriety of a denial of your request for records maintained by the Division of Parole. You asked to review your parole file in advance of your hearing before the Board of Parole in order that you can "take any special courses or training" that may be recommended in advance of the hearing. However, you were informed that it is the "policy" of the Division of Parole to honor requests made under the Freedom of Information Law only in accordance with certain criteria, none of which is yet applicable.

From my perspective, insofar as the Division's policy is inconsistent with the Freedom of Information Law and its judicial construction, the policy is invalid. In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. While some aspects of the records sought might properly be withheld, a blanket denial of access based on the policy expressed in response to your request is, in my view, inconsistent with law.

Several statutes deal with the powers and duties of the Division of Parole that are pertinent to an analysis. Section §259-a of the Executive Law requires that the Division of Parole maintain certain kinds of records. Section 259-k provides in subdivision (2) that the Board of Parole "shall make rules for the purpose of maintaining the confidentiality of records, information contained

therein and information obtained in an official capacity by officers, employees or members of the division of parole." The Division's regulations, 9 NYCRR §8000.5(c), pertain to disclosure of case records maintained by the Division. That provision confers limited rights of access to case records and states in paragraph (2)(ii) that "any record of the division of parole not made available pursuant to this section shall not be released, except by the chairman upon good cause shown." Section 8008.2(a) of the regulations defines the phrase "case record" to include: "...any memorandum, document or other writing pertaining to a present or former inmate, parolee, conditional releasee or other releasee, and maintained pursuant to sections 259-a(1)-(3) and 259-c(3) of the Executive Law."

The statutes and regulations that preceded those cited above and which pertained to the Board of Parole when it was part of the Department of Correctional Services included essentially the same direction. However, insofar as the regulations conflicted with the Freedom of Information Law, they were found more than twenty years ago to be invalid. Specifically, in Zuckerman v. Board of Parole, the court found that:

"Section 221 of the Correction Law, entitled 'Records', requires the commissioner to keep complete records 'of every person released on parole or conditional release'. The statute also requires the commissioner to make rules as to the privacy of these records. Under the authority of these two statutory mandates (7 NYCRR 5.1 [a], the following regulation was promulgated: 'Department records. Any department record not otherwise made available by rule or regulation of the department shall be confidential for the sole use of the department.' (7 NYCRR 5.10). The minutes of board meetings are *not* 'made available by rule or regulation' and, therefore, Special Term held that the minutes are private.

"It would seem clear that section 29 of the Correction Law exempts from disclosure those specifically enumerated statistics and, further, that section 221 exempts those records dealing with parolees. Minutes of Parole Board meetings are not *specifically* exempted by either of these statutes. Applying the rule of *ejusdem generis* (McKinney's Cons Laws of NY, Book 1, Statutes, §239, subd b), the nonexclusive list contained in subdivision 1 of section 29 of the Correction Law could not be construed to include those minutes.

"It would therefore appear that this regulation, as applied to the minutes of Parole Board meetings, is invalid on two grounds. As shown above, the regulation makes *all* records private initially and is not limited solely to those categories of information specifically set forth or included by reasonable implication in the statutes. Furthermore, by making *all* records initially confidential in a broad and sweeping manner, the regulation violates the clear intention of the Freedom of Information Law (see Public Officers Law, §85). It is established as a general proposition that a regulation cannot be

inconsistent with a statutory scheme (see e.g. *Matter of Broadacres Skilled Nursing Facility v. Ingraham*, 51 AD2d 243, 245-246)...This conclusion is further reinforced by the general rule that public disclosure laws are to be liberally construed..." [53 AD 2d 405, 407(1976); emphasis supplied by the court; see also *Morris v. Martin*, 440 NYS 2d 1026 (1982)].

In sum, based upon the direction provided judicially, I do not believe that the records in question can be characterized as being exempted from disclosure by statute or that the regulations serve to enable the Department to withhold records that would otherwise be available under the Freedom of Information Law.

Second, I am unaware of the contents of the records at issue, and it is possible that several grounds for denial may be relevant. For instance, under §87(2)(b), an agency may withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." That provision may be applicable insofar as the records include reference to persons other than yourself or government officers. Perhaps most relevant is §87(2)(g), which permits an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations; or
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

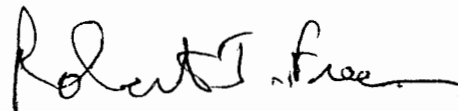
It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

Lastly, 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.

Mr. Douglas E. Lee
August 1, 2000
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 flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Terrence X. Tracy
Charles Schwarz



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12249

Committee Members

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Alan Jay Gerson
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August 1, 2000

Executive Director

Robert J. Freeman

Mr. Fred Puglisi



The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Puglisi:

I have received your letter and apologize for the delay in response. Having requested a copy of "the original application use/or signed by [your] mother in order to obtain a birth certificate for [you]", you were informed by the Bureau of Vital Records at the New York City Health Department that that agency is exempt from the Freedom of Information Law.

In this regard, first, birth records are generally available to the subjects of such records and their parents; they are exempt from disclosure with respect to others [see Public Health Law, §4173]. I note that if records relate to an adoption, they are exempt from disclosure pursuant to §114 of the Domestic Relations Law and can be disclosed only pursuant to a court order. Assuming that the record of your interest is not otherwise exempt from disclosure, it is suggested that you might resubmit your request, indicating that you are the subject of the record and providing proof of your identity.

Second, when a request for records is denied, the applicant may appeal the denial under §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"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."

Mr. Fred Puglisi

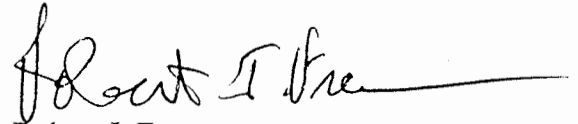
August 1, 2000

Page - 2 -

I note, too, that when an agency denies a request for records, it is required to inform the applicant of the right to appeal, with the name and address of the person to whom the appeal may be made [see 21 NYCRR Part 1401].

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-AU-12250

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Alexander F. Treadwell

August 1, 2000

Executive Director

Robert J. Freeman

Mr. Craig Mack
99-R-3295
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. Mack:

I have received your letter and apologize for the delay in response. You have asked that this office contact the Chief Clerk at Riker's Island due to his failure to respond to your request made pursuant to 5 USC §§552 and 552a.

In this regard, first, the statutes to which you referred are, respectively, the federal Freedom of Information and Privacy Acts, which apply only to federal agencies. The applicable statute concerning access to records in this instance is the New York Freedom of Information Law, which applies to records maintained by state and local government in New York.

Second, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) require that each agency designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests, and requests should ordinarily be made to that person. While I believe that the person in receipt of your request should have responded directly or forwarded the request to the proper person, it is suggested that, if you have not yet received a response, your request should be resubmitted to Mr. Thomas Antenen, Records Access Officer, Department of Correction, 60 Hudson Street, 6th Floor, New York, NY 10013.

Lastly, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record

Mr. Craig Mack
August 1, 2000
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..."

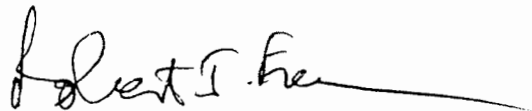
If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively 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
Chief Clerk



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12251

Committee Members

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Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Carole E. Stone
Alexander F. Treadwell

August 1, 2000

Executive Director

Robert J. Freeman

Mr. Roy Ali Hampton
95-A-0752
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. Hampton:

I have received your letter and apologize for the delay in response. You have sought guidance concerning difficulties in obtaining information under the Freedom of Information Law. Based on the information you provided, I offer the following comments.

First, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

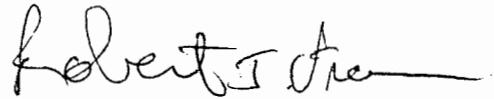
I point out that in Key v. Hynes [613 NYS 2d 926, 205 AD 2d 779 (1994)], it was found that a court could not validly accept conclusory allegations as a substitute for proof that an agency could not locate a record after having made a "diligent search". However, in another decision, such an allegation was found to be sufficient when "the employee who conducted the actual search for the documents in question submitted an affidavit which provided an adequate basis upon which to conclude that a 'diligent search' for the documents had been made" [Thomas v. Records Access Officer, 613 NYS 2d 929, 205 AD 2d 786 (1994)].

Second, it is emphasized that the Freedom of Information Law pertains to existing records, and that §89(3) states in part that an agency is not required to create a record in response to a request for information. Similarly, agency officials are not required to answer questions in order to provide information that has been requested. Rather than seeking a "verification" that a check was sent or asking "how much" money was taken from an account, it is suggested that, in the future, you should seek existing records. For instance, instead of asking for a verification, you might request a record indicating that a check was sent; instead of asking "how much", you might seek records indicating amounts taken from certain accounts.

Mr. Roy Ali Hampton
August 1, 2000
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

F02L-A0-12252

Committee Members

Mary O. Donohue
Alan Jay Gerson
Walter W. Grunfeld
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Wade S. Norwood
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August 1, 2000

Executive Director

Robert J. Freeman

Mr. Mark Ray
89-T-4638
Clinton Correctional Facility
Box 2001
Dannemora, NY 12929

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Ray:

I have received your letter and apologize for the delay in response. You have sought assistance concerning your right to gain access to a record pertaining to you involving homosexuality. You added that you want to "correct this erroneous information."

In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Since I am unaware of the content of the record at issue or its origin, I cannot offer unequivocal guidance.

If, for instance, it was prepared by another inmate who made an allegation, it likely that §87(2)(b) would be pertinent. That provision states that an agency may withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." Insofar as the record would, if disclosed, identify the inmate making the allegation, it is likely, in my view that it may be withheld.

If the record was prepared by an employee of the Department of Correctional Services, §87(2)(g) would appear to be relevant to an analysis of rights of access. That provision permits an agency to withhold records that:

Mr. Mark Ray
August 1, 2000
Page - 2 -

"are inter-agency or intra-agency materials which are not:

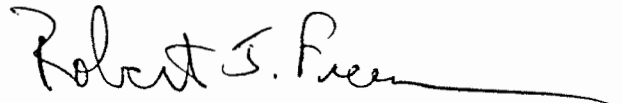
- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations; or
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

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.

Second, there is nothing in the Freedom of Information Law that provides a right to an individual to seek the correction or amendment of a record pertaining to himself. While an agency may choose to correct erroneous information, I am unaware any statute that would require that such action be taken in the circumstance that you described.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12253

Committee Members

Mary O. Donohue
Alan Jay Gerson
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August 1, 2000

Executive Director

Robert J. Freeman

Mr. Herman Strauch
81-A-1160
Bare Hill Correctional Facility
Caller Box 20
Cady Road
Malone, NY 12953

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Strauch:

I have received your letter and apologize for the delay in response. You have raised a series of questions and asked whether certain records are available 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.

Particularly relevant with respect to several aspects of your inquiry is §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute..." Relevant with respect to pre-sentence reports and related records is §390.50 of the Criminal Procedure Law, which, in my opinion represents the exclusive procedure concerning access to those records.

Section 390.50(1) of the Criminal Procedure Law states that:

"Any pre-sentence report or memorandum submitted to the court pursuant to this article and any medical, psychiatric or social agency report or other information gathered for the court by a probation department, or submitted directly to the court, in connection with the question of sentence is confidential and may not be made available to any person or public or private agency except where specifically required or permitted by statute or upon specific authorization of the

Mr. Herman Strauch

August 1, 2000

Page - 2 -

court. For purposes of this section, any report, memorandum or other information forwarded to a probation department within this state is governed by the same rules of confidentiality. Any person, public or private agency receiving such material must retain it under the same conditions of confidentiality as apply to the probation department that made it available."

In addition, subdivision (2) of §390.50 states in part that: "The pre-sentence report shall be made available by the court for examination and copying in connection with any appeal in the case..."

In view of the foregoing, I believe that a pre-sentence report and records relating to it 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.

Insofar as your inquiry relates to a person who was charged, but against whom, for whatever the reason, the charges were dismissed, I believe that §160.50 of Criminal Procedure Law would be pertinent. In brief, if a person is charged and the charge is later dismissed, the records relating to the event are sealed pursuant to that statute.

To the extent that the records of your interest are not exempt from disclosure under the statutes cited above, it appears that rights of access would be governed by the Freedom of Information Law. I note that I am unfamiliar with the contents of the records of your interest or whether they might have been disclosed during judicial proceedings. If the records were not previously disclosed, and again, if they are not exempt from disclosure by statute, several of the grounds for denial appearing in the Freedom of Information Law 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". 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. Herman Strauch
August 1, 2000
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). Subparagraph (iii) may be especially relevant in the circumstances to which you referred.

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.

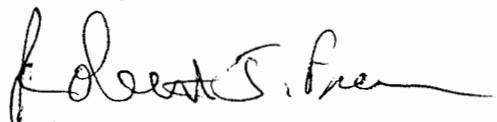
Also of potential relevance to the matter is the decision rendered in Moore v. Santucci [151 AD 2d 677 (1989)], in which it was held that if records have been disclosed during a public proceeding, they are generally available under the Freedom of Information Law. In that decision, it was also found, 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).

Next, a district attorney may be required to disclose records obtained from other agencies if there is no basis for a denial of access. Frequently records may be maintained by a variety of agencies. Each in my view would be required to respond to a request made under the Freedom of Information Law and respond in accordance with the provisions of that statute.

Lastly, you asked how a person's past criminal record can be disclosed "when the location of that offense is unknown." I do not have sufficient information to respond effectively.

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-12254

Committee Members

Mary O. Donohue
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August 2, 2000

Executive Director

Robert J. Freeman

Mr. David J. Todeschini
98-A-4798
Groveland Correctional Facility
P.O. Box 104
Sonyea, NY 14556-0001

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Todeschini:

I have received your letter and apologize for the delay in response. You have asked "what the penalties are for lying on a FOIL/FOIA/PA request."

In this regard, since this is a New York State agency, my response will be limited to the application of the New York Freedom of Information Law. That statute in §89(8) and §240.65 of the Penal Law include essentially the same language. Specifically, the latter states that:

"A person is guilty of unlawful prevention of public access to records when, with intent to prevent the public inspection of a record pursuant to article six of the public officers law, he willfully conceals or destroys any such record."

From my perspective, the preceding may be applicable in two circumstances: first, when an agency employee receives a request for a record and indicates that the agency does not maintain the record even though he or she knows that the agency does maintain the record; or second, when an agency employee destroys a record following a request for that record in order to prevent public disclosure of the record. I do not believe that §240.65 applies when an agency denies access to a record, even though the basis for the denial may be inappropriate or erroneous, or when an agency cannot locate a record that must be maintained.

That statute indicates that unlawful prevention of public access to records is a violation. The term "violation" is defined in §10.00(3) of the Penal Law to mean "an offense, other than a 'traffic infraction', for which a sentence to a term in excess of fifteen days cannot be imposed."

Mr. David J. Todeschini

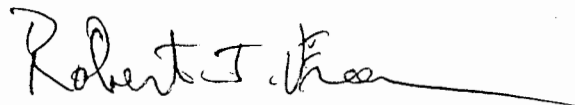
August 2, 2000

Page - 2 -

Additionally, §80.05(4) of the Penal Law states that: "A sentence to pay a fine for a violation shall be a sentence to pay an amount, fixed by the court, not exceeding two hundred fifty dollars." Based on the foregoing, it appears that a person found guilty of a violation may serve up to fifteen days in jail and/or be fined up to \$250.

I hope that I have been of 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

FOIL-AO-12255

Committee Members

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Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Carole E. Stone
Alexander F. Treadwell

August 2, 2000

Executive Director

Robert J. Freeman

Mr. Milton Jones
98-A-0151
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. Jones:

I have received your letter and apologize for the delay in response. You expressed the understanding that the Committee on Open Government "has the power" to assist you in gaining access to records, and you referred to requests made to the New York City Police Department and Jamaica Hospital.

In this regard, the Committee is authorized to provide advice concerning the Freedom of Information Law; it is not empowered to obtain records for individuals or to compel an agency to grant or deny access to records. Nevertheless, in effort to provide guidance, I offer the following comments.

First, the Freedom of Information Law 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 Police Department is clearly an "agency" required to comply with the Freedom of Information Law. I am unaware of whether Jamaica Hospital is a governmental or a private entity. If it is private, the Freedom of Information Law would not apply.

Mr. Milton Jones

August 2, 2000

Page - 2 -

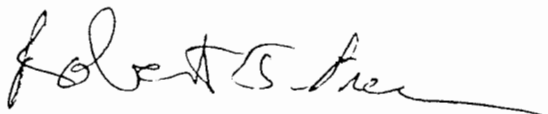
Second, pursuant to regulations promulgated by the Committee (21 NYCRR Part 1401), each agency must designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests, and requests should generally be made to that person. If you have not received a response to your request, it is suggest that you resubmit the request to the records access officer.

Third, while I have no knowledge of the nature of the records sought from the Police Department, 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.

Lastly, whether Jamaica Hospital is public or private, the kinds of records in which you are interested would be beyond the scope of rights granted by the Freedom of Information Law. Section 87(2)(b) authorizes an agency to withhold records insofar as disclosure would result in "an unwarranted invasion of personal privacy", and §89(2) indicates that medical and similar records may be withheld on that basis. In addition, §18 of the Public Health prohibits the disclosure of medical records, except in specified circumstances.

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

FOIL-AO-12256

Committee Members

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August 2, 2000

Executive Director

Robert J. Freeman

Mr. Delroy Lewin
98-A-1434
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. Lewin:

I have received your letter and apologize for the delay in response. You have asked whether a former client may obtain his attorney's work product.

If I understand your question correctly, it appears that you would like to obtain the work product of your former attorney. If that is so, I point out that the Freedom of Information Law, the statute within the advisory jurisdiction of this office, pertains to agency records, and that §86(3) of that statute defines the term "agency" to mean:

"any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

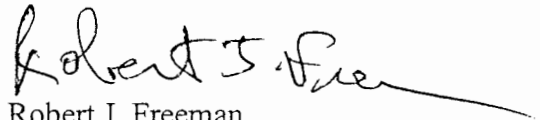
Based on the foregoing, the Freedom of Information Law generally applies to records maintained by entities of state and local government; it does not apply to private attorneys, law firms or other entities outside of government. Assuming that the Freedom of Information Law does not apply, I have neither the jurisdiction nor the expertise to advise as to the application of other provisions.

In the event that you are interested in the work product of an attorney employed by an agency, I have enclosed copies of latest opinions rendered on the subject by this office.

Mr. Delroy Lewin
August 2, 2000
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 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

FODL-AO-12257

Committee Members

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Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Carole E. Stone
Alexander F. Treadwell

August 2, 2000

Executive Director

Robert J. Freeman

Mr. Kasey Efaw
97-R-8755
Greene Correctional Facility
P.O. Box 975
Coxsackie, NY 12051-0975

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Efaw:

I have received your letters concerning your request sent to the City of Albany for copies of photographs and apologize for the delay in response.

In this regard, under §87(1)(b)(iii) of the Freedom of Information Law, an agency may charge up to twenty-five cents per photocopy up to nine by fourteen inches. In situations in which records are larger than that size or cannot be photocopied, that provision authorizes an agency to charge a fee based on the actual cost of reproduction.

If the City can make photocopies of the photographs in which you are interested, I believe that it would be required to do so upon payment of twenty-five cents per photocopy. If you want duplicates of the photographs, the City could charge on the basis of the actual cost of reproduction. I note, too, that it has been held that an agency may charge its established fee for copying records, even if the applicant is an indigent inmate [see Whitehead v. Morgenthau, 552 NYS2d 518 (1990)]

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Nancy Anderson



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AU-12258

Committee Members

Mary O. Donohue
Alan Jay Gerson
Walter W. Grunfeld
Gary Lewi
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Wade S. Norwood
David A. Schulz
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August 2, 2000

Executive Director

Robert J. Freeman

Mr. Patrick Jeanty
98-A-1874
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. Jeanty:

I have received your letter and apologize for the delay in response. You have sought assistance in relation to a request for records directed to the Office of the Schenectady District Attorney.

With respect to the right to appeal a denial of access to records, §89(4)(a) of the Freedom of Information Law states in relevant part that:

"any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Based on your letter of April 10 to the County Manager, it appears that you were informed that an appeal should be directed to his office. If that is so, the County Manager or his designee would have had ten business days to make the records available or fully explain the reasons for further denial. I note that if the appeals person or body fails to determine an appeal within the statutory time, the person denied access is deemed to have exhausted his administrative remedies and may seek judicial review of the denial under Article 78 of the Civil Practice Law and Rules [see Floyd v. McGuire 87 AD2d 388, appeal dismissed, 57 NY2d 774 (1982)].

Mr. Patrick Jeanty
August 2, 2000
Page - 2 -

Notwithstanding the foregoing, having reviewed the response to your request by Chief Assistant District Attorney Alfred D. Chapleau, it appears that the denial was consistent with law. Based on the decision rendered in Moore v. Santucci [151 AD2d 677 (1989)], if a record was made available to you or your attorney, there must be a demonstration that neither you nor your attorney possesses the record in order to successfully obtain a second copy. Specifically, the decision states that:

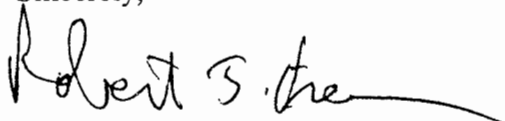
"...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

Based on the foregoing, it is suggested that you contact your attorney to determine whether he or she continues to possess the record. If the attorney no longer maintains the record, he or she should prepare an affidavit so stating that can be submitted to the Office of the District Attorney.

Lastly, Mr. Chapleau indicated that his office is "unfamiliar" with some of the records that you requested. Having read your request, I believe that your references to certain records involve items that are kept only by the New York City Police Department, such as "DD5's".

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Robert D. McAvoy
Alfred D. Chapleau



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12259

Committee Members

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Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Carole E. Stone
Alexander F. Treadwell

August 2, 2000

Executive Director

Robert J. Freeman

Mr. Carlos Ayala
87-A-7601
Groveland Correctional Facility
Box 104
Sonyea, NY 14556-0001

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Ayala:

I have received your letter and apologize for the delay in response. You indicated that you requested records from the Office of the New York County District Attorney in May of 1999 and that "[e]very month since then [you] have received request[s] for four weeks extensions." You have questioned the validity of those extensions.

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 the context of your correspondence, it appears that approximate dates have been given, but that the agency has repeatedly gone beyond those dates.

In a case that described an experience similar to yours, the court cited §89(3) of the Freedom of Information Law and wrote that:

"The acknowledgement letters in this proceeding neither granted nor denied petitioner's request nor approximated a determination date. Rather, the letters were open ended as to time as they stated, 'that a period of time would be required to ascertain whether such documents do exist, and if they did, whether they qualify for inspection.

"This court finds that respondent's actions and/or inactions placed petitioner in a "Catch 22" position. The petitioner, relying on the respondent's representation, anticipated a determination to her request...this court finds that this petitioner should not be penalized for respondent's failure to comply with Public Officers Law §89 (3), especially when petitioner was advised by respondent that a decision concerning her application would be forthcoming.

"It should also be noted that petitioner did not sit idle during this period but rather made numerous efforts to obtain a decision from respondent including the submission of a follow up letter to the Records Access Officer and submission of various requests for said records with the Department of Transportation" (Bernstein v. City of New York, Supreme Court, Supreme Court, New York County, November 7, 1990).

In Bernstein, the court determined that the agency "is estopped from asserting that this proceeding is improper due to petitioner's failure to appeal the denial of access to records within 30 days to the agency head, as provided in Public Officers Law, §89(4)(a)."

Based on the foregoing, I believe that your requests have been constructively denied and that you may appeal the denials to Mr. Gary J. Galperin pursuant to §89(4)(a). That provision states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reason for further denial, or provide access to the record sought."

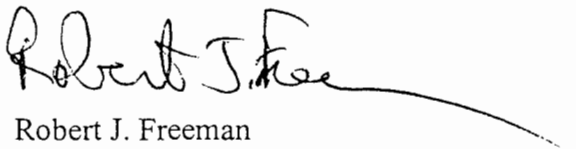
Alternatively, based on the holding in Bernstein, it appears that you could seek judicial review of the denials now. I suggest, however, that you appeal in an effort to avoid the time and cost of litigation.

Mr. Carlos Ayala
August 2, 2000
Page - 3 -

I note, too, that it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

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: Gary J. Galperin



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12260

Committee Members

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August 2, 2000

Executive Director

Robert J. Freeman

Mr. Dean J. Villante
92-A-3786
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. Villante:

I have received your letter and the materials attached to it, and I hope that you will accept my apologies for the delay in response. Having reviewed the correspondence, I offer the following comments.

First, it is emphasized that the Freedom of Information Law pertains to existing records and that §89(3) states in part that an agency is not required to create or prepare a record in response to a request. Similarly, an agency and its staff are not required by that statute to answer questions. Therefore, if, for example, there are no figures indicating "how many assaults" occurred during a certain period, or "how many" required medical attention, there would be no obligation to create new records that contain 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.

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.

Mr. Dean J. Villante

August 2, 2000

Page - 2 -

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 when seeking medical records, specific reference be made to §18 of the Public Health Law, as well as 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

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."

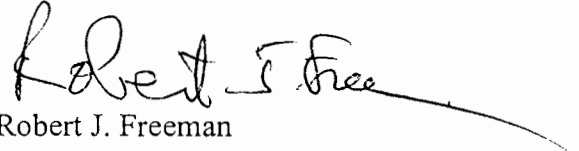
In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge 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)].

Mr. Dean J. Villante
August 2, 2000
Page - 3 -

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 to the right with a long horizontal stroke.

Robert J. Freeman
Executive Director

RJF:jm

cc: D. Mangus



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12261

Committee Members

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David A. Schulz
Joseph J. Seymour
Carole E. Stone
Alexander F. Treadwell

August 2, 2000

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.

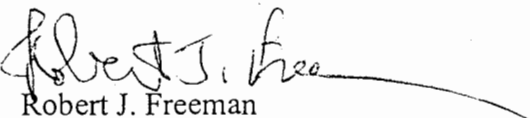
Dear Mr. Thompson:

I have received your letter and apologize for the delay in response. You wrote that you considered the opinion prepared on April 17 concerning fees to be "unsatisfactory", and you offered a series of conclusions and asked whether I disagree with you.

In this regard, in short, first, it is my opinion that an agency may require the payment of a fee in advance of preparing copies of records; and second, that an agency may charge its established fee for copies, irrespective of the status, the interest, or the financial condition of the person seeking the records.

I hope that the foregoing serves to clarify your understanding of my views on the subject.

Sincerely,


Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12262

Committee Members

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August 3, 2000

Executive Director

Robert J. Freeman

Mr. Ronald Lynch
99-A-3773
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. Lynch:

I have received your letter and hope that you will accept my apologies for the delay in response. It is noted that the letter was addressed to the former location of this office. You have asked "what [you] are entitled to" under the Freedom of Information Law in your effort to appeal your 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 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 of interest to you, 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;

Mr. Ronald Lynch

August 3, 2000

Page - 2 -

- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations; or
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those 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 subparagraphs (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. Ronald Lynch
August 3, 2000
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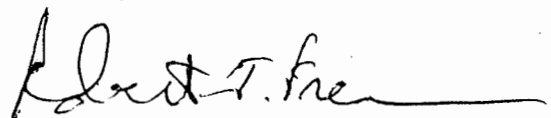
Lastly, in a decision concerning a request for records maintained by the office of a district attorney that would ordinarily be exempted from disclosure under the Freedom of Information Law, it was held that "once the statements have been used in open court, they have lost their cloak of confidentiality 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

FOIL-AO-12263

Committee Members

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August 3, 2000

Executive Director

Robert J. Freeman

Mr. David Jankowski

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Jankowski:

I have received your letter of June 29. You have questioned the propriety of a fee of ten dollars charged by the Montgomery County Sheriff's Department for a copy of an accident report. The fee was apparently authorized by the County Board of Supervisors.

From my perspective, unless a statute, an act of the State Legislature, authorizes an agency to charge a different fee, an agency can charge no more than twenty-five cents per photocopy up to nine by fourteen inches, nor can it charge a fee for search or administrative costs. In this regard, I offer the following comments.

By way of background, §87(1)(b)(iii) of the Freedom of Information Law stated until October 15, 1982, that an agency could charge up to twenty-five cents per photocopy unless a different fee was prescribed by "law". Chapter 73 of the Laws of 1982 replaced the word "law" with the term "statute". As described in the Committee's fourth annual report to the Governor and the Legislature of the Freedom of Information Law, which was submitted in December of 1981 and which recommended the amendment that is now law:

"The problem is that the term 'law' may include regulations, local laws, or ordinances, for example. As such, state agencies by means of regulation or municipalities by means of local law may and in some instances have established fees in excess of twenty-five cents per photocopy, thereby resulting in constructive denials of access. To remove this problem, the word 'law' should be replaced by 'statute', thereby enabling an agency to charge more than twenty-five cents only in situations in which an act of the State Legislature, a statute, so specifies."

As such, prior to October 15, 1982, a local law, an ordinance, or a regulation for instance, establishing a search fee or a fee in excess of twenty-five cents per photocopy or higher than the actual cost of reproduction was valid. However, under the amendment, only an act of the State Legislature, a statute, would in my view permit the assessment of a fee higher than twenty-five cents per photocopy, a fee that exceeds the actual cost of reproducing records that cannot be photocopied, or any other fee, such as a fee for search. In addition, it was confirmed judicially that fees inconsistent with the Freedom of Information Law may be validly charged only when the authority to do so is conferred by a statute. In addition, in Sheehan v. City of Syracuse [521 NYS 2d 207 (1987)], a fee in excess of twenty-five cents per photocopy for certain records was established by an ordinance, and the court found the ordinance to be invalid. More recently, a provision of a county code authorizing a fee of twenty dollars for an accident report was struck down, and it was determined that the agency could charge no more than twenty-five cents per photocopy [Gordon Schotsky & Rappaport v. Suffolk County, 221 AD 2d 339 (1996)].

Further, the specific language of the Freedom of Information Law and the regulations promulgated by the Committee on Open Government indicate that, absent statutory authority, an agency may charge fees only for the reproduction of records. Section 87(1)(b) of the Freedom of Information Law states:

"Each agency shall promulgate rules and regulations in conformance with this article...and pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the availability of records and procedures to be followed, including, but not limited to...

(iii) the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by statute."

The regulations promulgated by the Committee states in relevant part that:

"Except when a different fee is otherwise prescribed by statute:

- (a) There shall be no fee charged for the following:
- (1) inspection of records;
 - (2) search for records; or
 - (3) any certification pursuant to this Part" (21 NYCRR section 1401.8).

As such, the Committee's regulations specify that no fee may be charged for inspection of or search for records, except as otherwise prescribed by statute. Therefore, absent statutory authority to do so,

Mr. David Jankowski

August 3, 2000

Page - 3 -

I do not believe that the Department could validly charge a fee other than a maximum fee of twenty-five cents per photocopy.

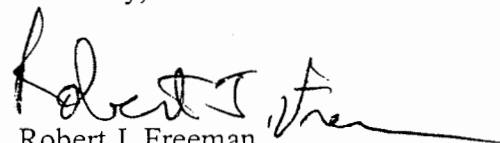
Moreover, although compliance with the Freedom of Information Law involves the use of public employees' time, the Court of Appeals has found that the Law is not intended to be given effect "on a cost-accounting basis", but rather that "Meeting the public's legitimate right of access to information concerning government is fulfillment of a governmental obligation, not the gift of, or waste of, public funds" [Doolan v. BOCES, 48 NY 2d 341, 347 (1979)].

Lastly, confusion has arisen on occasion concerning fees for accident reports due perhaps to the provisions of §202 of the Vehicle and Traffic Law. Section 202(3) authorizes a copying fee of \$15.00 for accident reports obtained from the Department of Motor Vehicles and one dollar per page for copies of other records. Section 202 also authorizes the Department to collect certain fees for searching for records. However, since the provisions of the Vehicle and Traffic Law pertain to particular records in possession of the Department of Motor Vehicles only, in my opinion, other agencies, such as municipal police or sheriff's departments, cannot unilaterally adopt policy or regulations authorizing fees in excess of twenty-five cents per photocopy or other fees without specific statutory authority to do so.

In an effort to enhance compliance with and understanding of applicable law, copies of this response will be forwarded to County officials.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Montgomery County Board of Supervisors
Montgomery County Sheriff

- 64 Broadway St.
Fonda 12068



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AJ-12264

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August 3, 2000

Executive Director

Robert J. Freeman

Mr. Anthony D. Amaker
89-T-2815
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. Amaker:

I have received your letter in which you asked that I "monitor" your request made to the Albany Medical Center.

In this regard, I point out that the Freedom of Information Law pertains to agency records, and that §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; it does not apply to private organizations, such as Albany Medical Center.

I hope that the foregoing serves to clarify your understanding of the scope of the Freedom of Information Law.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12265

Committee Members

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Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Carole E. Stone
Alexander F. Treadwell

August 3, 2000

Executive Director

Robert J. Freeman

Mr. Kevin Martin
00-A-2027
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. Martin:

I have received your correspondence in which you raised a variety of issues in relation to your requests made pursuant to the Freedom of Information Law. Having reviewed the materials, I offer the following comments.

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."

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. Kevin Martin
August 3, 2000
Page - 2 -

In a related vein, it is my understanding 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, if it is a corporate entity separate and distinct from government, it would not be an "agency" subject to the Freedom of Information Law.

Second, you indicated that you are seeking records in relation to a claim made under §50-h of the General Municipal Law and that you do not expect to be charged fees for copies. In my view, an agency may charge its established fee, irrespective of your status or the intended use of the records. 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)]. In short, that you may be involved in litigation has no impact on your rights or an agency's obligations under the Freedom of Information Law. Similarly, there is nothing in the Freedom of Information Law dealing with fee waivers, and it has been held that an agency may charge its standard fee, even in the case of a request made by indigent inmate [see Whitehead v. Morgenthau, 552 NYS2d 518 (1990)].

With respect to the records sought, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

The first ground for denial, §87(2)(a), states that an agency may withhold records or portions thereof that "...are specifically exempted from disclosure by state or federal statute..." Relevant with regard to a portion of your requests is §390.50 of the Criminal Procedure Law, which, in my opinion represents the exclusive procedure concerning access to pre-sentence reports.

Section 390.50(1) of the Criminal Procedure Law states that:

"Any pre-sentence report or memorandum submitted to the court pursuant to this article and any medical, psychiatric or social agency report or other information gathered for the court by a probation department, or submitted directly to the court, in connection with the question of sentence is confidential and may not be made available to

any person or public or private agency except where specifically required or permitted by statute or upon specific authorization of the court. For purposes of this section, any report, memorandum or other information forwarded to a probation department within this state is governed by the same rules of confidentiality. Any person, public or private agency receiving such material must retain it under the same conditions of confidentiality as apply to the probation department that made it available."

In addition, subdivision (2) of §390.50 states in part that: "The pre-sentence report shall be made available by the court for examination and copying in connection with any appeal in the case..."

In view of the foregoing, I believe that a pre-sentence report may be made available only upon the order of a court, and only under the circumstances described in §390.50 of the Criminal Procedure Law. It is suggested that you review that statute.

Insofar as the remaining records are subject to the Freedom of Information Law, since I am unaware of the contents of the records sought, 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. Doice, 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. Kevin Martin

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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 subparagraphs (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. Kevin Martin
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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 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: Hon. Jeanine Pirro
Nancy Mangold
Eric Press



STATE OF NEW YORK
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FOIL-AU-12266

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August 3, 2000

Executive Director

Robert J. Freeman

Mr. James E. Cliff
92-A-2300
Great Meadow Correctional Facility
Box 51
Comstock, NY 12821

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Cliff:

I have received your letter and apologize for the delay in response. You wrote that you "thought [I] should be informed of the conduct of the FOIL officer" at your facility who rejected your request on the ground that it is "vague."

Having reviewed the request, it appears that it is not vague. Nevertheless, in much of the request, you sought information by raising a series of questions. In this regard, 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 for information. Similarly, agency officials are not required to answer questions; their responsibility under the Freedom of Information Law, in my opinion, involves granting or denying access to 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: Superintendent Duncan



STATE OF NEW YORK
DEPARTMENT OF STATE
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OML-AO-3193
FOIL-AO-12267

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August 3, 2000

Executive Director

Robert J. Freeman

E-Mail

TO: Josepha Gutelius [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. Gutelius:

As you are aware, I have received your letter of July 5. You have raised a series of questions relating to the activities of the Festival Development Corporation ("the FDC"), which was created by the Town Board of the Town of Saugerties, initially to deal with the Woodstock Festival. The Board of Directors of the FDC consists of the five members of the Town Board, and that entity recently voted to use the proceeds from the Festival to build a new town hall. However, you wrote that the "Town Supervisor announced that there not be a public debate or discussion/hearing on the subject", and that the FDC "will continue to act as a private body negotiating with the seller, who will arrange the construction of the new Town Hall." Following its construction, the FDC will "donate" the building to the Town.

From my perspective, the FDC and its Board are subject to the same requirements under the Open Meetings and Freedom of Information Laws as the Town Board itself, for it is essentially the *alter ego* of the Town Board..

It is emphasized at the outset that the advisory jurisdiction of the Committee on Open Government involves the statutes cited above, and that several of your questions are beyond the scope of its jurisdiction or expertise. With respect to those issues, it is suggested that you contact the Office of the State Comptroller. As your questions relate to matters within the Committee's jurisdiction, I offer the following comments.

Judicial decisions indicate that not-for-profit corporations that are creations of government or which under substantial governmental control are subject to both the Open Meetings and Freedom of Information Laws.

By way of background, the Freedom of Information Law pertains to agency records, and §86(3) of that statute defines the term "agency" to mean:

"any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In view of the foregoing, an "agency" generally is an entity of state or local government. Typically, a private entity or a not-for-profit corporation would not constitute an agency, for it would not be a governmental entity.

However, there is precedent indicating that in some instances a not-for-profit corporation may indeed be an "agency" required to comply with the Freedom of Information Law. In Westchester-Rockland Newspapers v. Kimball [50 NYS 2d 575 (1980)], a case involving access to records relating to a lottery conducted by a volunteer fire company, the Court of Appeals, the state's highest court, found that volunteer fire companies, despite their status as not-for-profit corporations, are "agencies" subject to the Freedom of Information Law. In so holding, the Court stated that:

"We begin by rejecting respondent's contention that, in applying the Freedom of Information Law, a distinction is to be made between a volunteer organization on which a local government relies for performance of an essential public service, as is true of the fire department here, and on the other hand, an organic arm of government, when that is the channel through which such services are delivered. Key is the Legislature's own unmistakably broad declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (emphasis added; Public Officers Law, §84).

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).

Ms. Josepha Gutelius

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In the same decision, the Court noted that:

"...not only are the expanding boundaries of governmental activity increasingly difficult to draw, but in perception, if not in actuality, there is bound to be considerable crossover between governmental and nongovernmental activities, especially where both are carried on by the same person or persons" (id., 581).

The point made in the final sentence of the passage quoted above appears to be especially relevant, for there is clearly "considerable crossover" in the activities of town Board members in the performance of their duties for the Town government and the FDC.

More recently, in Buffalo News v. Buffalo Enterprise Development Corporation [84 NY 2d 488 (1994)], the Court of Appeals found again that a not-for-profit corporation, based on its relationship to an agency, was itself an agency subject to the Freedom of Information Law. The decision indicates that:

"The BEDC principally pegs its argument for nondisclosure on the feature that an entity qualifies as an 'agency' only if there is substantial governmental control over its daily operations (see, e.g., Irwin Mem. Blood Bank of San Francisco Med. Socy. v American Natl. Red Cross, 640 F2d 1051; Rocap v Indiek, 519 F2d 174). The Buffalo News counters by arguing that the City of Buffalo is 'inextricably involved in the core planning and execution of the agency's [BEDC] program'; thus, the BEDC is a 'governmental entity' performing a governmental function for the City of Buffalo, within the statutory definition.

"The BEDC's purpose is undeniably governmental. It was created exclusively by and for the City of Buffalo...In sum, the constricted construction urged by appellant BEDC would contradict the expansive public policy dictates underpinning FOIL. Thus, we reject appellant's arguments," (id., 492-493).

Based on the foregoing, since the relationship between the FDC and the Town of Saugerties is even more direct than that of the BEDC and the City of Buffalo, I believe that the FDC constitutes an "agency" required to comply with the Freedom of Information Law.

Because the Supervisor serves as the Chairman of the FDC and the members of the Town Board and the FDC Board are one and the same, it is clear that the Town of Saugerties exercises substantial control over the FDC. If that is so, I believe that the FDC constitutes an "agency" required to comply with the Freedom of Information Law. In brief, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

If the FDC is an agency that falls within the scope of the Freedom of Information Law, I believe that its Board would constitute a "public body" for purposes of the Open Meetings Law. Section 102(2) defines that phrase to mean:

"...any entity for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

By breaking the definition into its components, I believe that each condition necessary to a finding that the board of FDC is a "public body" may be met. It is an entity for which a quorum is required pursuant to the provisions of the Not-for-Profit Corporation Law. It consists of more than two members. In view of its membership the degree of governmental control exercised by the Town, I believe that it conducts public business and performs a governmental function for a public corporation, in this instance, the Town of Saugerties. It is noted, too, that the same conclusion was reached recently in VanNess v. The Center for Animal Control (Supreme Court, New York County, January 28, 1999). In that instance, "The Center is a not-for profit corporation with its four Board members appointed by the Mayor, with three New York City Commissioners also sitting as *ex officio* Board members."

Like the Freedom of Information Law, the Open Meetings Law is based on a presumption of openness. Meetings of public bodies must be conducted open to the public, except to the extent that an executive session may be conducted in accordance with the provisions of paragraphs (a) through (h) of §105(1) of that statute.

Lastly, you asked whether notice of a meeting must specify its purpose. Since the FDC Board is in my view a public body subject to the Open Meetings Law, it is required to provide notice in accordance with §104 of that statute, which states that:

- "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

Ms. Josepha Gutelius

August 3, 2000

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I point out that the foregoing requires that notice of the time and place of a meeting must be given. Although a public body may include an indication of the subject matter to be considered, there is no obligation to do so.

I hope that I have been of assistance.

RJF:jm

cc: Town Board



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL AO-12268

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August 3, 2000

Executive Director

Robert J. Freeman

Mr. Roy Rider

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Rider:

I have received your letters of July and July 13. You have described difficulty in obtaining communications between the Delaware County's Sheriff's Department and the Bloomsburg, Pennsylvania, Police Department. You added that you were scheduled to appear in the Village of Walton Justice Court, but that you were granted an adjournment "to grant time for a report" from this office.

In this regard, the Committee on Open Government does not prepare "reports" concerning the kinds of matters to which you referred. The primary function of this office involves providing advice and opinions concerning the New York Freedom of Information Law. While its opinions are not binding, it is our hope that they are educational and persuasive.

In consideration of the information that you provided, I offer the following comments.

First, 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. In my view, the person in receipt of your request should have responded directly or forwarded your request to the proper person.

Second, since you indicated that you did not receive a response to your requests, I point out that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I am unaware of the contents of the records of your interest. However, the Freedom of Information Law pertains to all agency records and 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, information in any physical form exchanged between the Sheriff's Department and the Bloomsburg Police Department would constitute a "record" that falls within the coverage of the Freedom of Information Law. Further, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

While I have no knowledge of the nature or content of the records at issue, it is possible that several of the grounds for denial may be pertinent to an analysis of rights of access. For instance,

under §87(2)(b), an agency may withhold records when disclosure would result in "an unwarranted invasion of personal privacy", i.e., the privacy of persons other than yourself or government officers or employees; §87(2)(e) permits an agency to withhold records "compiled for law enforcement purposes" in certain circumstances; and §87(2)(f) authorizes an agency to deny access to records insofar as disclosure would "endanger the life or safety of any person." Also relevant may be §87(2)(g), which permits an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations; or
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

I point out that communications between the Sheriff's Department and an entity outside of New York would appear to fall outside the coverage of §87(2)(g). The term "agency" is defined in §86(3) 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 view of the language quoted above, an "agency" is an entity of state or local government in New York; a police department in another state would not constitute an agency for the purposes of the Freedom of Information Law and, therefore, the communications between the Sheriff's Department and a Pennsylvania police department would not constitute "inter-agency materials" subject to §87(2)(g).

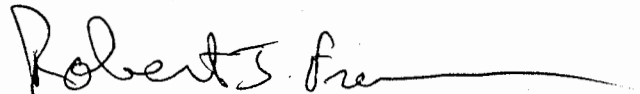
In sum, without knowledge of the nature or content of the records of your interest, I cannot offer unequivocal guidance. However, it appears that rights of access would be determined on the basis of the analysis offered above.

Mr. Roy Rider
August 3, 2000
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Lastly, I believe that the jurisdiction of the Office of the Inspector General involves the activities of state agencies rather than local governments. However, that agency is located in Agency Building 2, Empire State Plaza, Albany, NY 12223-1250.

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: Delaware County Sheriff



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12269

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August 7, 2000

Executive Director

Robert J. Freeman

Mitchel D. Grotch, Esq.
18-25 215th Street
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 Mr. Grotch:

I have received your letter of July 1 and the correspondence attached to it. You have raised a series of issues relating to certification under the Freedom of Information Law.

As you are aware, §89(3) of that statute provides in relevant part that, after making a copy of a record or failing to locate the record sought, an agency shall "certify to the correctness of such copy if so requested, or as the case may be, shall certify that it does not have possession of such record or that such record cannot be found after diligent search."

In conjunction with your commentary, first, I point out that nothing in the Freedom of Information Law specifies the form of a certification. In my view, an affidavit or verification in writing in which it is asserted that the records made available are true copies of an agency's records would suffice. Further, it has been advised that a separate certification need not be given for each record or page of a record.

Second, with regard to the situation in which an agency indicates that it cannot locate a record, 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)].

Mitchel D. Grotch, Esq.
August 7, 2000
Page - 2 -

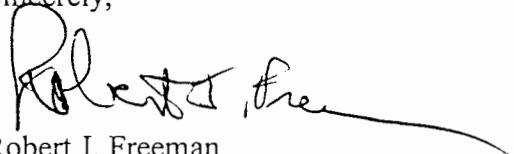
Lastly, you asked for an opinion concerning "the issue of CUNY's criminality under Public Officers Law §89(8)..." In this regard, neither myself nor the Committee on Open Government serves as a prosecutor or a court, and I cannot respond as to "criminality." The companion of the cited provision, §240.65 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. I do not believe that §240.65 applies when an agency denies access to a record, even though the basis for the denial may be inappropriate or erroneous, or when an agency cannot locate a record that must be maintained.

I hope that I have been of assistance.

Sincerely,

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: Dave Fields



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-A0-12270

Committee Members

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August 8, 2000

Executive Director

Robert J. Freeman

Mr. John Lusardi

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Lusardi:

I have received your letter of July 7 in which you sought assistance in obtaining a letter sent by an insurance company to the Syosset Fire District. The District denied the request on the ground that the record "is intra-agency material..."

If I understand the matter accurately, the denial was unjustified. 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, one of the grounds for denial, §87(2)(g), pertains to "inter-agency and intra-agency materials", which may be withheld in whole or in part, depending on their contents. "Inter-agency" materials consist of communications between or among officials of two or more agencies; "intra-agency" materials consist of communications made within an agency.

Most importantly in the circumstance that you described is that the insurance company is not an agency. 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."

Mr. John Lusardi
August 8, 2000
Page - 2 -

Based on the foregoing, an "agency" is an entity of state or local government; the definition does not include private entities.

In short, since an insurance company is not an "agency" as that term is defined in the Freedom of Information Law, correspondence between the District and an insurance company would not constitute either inter-agency or intra-agency material, and §87(2)(g) would not serve as a valid basis for a denial of your request.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, a copy of this opinion will be sent to the District's Board of Commissioners.

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 Commissioners



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL AP - 12271

Committee Members

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August 8, 2000

Executive Director

Robert J. Freeman

Dr. Michael Polakoff

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Dr. Polakoff:

I have received your letter of July 3 in which you described difficulty in obtaining copies of the Town of Cuyler's assessment rolls. In conjunction with your remarks, I offer the following comments.

First, the Freedom of Information Law pertains to all records of a government agency, such as a town, and §86(4) of that statute defines the term "record" expansively to include:

"any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, the Freedom of Information Law includes within its coverage information in any physical form, maintained by or for the Town, irrespective, in the case of paper, of the size of the document. Further, if a record is maintained by more than one agency, any agency in possession of the record would have the duty to respond to a request for the record, whether it is the creator of the record or merely has a copy.

Second, §87(1)b)(iii) of the Law deals with the fees that may be charged for copies of records, "which shall not exceed twenty-five cents per photocopy not in excess of nine inches by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by statute." In my view, "any other record" would include those that are larger than nine by fourteen inches, or those that cannot be photocopied, such as tape recordings, computer

disks and the like. In those instances, an agency is required to prepare copies when the applicant pays a fee based on "the actual cost" of reproduction. In short, that a record is larger than nine by fourteen inches does not in my opinion relieve an agency of its duty to prepare copies; again, in that circumstance, the agency must prepare copies if it has the ability to do so, and it may charge a fee based on the actual cost of reproducing the record.

If a record includes print on two sides, it has been advised that, since the duplication of the record involves two photocopies, an agency may charge on that basis. Therefore, if, for example, an agency has established a fee of twenty-five cents per photocopy, it may charge fifty cents for reproducing a page with print on both sides.

Third, since it appears that you have encountered delays, I point out that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

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. From my

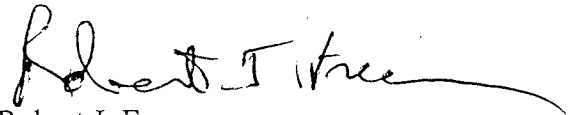
Dr. Michael Polakoff
August 8, 2000
Page - 3 -

perspective, the kinds of records to which you referred, if they exist, must be disclosed, for none of the grounds for denial would apply.

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,

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: Town Board
Hon. Lynn Jackson



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML A0 - 3194
FOIL A0 - 12272

Committee Members

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August 8, 2000

Executive Director

Robert J. Freeman

Mr. Harold Oliver

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Oliver:

I have received your letter of July 5 in which you questioned the status of the Canandaigua Recreation Development Corporation ("the Corporation"), which was established by the City of Canandaigua. You wrote that the City "wants to build a water park financed by bonds using I.R.S. ruling 63-20" and that in order to comply with the tax ruling, the city established the corporation...." A document prepared by the City's Office of Development and Planning indicates that the City Council adopted resolutions to appoint the members of the Corporation's Board of Directors.

In this regard, judicial decisions indicate that not-for-profit- corporations that are creations of government are subject to both the Open Meetings Law and the Freedom of Information Law. That being so, from my perspective, the Corporation is required to comply with those statutes.

By way of background, the Freedom of Information Law pertains to agency records, and §86(3) of that statute defines the term "agency" to mean:

"any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In view of the foregoing, an "agency" generally is an entity of state or local government. Typically, a private entity or a not-for-profit corporation would not constitute an agency, for it would not be a governmental entity.

However, there is precedent indicating that in some instances a not-for-profit corporation may indeed be an "agency" required to comply with the Freedom of Information Law. In Westchester-Rockland Newspapers v. Kimball [50 NYS 2d 575 (1980)], a case involving access to records relating to a lottery conducted by a volunteer fire company, the Court of Appeals, the state's highest court, found that volunteer fire companies, despite their status as not-for-profit corporations, are "agencies" subject to the Freedom of Information Law. In so holding, the Court stated that:

"We begin by rejecting respondent's contention that, in applying the Freedom of Information Law, a distinction is to be made between a volunteer organization on which a local government relies for performance of an essential public service, as is true of the fire department here, and on the other hand, an organic arm of government, when that is the channel through which such services are delivered. Key is the Legislature's own unmistakably broad declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (emphasis added; Public Officers Law, §84).

For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objections cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" (id. at 579).

In the same decision, the Court noted that:

"...not only are the expanding boundaries of governmental activity increasingly difficult to draw, but in perception, if not in actuality, there is bound to be considerable crossover between governmental and nongovernmental activities, especially where both are carried on by the same person or persons" (id., 581).

The point made in the final sentence of the passage quoted above appears to be especially relevant, for there is clearly "considerable crossover" in the activities of City officials in the performance of their duties for the City government and the Corporation.

Mr. Harold Oliver
August 8, 2000
Page - 3 -

More recently, in Buffalo News v. Buffalo Enterprise Development Corporation [84 NY 2d 488 (1994)], the Court of Appeals found again that a not-for-profit corporation, based on its relationship to an agency, was itself an agency subject to the Freedom of Information Law. The decision indicates that:

"The BEDC principally pegs its argument for nondisclosure on the feature that an entity qualifies as an 'agency' only if there is substantial governmental control over its daily operations (see, e.g., Irwin Mem. Blood Bank of San Francisco Med. Socy. v American Natl. Red Cross, 640 F2d 1051; Rocap v Indiek, 519 F2d 174). The Buffalo News counters by arguing that the City of Buffalo is 'inextricably involved in the core planning and execution of the agency's [BEDC] program'; thus, the BEDC is a 'governmental entity' performing a governmental function for the City of Buffalo, within the statutory definition.

"The BEDC's purpose is undeniably governmental. It was created exclusively by and for the City of Buffalo...In sum, the constricted construction urged by appellant BEDC would contradict the expansive public policy dictates underpinning FOIL. Thus, we reject appellant's arguments," (id., 492-493).

Based on the foregoing, since the relationship between the Corporation and the City of Canandaigua is analogous to that of the BEDC and the City of Buffalo, I believe that the Corporation constitutes an "agency" required to comply with the Freedom of Information Law.

Because the City Council appoints the members of the Corporation's Board of Directors, it is clear that the City exercises substantial control over the Corporation. If that is so, I believe that the Corporation constitutes an "agency" required to comply with the Freedom of Information Law. In brief, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

If the Corporation is an agency that falls within the scope of the Freedom of Information Law, I believe that its Board of Directors would constitute a "public body" for purposes of the Open Meetings Law. Section 102(2) defines that phrase to mean:

"...any entity for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

Mr. Harold Oliver
August 8, 2000
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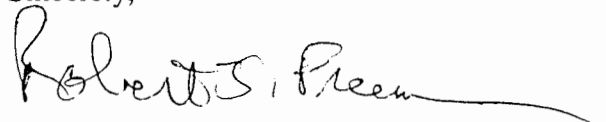
By breaking the definition into its components, I believe that each condition necessary to a finding that the board of the Corporation is a "public body" may be met. It is an entity for which a quorum is required pursuant to the provisions of the Not-for-Profit Corporation Law. It consists of more than two members. In view of its membership the degree of governmental control exercised by the City, I believe that it conducts public business and performs a governmental function for a public corporation, in this instance, the City of Canandaigua. It is noted, too, that the same conclusion was reached recently in VanNess v. The Center for Animal Control (Supreme Court, New York County, January 28, 1999). In that instance, "The Center is a not-for profit corporation with its four Board members appointed by the Mayor, with three New York City Commissioners also sitting as *ex officio* Board members."

Like the Freedom of Information Law, the Open Meetings Law is based on a presumption of openness. Meetings of public bodies must be conducted open to the public, except to the extent that an executive session may be conducted in accordance with the provisions of paragraphs (a) through (h) of §105(1) of that statute.

In an effort to share the foregoing with City officials, a copy of this opinion will be forwarded to the City Council.

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: City Council



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

ROLL-AO-12273

Committee Members

Mary O. Donohue
Alan Jay Gerson
Walter W. Grunfeld
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August 8, 2000

Executive Director

Robert J. Freeman

Mr. Peter W. Sluys
Editor-in-Chief
Rockland County News
119 Main Street
Nanuet, NY 10954

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Sluys:

I have received your letter of July 5 in which you sought an opinion concerning the Freedom of Information Law. You wrote that the Department of Environmental Conservation of the Town of Clarkstown prepared a report that was transmitted to the Town Board. Following your request for the report, the Town denied access on the ground that it is an "intra-agency document." You expressed the belief "that a report from one department to a town board, upon which report a town board subsequently takes action, is [not] protected from disclosure under the Freedom of Information Law simply because it is a [sic] 'intra-agency report'."

In this regard, first, §86(3) of the Freedom of Information Law defines the term "agency" to mean:

"any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, communications between or among officers or employees of the same agency, i.e., a town, would in my view clearly constitute "intra-agency materials."

Second, although intra-agency materials fall within one of grounds for denial, due to the structure of that provision, it may require the disclosure of portions of such materials. Specifically, §87(2)(g) authorizes an agency to withhold records that:

Mr. Peter W. Sluys
August 8, 2000
Page - 2 -

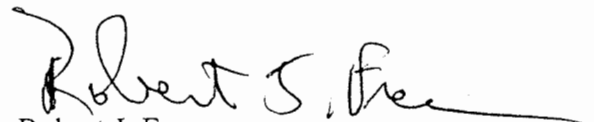
"are inter-agency or intra-agency materials which are not:

- 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 serves to clarify your understanding of the Freedom of Information Law and that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Town Attorney



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12274

Committee Members

Mary O. Donohue
Alan Jay Gerson
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August 8, 2000

Executive Director

Robert J. Freeman

E-Mail

TO: Paul Kulniszewski [REDACTED]

FROM: Robert J. Freeman, Executive Director *RSF*

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Kulniszewski:

I have received your letter of July 9. You complained that the Town of Darien has "ignored" your requests for records.

In this regard, first, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) require that each agency, including 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 for records, and requests should ordinarily be made to that person. In most towns, the town clerk is the records access officer.

Second, as indicated in my response to you of May 23, Town officials cannot merely ignore a request for records. It is reiterated 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

Mr. Paul Kulniszewski

August 8, 2000

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)].

Lastly, I do not believe that the Office of the Attorney General deals with matters such as those that you described. Nevertheless, if you believe that it would be productive to do so, certainly you may contact that agency.

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.

RJF:jm

cc: Town Board
Town Clerk



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AU-12275

Committee Members

Mary O. Donohue
Alan Jay Gerson
Waller W. Grunfeld
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August 8, 2000

Executive Director

Robert J. Freeman

E-Mail

TO: Robert Danner <rdanner@houghton.edu>

FROM: Robert J. Freeman, Executive Director *RJF*

Dear Mr. Danner:

Your inquiry of August 4 addressed to Scott Trent 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 New York Freedom of Information Law, which is can also be cited as Article 6 of the Public Officers Law, §§84-89. The full text of that statute is available via our website, which is identified at the end of the introductory message.

There is no particular form that must be used to seek records, and it has been advised that any request made in writing that "reasonably describes" the records sought [see §89(3)] should be sufficient. The procedure for seeking records and a sample letter of request appear in our publication, "Your Right to Know." That, too, is available on line by clicking on to "publications." 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 addressed to that person. In most local governments, such as towns and villages, the clerk is most frequently designated as records access officer.

The Freedom of Information Law applies to agency records, and §86(3) defines the term "agency" to include:

"any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, entities of state and local government fall within the coverage of the Freedom of Information Law. Private or not-for-profit organizations generally are not subject to that statute. However, the state's highest court, the Court of Appeals, has held that volunteer fire

Mr. Robert Danner

August 8, 2000

Page - 2 -

companies are “agencies”, despite their status as not-for-profit corporations [Westchester-Rockland Newspapers v. Kimball, 50 NY2d 575 (1980)]. In brief, it was determined that local governments rely on volunteer fire companies to provide what traditionally has been an essential governmental service, and that those companies would not exist but for their relationships with local governments.

I note that the Committee has prepared more than twelve thousand advisory opinions pertaining to that statute since its creation in 1974. The opinions are indexed by “key phrase”, and those prepared within approximately the past eight years are accessible in full text. For instance, to obtain more detailed information regarding the status of volunteer fire companies under the Freedom of Information Law by use of the index, one may click on to “v” and scroll down to “Volunteer Fire Company.” The higher the number, the more recent is the opinion.

I hope that I have been of assistance. Should any further questions arise, please feel free to contact me.

cc: Scott Trent



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

File No - 12276

Committee Members

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Executive Director

Robert J. Freeman

August 9, 2000

Mr. Hasaun Grigger
95-A-6086
Lakeview Shock Incarceration Correctional Facility
P.O. Box T
Brocton, NY 14716-0679

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Grigger:

I have received your letter of May 9 and apologize for the delay in response. You have sought guidance concerning the 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."

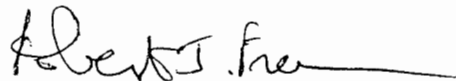
Mr. Hasaun Grigger
August 9, 2000
Page - 2 -

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 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

FOI-AP-12277

Committee Members

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Executive Director

Robert J. Freeman

August 9, 2000

Mr. Kenneth G. Pavel
90-C-1235
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 facts presented in your correspondence.

Dear Mr. Pavel:

I have received your letter of May 3 and apologize for the delay in response. You complained with respect to a failure on the part of officials of the Department of Correctional Services to respond to a request made under the Freedom of Information Law.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which an agency must respond to a request. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body,

Mr. Kenneth G. Pavel
August 9, 2000
Page - 2 -

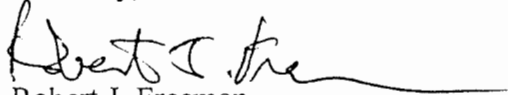
who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

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)].

In an effort to assist you, copies of this opinion will be forwarded to Department officials.

I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:tt

cc: Anthony J. Annucci
Records Access Officer



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-10-12278

Committee Members

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Executive Director

Robert J. Freeman

August 9, 2000

Mr. Benjamin Serrano
95-A-3627
Southport Correctional Facility
P.O. Box 2000
Pine City, NY 14871

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Serrano:

I have received your letter of May 7 and apologize for the delay in response. You complained that you had not received responses to requests for records made to the New York City Department of Correction and the New York City Police Department.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body,

Mr. Benjamin Serrano
August 9, 2000
Page -2-

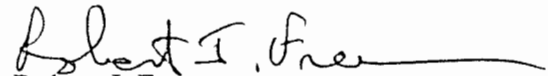
who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

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 Police Department is William Tesler, Special Counsel, and I believe that the person so designated at the Department of Correction is the Department's General Counsel.

I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:tt

cc: Thomas Antenen
Sgt. Richard Evangelista



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI/AO - 12279

Committee Members

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Executive Director
Robert J. Freeman

August 9, 2000

Ms. Tamara O'Bradovich



The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. O'Bradovich:

I have received your letter of July 11 in which you raised a series of issues relating to the implementation of the Freedom of Information Law by the Tuckahoe School District. In consideration of those issues and the remarks contained in the opinion addressed to you on June 16, I offer the following comments.

First, for reasons described in the earlier opinion, I do not believe that the District can require that a request for records be made on its prescribed form. In short, any request made in writing that reasonably describes the records sought should, in my view, be sufficient.

Second, the District's policy indicates that requests for records may be made "during regular business hours...on regular working days..." That standard is fully consistent with the regulations promulgated by the Committee on Open Government, which govern the procedural implementation of the Freedom of Information Law (see 21 NYCRR Part 1401).

And 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..."

Ms. Tamara O'Bradovich

August 9, 2000

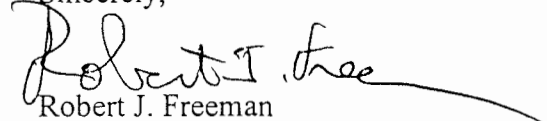
Page - 2 -

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.

I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:tt

cc: Superintendent of Schools



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI 2012280

Committee Members

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Executive Director

Robert J. Freeman

August 9, 2000

Andre Dolberry
99-A-4612
Wyoming Correctional Facility
P.O. Box 501
Attica, NY 14011

Dear Mr. Dolberry:

I have received your letter of May 2 and apologize for the delay in response. As I understand the matter, you are attempting to learn whether your attorney had a court date in New York County on a particular date. Although you have written to the Office of Court Administration several times, you indicated that you have received no response. You asked that this office "look into the situation and get back to [you] within ten business days."

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 investigate or compel an entity to comply with law.

Second, I would conjecture that if a record exists that contains the information of your interest, it would be maintained by the clerk of the court in which the attorney was scheduled to be present. If that is so, 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."

Mr. Andre Dolberry

August 9, 2000

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. When seeking court records, it is suggested that a request be directed to the clerk of the proper court, citing an applicable provision of law as the basis for the request.

And third, if the kind of record in which you are interested exists, it is questionable whether it can be located on the basis of an attorney's name; in most instances, I believe that dockets and calendars refer to the names of cases rather than the attorneys representing the parties.

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

1011-AO-12281

Committee Members

Mary O. Donohue
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Executive Director

Robert J. Freeman

August 9, 2000

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 facts presented in your correspondence.

Dear Mr. Elentuck:

I have received your memorandum of July 14 in which you sought my opinion concerning the propriety of deletions from records made available to you by the New York City Department of Investigation. The records consist of letters addressed to the Commissioner of the Department by Deputy Commissioners of the Office of the Special Commissioner of Investigation for the New York City School District, and they relate to incidents in which there were sexual relationships or alleged sexual relationships between District employees and students. Reference is made in the materials to sexual abuse and sodomy.

Having reviewed the materials, it is noted at the outset that §50-b of the Civil Rights Law, as I interpret that statute, prohibits public officers or employees from disclosing any record that would, if disclosed, tend to identify the victim of a sex offense, unless directed to do so by a court. Subdivision (1) of that provision states in relevant part that:

“No report, paper, picture, photograph, court file or other documents, in the custody or possession of any public officer or employee, which identifies such a victim shall be made available for public inspection. No such public officer shall disclose any portion of any police report, court file, or other document, which tends to identify such a victim...”

Many of the deletions appear to have been made on the ground that disclosure might tend to identify a victim. In those instances, I believe that the deletions would have been required, for information of that nature, for purposes of the Freedom of Information Law, would be “specifically exempted from disclosure by...statute” [87(2)(a)].

Mr. Harvey Elentuck

August 9, 2000

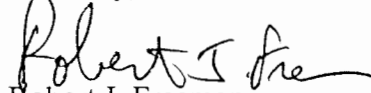
Page -2-

In other instances, it appears that deletions were made to protect the privacy of the subject of a complaint or inquiry. In this regard, as you are aware, it has been advised that the identity of a public employee who is the subject of an unproven or unsubstantiated complaint or allegation may be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [§87(2)(b)].

The remaining deletions appear to involve expressions of opinion or conjecture. If that is so, the deletions would be justified under §87(2)(g).

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 is positioned above the printed name and title.

Robert J. Freeman
Executive Director

RJF:tt

cc: Elyse G. Hirschorn



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI-A - 12282

Committee Members

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Executive Director

Robert J. Freeman

August 9, 2000

Mr. Anthony Carty
92-A-9491
Great Meadow Correctional Facility
Comstock, NY 12821

Dear Mr. Carty:

I have received your letter of May 11 and apologize for the delay in response. You have sought guidance concerning the "correct statute to be used to gain access to [your] verdict sheet." You had requested the record in question on the basis of §255 of the Judiciary Law.

In this regard, the Committee on Open Government is authorized to offer advice concerning the Freedom of Information Law. As you may be aware, 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 court records are not subject to the Freedom of Information Law. Similarly, the federal Freedom of Information Act applies to federal agencies and excludes the courts from its coverage.

This is not to suggest that court records need not be disclosed, for other statutes may confer broad rights of access to court records, one of which is the statute to which you referred, §255 of the Judiciary Law. That provision states that:

Mr. Anthony Carty

August 9, 2000

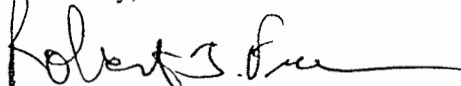
Page - 2 -

“A clerk of a court must, upon request, and upon payment of, or offer to pay, the fees allowed by law, or, if no fees are expressly allowed by law, fees at the rate allowed to a county clerk for a similar service, diligently search the files, papers, records, and dockets in his office; and either make one or more transcripts or certificates of change therefrom, and certify to the correctness thereof, and to the search, or certify that a document or paper, of which the custody legally belongs to him, can not be found.”

Based on the foregoing, I do not understand the basis for the response to your request from the court that you attached. It is suggested that you resubmit your request to clerk of the court, referring to or quoting from §255 or that you seek guidance from the Office of Court Administration.

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-AU-12283

Committee Members

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August 15, 2000

Executive Director

Robert J. Freeman

Mr. Joseph DiNicola
95-B-0303
Oneida Correctional Facility
6100 School Road
Rome, NY 13440

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. DiNicola:

I have received your letter and apologize for the delay in response. You described a series of difficulties in your attempts to obtain records from the Office of the Onondaga County District Attorney and court records from the Office of the County Clerk. In this regard, I offer the following comments.

First, you referred in your requests to 5 USC §552 and 552a, which are, respectively, the federal Freedom of Information and Privacy Acts. Those statutes apply only to federal agencies; they do not apply to offices of district attorneys or state or municipal courts. Further, although those statutes include provisions that deal with the waiver of fees, there no equivalent provisions in the New York Freedom of Information Law.

Second, in a related vein, 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. Joseph DiNicola
August 15, 2000
Page - 2 -

Based on the provisions quoted above, while the office of a district attorney is an "agency", 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.

Third, the Freedom of Information Law is applicable to all agency records, even those in storage. Section 86(4) of that statute defines the term "record" to include:

"any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, if the documentation of your interest is maintained for the Office of the District Attorney in storage or elsewhere, again, I believe that it would constitute a "record" that falls within the requirements of the Freedom of Information Law.

Lastly, when an agency receives a request for records, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

Based on the foregoing, an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date indicating when it can be anticipated that a request will be granted or denied.

I note that there is no precise time period within which an agency must grant or deny access to records. The time needed to do so may be dependent upon the volume of a request, the possibility that other requests have been made, the necessity to conduct legal research, the search and retrieval techniques used to locate the records and the like. In short, when an agency acknowledges the receipt of a request because more than five business days may be needed to grant or deny a request, so long as it provides an approximate date indicating when the request will be granted or denied, and

Mr. Joseph DiNicola
August 15, 2000
Page - 3 -

that date is reasonable in view of the attendant circumstances, I believe that the agency would be acting in compliance with law.

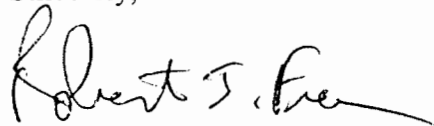
If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively 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: E.M. Kilpatrick
Jane DiNicola



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AU-3195
FOIL-AU-12284

Committee Members

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Mary O. Donohue
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Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Carole E. Stone
Alexander F. Treadwell

August 16, 2000

Executive Director

Robert J. Freeman

Ronald B. McGuire, Esq.
30 Newport Parkway, Suite 2608
Jersey City, NJ 07310

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. McGuire:

I have received your letter of July 17 in which you questioned the status of personnel and budget committees created pursuant to CUNY bylaws under the Freedom of Information and Open Meetings Laws. You also referred to a provision in the bylaws requiring that the committees at issue vote by means of secret ballot.

From my perspective, the committees are subject to both statutes. In this regard, I offer the following comments.

First, by way of background, Section 8.9 of the bylaws adopted by the CUNY Board of Trustees states in subdivision a. that: "There shall be in each college....a committee on faculty personnel and budget or equivalent committee. The chairperson of this committee shall be the president. The members of the committee shall be a dean designated by the president and the department chairman." Subdivision b. states that:

"This committee shall receive from the several departments all recommendations for appointments to the instructional staff, reappointments thereto, with or without tenure, and promotions therein, together with compensation; it shall recommend action thereon to the president. If the recommendations are adverse to the person concerned and if he/she considers himself/herself aggrieved within the terms and conditions of an existing collective negotiation agreement, he/she may avail himself/herself of the grievance procedure set forth in said agreement. The committee may also recommend to the president special salary increments. The president shall consider such recommendations in making his/her recommendations on such matters to the board."

Second, as you are aware, the Open Meetings Law is applicable to meetings of public bodies, and §102(2) of that statute defines the phrase "public body" to mean:

"...any entity for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

Judicial decisions indicate generally that advisory bodies having no power to take final action, other than committees consisting solely of members of public bodies, fall outside the scope of the Open Meetings Law. As stated in those decisions: "it has long been held that the mere giving of advice, even about governmental matters is not itself a governmental function" [Goodson-Todman Enterprises, Ltd. v. Town Board of Milan, 542 NYS 2d 373, 374, 151 AD 2d 642 (1989); Poughkeepsie Newspapers v. Mayor's Intergovernmental Task Force, 145 AD 2d 65, 67 (1989); see also New York Public Interest Research Group v. Governor's Advisory Commission, 507 NYS 2d 798, aff'd with no opinion, 135 AD 2d 1149, motion for leave to appeal denied, 71 NY 2d 964 (1988)].

In the decisions cited above, each of the entities had purely advisory functions. More analogous to the matter in my view is the decision rendered in MFY Legal Services v. Toia [402 NYS 2d 510 (1977)]. That case involved an advisory body created to advise the Commissioner of the State Department of Social Services. In MFY, it was found that "[a]lthough the duty of the committee is only to give advice which may be disregarded by the Commissioner, the Commissioner may, in some instances, be prohibited from acting before he receives that advice" (id. 511) and that, "[t]herefore, the giving of advice by the Committee either on their own volition or at the request of the Commissioner is a necessary governmental function for the proper actions of the Social Services Department" (id. 511-512).

Again, subdivision b. of Section 8.9 of the bylaws indicates that "The president *shall consider* the recommendations of a personnel and budget committee in making his/her recommendations...to the board." That being so, I believe that the committees at issue carry out necessary functions in the decision making process, perform a governmental function and, therefore, are public bodies subject to the Open Meetings Law.

In my opinion, the same conclusion can be reached by viewing the definition of "public body" in terms of its components. A personnel and budget committee is an entity consisting of at least two members; it is required in my view to conduct its business subject to quorum requirements (see General Construction Law, §41); and, based upon the preceding commentary, it conducts public business and performs a governmental function for a public corporation, i.e., the City of New York.

Next, the Freedom of Information Law is applicable to agencies, and §86(3) of that statute defines the term "agency" to include:

Ronald B. McGuire, Esq.

August 16, 2000

Page - 3 -

"any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

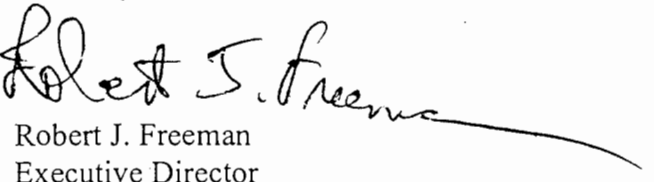
I believe that the entities in question may be characterized as "municipal...committees" or as governmental entities performing governmental functions for a municipality.

Lastly, Section 8.12 of the bylaws states in part that "The action of the committee shall be by secret ballot." In my view, insofar as a provision of a bylaw or similar enactment is inconsistent with the requirements of a statute, it is of no effect. In this instance, §87(3)(a) of the Freedom of Information Law requires that "Each agency shall maintain...a record setting forth the final vote of each member in every agency proceeding in which the member votes." In a case that you litigated, which also involved an entity functioning within CUNY, it was held that "Entities covered by the OML or the FOIL may not take action by secret ballot" Wallace v. The City University of New York, Supreme Court, New York County, NYLJ, July 7, 2000).

In sum, it is my opinion that the personnel and budget committees created pursuant to CUNY bylaws are required to comply with both the Freedom of Information and Open Meetings Laws. This is not to suggest, however, that meetings of those committees must be conducted open to the public in their entirety or that records generated by them must be disclosed in their entirety. I would conjecture that much of the deliberative process of the committees could be conducted in executive session pursuant §105(1)(f) of the Open Meetings Law, and that their recommendations could likely be withheld in great measure under §87(2)(g) of the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:jm

cc: Roy Moskowitz
Dave Fields



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-A0-12285

Committee Members

Mary O. Donohue
Alan Jay Gerson
Walter W. Grunfeld
Gary Lewi
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Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Carole E. Stone
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August 17, 2000

Executive Director

Robert J. Freeman

Alice P. Green, Ph.D.
Executive Director
Center for Law & Justice, Inc.
Pine West Plaza Building 2
Washington Avenue Extension
Albany, NY 12205

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Dr. Green:

I have received your letter of July 17, as well as the correspondence attached to it. You have sought an advisory opinion concerning rights of access to records that you requested from the Commissioner of the Department of Correctional Services and whether the Department may deny your request "in the event that [you] exercise [your] right to commence litigation challenging the Commissioner's determination" to prohibit you from visiting state correctional facilities. You requested:

"-a full and complete list of all private organizations who currently have visitation access to state prisons either as volunteers or contractors of services

-names of all persons and/or groups that are presently banned from any and all state prisons

-names of all persons and/or groups officially banned from state prisons that were notified and given an opportunity to appeal the Department's revocation of their visiting privileges"

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 need not create a record in response to a request. Therefore, if, for example, there is no "full and complete list" of those having "visitation access" to correctional facilities, the Department would not be required to create a new record on your behalf that contains the information sought.

Second, insofar as your request involves existing records, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. It would appear that the records sought, if they exist would be available, with one possible exception. Section 87(2)(f) authorizes an agency to withhold records to the extent that the disclosure "would endanger the life or safety of any person." I am unfamiliar with the considerations pertinent to granting or denying access to correctional facilities, but security is of substantial concern, and the exception cited above may be pertinent.

Lastly, the possibility that the records sought might be pertinent to or used in litigation is, in my view, largely irrelevant. As stated by the Court of Appeals in a case involving a request made under the Freedom of Information Law by a person involved in litigation against an agency: "Access to records of a government agency under the Freedom of Information Law (FOIL) (Public Officers Law, Article 6) is not affected by the fact that there is pending or potential litigation between the person making the request and the agency" [Farbman v. NYC Health and Hospitals Corporation, 62 NY 2d 75, 78 (1984)]. Similarly, in an earlier decision, the Court of Appeals determined that "the standing of one who seeks access to records under the Freedom of Information Law is as a member of the public, and is neither enhanced...nor restricted...because he is also a litigant or potential litigant" [Matter of John P. v. Whalen, 54 NY 2d 89, 99 (1980)]. The Court in Farbman, supra, discussed the distinction between the use of the Freedom of Information Law as opposed to the use of discovery in Article 31 of the Civil Practice Law and Rules. Specifically, it was found that:

"FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on governmental decision-making, its ambit is not confined to records actually used in the decision-making process (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request.

"CPLR article 31 proceeds under a different premise, and serves quite different concerns. While speaking also of 'full disclosure' article 31 is plainly more restrictive than FOIL. Access to records under CPLR depends on status and need. With goals of promoting both the ascertainment of truth at trial and the prompt disposition of actions (Allen v. Crowell-Collier Pub. Co., 21 NY 2d 403, 407), discovery is at the outset limited to that which is 'material and necessary in the prosecution or defense of an action'" [see Farbman, supra, at 80].

Based upon the foregoing, the pendency of litigation would not, in my opinion, affect either the rights of the public or a litigant under the Freedom of Information Law.


Alice P. Green Ph.D.

August 17, 2000

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

cc: Mark Shepard
Anthony J. Annucci



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AJ-12286

Committee Members

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August 17, 2000

Executive Director

Robert J. Freeman

Ms. Laura J. Henderson

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Henderson:

I have received your letter of July 12, as well as the correspondence attached to it. You have sought assistance in your efforts in obtaining information from the Department of Labor relating to your unemployment insurance claim.

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 for records, 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 the Freedom of Information Law or forwarded the request to the proper person, it is suggested, if you have not yet received a response, that you resubmit the request to Jerome Tracy, Records Access Officer, NYS Department of Labor, State Campus, Building 12, Albany, NY 12240. Mr. Tracy can be reached by phone at (518)457-4380.

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, having reviewed 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, if, for example, there is no record containing an "explanation as to why [you] have not received payments yet", the Department would not be obliged to prepare a record containing an explanation on your behalf.

Next, with respect to rights of access 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.

Relevant to the matter is the first ground for denial, §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §537 of the Labor Law, which is entitled "Disclosures prohibited", and which states in subdivision (1) that:

"[I]nformation acquired from employers or employees pursuant to this article shall be for the exclusive use and information of the commissioner in the discharge of his duties hereunder and shall not be open to the public nor be used in any court in any action or proceeding pending therein unless the commissioner is a party to such action or proceeding, notwithstanding any other provisions of law. Such information insofar as it is material to the making and determination of a claim for benefits shall be available to the parties affected and, in the commissioner's discretion, may be made available to the parties affected in connection with effecting placement."

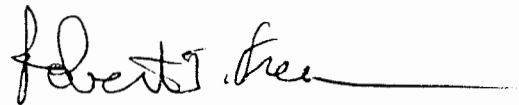
Ms. Laura J. Henderson
August 17, 2000
Page - 3 -

To the extent that the records sought fall within the scope of §537, they would be confidential, unless they are "material to the making and determination of a claim for benefits" or the Commissioner of Labor asserts his discretionary authority to disclose records for the purpose of effecting placement in a job.

Lastly, I note that the Town of Van Buren, your former employer, is also an agency subject to the Freedom of Information Law. In my view, records maintained by the Town would not fall within the scope of §537 of the Labor Law, and the restrictions imposed by that statute would not apply. Therefore, it may be worthwhile to seek records from the Town pursuant 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 line extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Jerome Tracy

FOIL-AO-12287

From: Robert Freeman
To: [REDACTED]
Date: 8/18/00 8:14AM
Subject: Dear Mr. Infante:

Dear Mr. Infante:

I have received your inquiry in which you asked whether you need "any kind of license to resell information such as public records."

In this regard, in general, under the New York Freedom of Information Law, which applies to agencies of state and local government in New York, a recipient of accessible records may do with the records as he or she sees fit; commercial use of the records ordinarily is irrelevant. and no license or other permission is needed.

There may be circumstances, however, in which rights of access may be limited due to the intended use of records. For instance, the law provides that a list of names and addresses may be withheld to protect personal privacy if the list would be used for commercial or fund-raising purposes [see Freedom of Information Law, §89(2)(b)(iii)].

If you would like additional information on the matter, I might be able to offer more specific guidance with additional detail concerning your situation.

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



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DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

Oml. AD - 3196
FOI - AD - 12288

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August 22, 2000

Executive Director

Robert J. Freeman

Hon. Robert S. Pekarek
Town Councilman

The staff of the Committee on 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 Pekarek:

Your letter sent to the Office of the State Comptroller has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State, is authorized to offer advice and opinions concerning the Freedom of Information and Open Meetings Laws, and I will attempt to address the issues that you raised that relate to those statutes.

The first area of inquiry involves the time in which minutes must be prepared. In this regard, subdivision (3) of §106 of the Open Meetings Law states that:

"Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

As such, a public body has two weeks from a meeting to prepare minutes and make them available.

It is also noted that there is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. Nevertheless, as a matter of practice or policy, many public bodies approve minutes of their meetings. In the event that minutes have not been approved, to comply with the Open Meetings Law, it has consistently been advised that minutes be prepared and made available within two weeks, and that 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

is effectively notified that the minutes are subject to change. If minutes have been prepared within less than two weeks, I believe that those unapproved minutes would be available as soon as they exist, and that they may be marked in the manner described above.

With respect to the "recess" involving a meeting held on May 30 and recessed to June 20, it is my view that the second gathering constituted a new meeting. That meeting should have been preceded by notice given in accordance with §104 of the Open Meetings Law and, again, I believe that minutes of the meeting of May 30 were required to have been prepared and disclosed on request within two weeks of the meeting.

Second, you asked whether a person seeking records must provide a reason for the request. Here I direct your attention to the Freedom of Information Law. In general, a person seeking records under that statute need not offer a reason, and 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)].

You also asked whether you, as a member of the Town Board, can be required to pay for copies of records. In my view, if it is clear that records are requested in the performance of one's official duties, the request might not be viewed as having been made under the Freedom of Information Law. In such a situation, if a request is reasonable, and in the absence of a board rule or policy to the contrary, I believe that a member of the board should not generally be required to resort to the Freedom of Information Law in order to seek or obtain records.

However, viewing the matter from a more technical perspective, one of the functions of a public body involves acting collectively, as an entity. A town board, as the governing body of a public corporation, generally acts by means of motions carried by an affirmative vote of a majority of its total membership (see General Construction Law, §41). In my view, in most instances, a board, including a supervisor, member acting unilaterally, without the consent or approval of a majority of the total membership of the board, has the same rights as those accorded to a member of the public, unless there is some right conferred upon a board member by means of law or rule. In such a case, a member seeking records could presumably be treated in the same manner as the public generally.

Lastly, you asked whether the Records Access Manager may refuse to make copies requested by the public and instead "tell them to come and look it up for themselves even if they have no way getting to her house."

Before considering the substance of your question, it is noted that the person designated by a town board, for example, to deal with requests for records is the "records access officer." That person, pursuant to the regulations promulgated by this office, has the duty of coordinating an agency's response to requests for records (see 21 NYCRR §1401.2).

With respect to the issue, I do not believe that an agency or its records access officer can require a person to travel to a town hall or the officer's home as a condition precedent to gaining

Hon. Robert S. Pekarek

August 22, 2000

Page - 3 -

is willing to pay the appropriate fees for copying, the records access officer must, in my opinion, make copies of the records sought and mail them to the applicant. The applicant in that circumstance may also be required to pay for postage.

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

cc: Town Clerk



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

DOTI-NO-12289

Committee Members

Mary O. Donohue
Alan Jay Gerson
Walter W. Grunfeld
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August 22, 2000

Executive Director
Robert J. Freeman

Mr. Janusz Muszak

The staff of the Committee on Open 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 July 15 concerning a response to a request by Mr. John E. Robitzek, Counsel to the Office of Temporary and Disability Assistance. Mr. Robitzek denied your request for a record indicating the "level of education" of a certain employee of that agency. In addition, you complained with respect to the time taken to respond to your request.

In this regard, 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. 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

Mr. Janusz Muszak
August 22, 2000
Page - 2 -

Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977, Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1981 Seelig v. Sielaff, 200 AD 2d 298 (1994)].

I note that it has been specifically held that disclosure of a public employee's educational background would not constitute an unwarranted invasion of personal privacy and must be disclosed [see Ruberti, Girvin & Ferlazzo v. NYS Division of State Police, 641 NYS 2d 411, 218 AD 2d 494 (1996)].

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.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: John E. Robitzek



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI AD - 12290

Committee Members

Mary O. Donohue
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August 22, 2000

Executive Director

Robert J. Freeman

Mr. Dwayne Chapman
92-A-5516 B-15-12
Attica Correctional Facility
Box 149
Attica, NY 14011-0149

Dear Mr. Chapman:

I have received your letter of August 11 in which you requested a copy of the correction officers manual pursuant to the Freedom of Information Law.

In this regard, it appears that you were misled by the Civil Liberties Union. The Committee on Open Government is authorized to offer advice concerning the Freedom of Information Law. The Committee does not have possession or control of records generally, and this office does not maintain any copy of the manual in which you are interested.

A request for a record should be made to the agency that maintains that the record, and in this instance, the agency would be the Department of Correctional Services. I note that the Department's regulations indicate that a request for a record kept at a correctional facility may be made to the Superintendent or his designee; a request for a record kept at the Department's central offices in Albany may be made to its records access officer, Mr. Mark Shepard.

I would conjecture that portions of the manual would be accessible; others might justifiably be withheld. 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;

Mr. Dwayne Chapman

August 22, 2000

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 basis for denial is applicable. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. It would appear that the records sought would consist of instructions to staff that affect the public or an agency's policy. Therefore, I believe that they would be available, unless a different basis for denial could be asserted.

A second provision of potential significance is §87(2)(e), which permits an agency to withhold records that:

"are compiled for law enforcement purposes and which, if disclosed, would:

- i. interfere with law enforcement investigations of judicial proceedings...
- ii. deprive a person of a right to a fair trial or impartial adjudication;
- iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
- iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

Under the circumstances, most relevant is §87(2)(e)(iv). The leading decision concerning that provision is Fink v. Lefkowitz, which involved access to a manual prepared by a special prosecutor that investigated nursing homes, in which the Court of Appeals held that:

"The purpose of this exemption is obvious. Effective law enforcement demands that violators of the law not be apprised the nonroutine procedures by which an agency obtains its information (see Frankel v. Securities & Exch. Comm., 460 F2d 813, 817, cert den 409 US 889). However beneficial its thrust, the purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution.

"To be distinguished from agency records compiled for law enforcement purposes which illustrate investigative techniques, are those which articulate the agency's understanding of the rules and regulations it is empowered to enforce. Records drafted by the body charged with enforcement of a statute which merely clarify procedural or substantive law must be disclosed. Such information in the hands of the public does not impede effective law enforcement. On the contrary, such knowledge actually encourages voluntary compliance with the law by detailing the standards with which a person is expected to comply, thus allowing him to conform his conduct to those requirements (see Stokes v. Brennan, 476 F2d 699, 702; Hawkes v. Internal Revenue Serv., 467 F2d 787, 794-795; Davis, Administrative Law [1970 Supp], section 3A, p 114).

"Indicative, but not necessarily dispositive of whether investigative techniques are nonroutine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel (see Cox v. United States Dept. of Justice, 576 F2d 1302, 1307-1308; City of Concord v. Ambrose, 333 F Supp 958). It is no secret that numbers on a balance sheet can be made to do magical things by scrupulous nursing home operators the path that an audit is likely to take and alerting them to items to which investigators are instructed to pay particular attention, does not encourage observance of the law. Rather, release of such information actually countenances fraud by enabling miscreants to alter their books and activities to minimize the possibility or being brought to task for criminal activities. In such a case, the procedures contained in an administrative manual are, in a very real sense, compilations of investigative techniques exempt from disclosure. The Freedom of Information Law was not enacted to furnish the safecracker with the combination to the safe" (id. at 572-573).

In applying those criteria to specific portions of the manual, which was compiled for law enforcement purposes, the Court found that:

"Chapter V of the Special Prosecutor's Manual provides a graphic illustration of the confidential techniques used in a successful nursing home prosecution. None of those procedures are 'routine' in the sense of fingerprinting or ballistic tests (see Senate Report No. 93-1200, 93 Cong 2d Sess [1974]). Rather, they constitute detailed, specialized methods of conducting an investigation into the activities of a specialized industry in which voluntary compliance with the law has been less than exemplary.

Mr. Dwayne Chapman

August 22, 2000

Page - 4 -

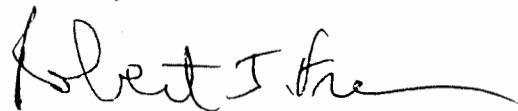
"Disclosure of the techniques enumerated in those pages would enable an operator to tailor his activities in such a way as to significantly diminish the likelihood of a successful prosecution. The information detailed on pages 481 and 482 of the manual, on the other hand, is merely a recitation of the 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.

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.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

7071-100-12291

Committee Members

Mary O. Donohue
Alan Jay Gerson
Walter W. Grunfeld
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Wade S. Norwood
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Executive Director

Robert J. Freeman

August 22, 2000

Mr. Roy Schneggenburger



The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence, unless otherwise indicated.

Dear Mr. Schneggenburger:

I have received your letter of July 19 and the materials attached to it. In addition, I have received correspondence from Richard J. Sherwood, Lancaster Town Attorney, indicating that the record that you requested has been made available to you.

Notwithstanding your receipt of the record, you complained that the Town has failed to make records available in a timely manner. In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

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

Mr. Roy Schneggenburger

August 22, 2000

Page - 2 -

that other requests have been made, the necessity to conduct legal research, the search and retrieval techniques used to locate the records and the like. In short, when an agency acknowledges the receipt of a request because more than five business days may be needed to grant or deny a request, so long as it provides an approximate date indicating when the request will be granted or denied, and that date is reasonable in view of the attendant circumstances, I believe that the agency would be acting in compliance with law.

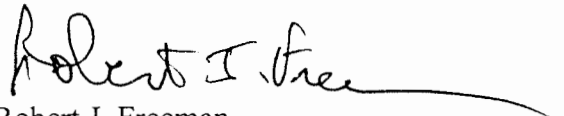
If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

cc: Richard J. Sherwood

RJF:tt



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI AD - 12292

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Executive Director
Robert J. Freeman

August 22, 2000

Mr. Janusz Muszak



The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Muszak:

I have received your letter of July 15, which you characterized as a "repeated request for an advisory opinion." I believe that I answered your earlier inquiry, and I am not sure what you want. You enclosed a copy of an earlier letter to me and highlighted two passages.

The first is as follows:

"Kindly let me know if FOIL or the section 255 of the Judiciary Law, as FOIL suggests, applies to the above-described circumstances."

The "circumstances", as I understand them involve whether a court official, a special matrimonial referee, "is exempted from responding to a FOIL request." As indicated in previous correspondence, the Freedom of Information Law excludes the courts and court records from its coverage. Therefore, I do not believe that a court official referred would be obliged to a request made under the Freedom of Information Law at statute simply would not apply. Further, the Freedom of Information Law does not apply to the Judiciary Law.

The statute
Information Law
I am not sure

822

appears to have nothing to do with the Freedom of Information Law.
As such, I cannot offer an opinion or guidance. Again, I am not sure of a response.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

One No - 3197
7071 No - 12293

Committee Members

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Executive Director
Robert J. Freeman

August 22, 2000

Ms. Elizabeth Dean, President
Joint Civics of Lindenhurst
311 N. 7th Street
Lindenhurst, NY 11757

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Dean:

I have received your letter of July 14, which reached this office on July 24. On behalf of the Joint Civics of Lindenhurst, you have raised a series of questions and sought guidance concerning the operation of the Village of Lindenhurst.

As you may recall, the Committee on Open Government is authorized to offer opinions relating to the Freedom of Information and Open Meetings Laws. Consequently, my remarks will be limited to matters involving those statutes.

You referred initially to a request for a tape recording of a Village Board meeting that had not been answered. 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, 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 upon the foregoing, a tape recording of a meeting prepared by a Village official 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 you were present, and none of the grounds for denial would apply. Moreover, there is case law indicating that a tape recording of an open meeting is accessible for listening and/or copying under the Freedom of Information Law [see Zaleski v. Board of Education of Hicksville Union Free School District, Supreme Court, Nassau County, NYLJ, December 27, 1978].

Since a person present at an open meeting of a public body could have tape recorded the proceedings [see Mitchell v. Board of Education of the Garden City Union Free School District, 113 AD 2d 924 (1985)], I do not believe that there would be a valid basis for withholding the tape, particularly since many were apparently present.

Next, you alluded to a request for records of the Center for the Community Interest. While I am not familiar with that organization, I point out that the Freedom of Information Law applies to agencies and that §86(3) defines the term "agency" to mean:

Ms. Elizabeth Dean, President

August 22, 2000

Page - 3 -

"...any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental 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 entity in question is not governmental in nature, the Freedom of Information Law would not be applicable.

In a matter relating to the Open Meetings Law, you indicated that the secretary to the Planning Board does not prepare minutes; she prepares only notes of meetings. In my view, the notes are inadequate and do not reflect compliance with law. The Open Meetings Law is applicable to meetings of public bodies, and §102 (2) of that statute defines the term "public body" to mean:

"...any entity for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

I believe that a village planning board clearly constitutes a "public body" that is subject to the requirements of the Open Meetings Law.

The Open Meetings Law offers direction concerning minutes and their contents and states in §106 that:

"1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.

2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.

3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be

available to the public within one week from the date of the executive session."

Based upon the foregoing, minutes must be prepared and made available within two weeks.

I note that there is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. Nevertheless, as a matter of practice or policy, many public bodies approve minutes of their meetings. In the event that minutes have not been approved, to comply with the Open Meetings Law, it has consistently been advised that minutes be prepared and made available within two weeks, and that they may be marked "unapproved", "draft" or "preliminary", for example. By so doing within the requisite time limitations, the public can generally know what transpired at a meeting; concurrently, the public is effectively notified that the minutes are subject to change.

Lastly, as I understand the remaining area of inquiry, a resolution appears to have been adopted outside of a meeting. If that is so, relevant to the issue in my view is §41 of the General Construction Law which provides guidance concerning quorum and voting requirements. Specifically, the cited provision states that:

"Whenever three 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 or body, or at any duly adjourned meeting of such meeting, or at any meeting duly held upon reasonable notice to all of them, shall constitute a quorum and not less than a majority of the whole number may perform and exercise such power, authority or duty. For the purpose of this provision the words 'whole number' shall be construed to mean the total number which the board, commission, body or other group of persons or officers would have were there no vacancies and were none of the persons or officers disqualified from acting."

Based upon the language quoted above, a public body cannot carry out its powers or duties except by means of an affirmative vote of a majority of its total membership taken at a meeting duly held upon reasonable notice to all of the members.

Section 102(1) of the Open Meetings Law defines the term "meeting" to mean "the official convening of a public body for the purpose of conducting public business". Based upon an ordinary dictionary definition of "convene", that term means:

- "1. to summon before a tribunal;
2. to cause to assemble syn see 'SUMMON'" (Webster's Seventh New Collegiate Dictionary, Copyright 1965).

In view of the ordinary definition of "convene", I believe that a "convening" of a quorum requires the physical coming together of at least a majority of the total membership of a board of trustees, that a majority of a board would constitute a quorum, and that an affirmative majority of votes would be needed for a board to take action or to carry out its duties.

It is emphasized 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.*).

Ms. Elizabeth Dean, President

August 22, 2000

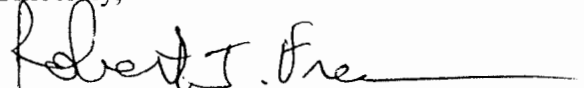
Page - 6 -

Based upon the direction given by the courts, if a majority of the Board gathers to discuss public business, in their capacities as Board members, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law.

In an effort to enhance compliance with and understanding of the Freedom of Information and Open Meetings Laws, copies of this opinion will be forwarded to the Board of Trustees and the Planning Board.

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: Board of Trustees
Planning Board



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI No - 12294

Committee Members

Mary O. Donohue
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August 22, 2000

Executive Director

Robert J. Freeman

Mr. Douglas W. 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 July 13 and the materials attached to it. You have sought assistance concerning your repeated efforts in gaining access to personnel records pertaining to yourself in relation to your employment as a part time police officer for the City of Little Falls. You have been informed that no such records exist.

In this regard, I offer the following comments.

First, while some of the records of your interest might no longer exist because they were properly disposed of or destroyed, it is likely in my view that the City is required to retain others. Article 57-A of the Arts and Cultural Affairs Law, the "Local Government Records Law", requires that local governmental entities must retain records for specified periods before the records may be disposed of or destroyed. I am unaware of the retention period applicable to the kinds of records in which you are interested. However, the State Archives and Records Administration (SARA), a unit of the State Education Department, develops schedules indicating the minimum periods of retention for certain kinds of records, and a representative of that office can likely inform you of the retention period applicable to the records in question. SARA can be reached at (518) 474-6926.

Second, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification in writing 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." It is suggested that you 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

Mr. Douglas W. Hewitt

August 22, 2000

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)].

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."

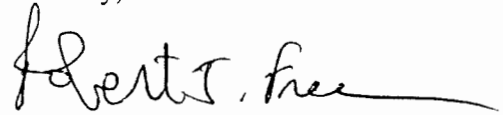
In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge 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)].

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this opinion will be forwarded to City officials.

Mr. Douglas W. Hewitt
August 22, 2000
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: Hon. Theodore Wind
Mr. Rose, City Attorney
Chief DeLuca



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

omc. 10 - 3199
FOI - 10 - 12295

Committee Members

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Executive Director

Robert J. Freeman

August 24, 2000

Trustee Wendy Lukas

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Trustee Lukas:

I have received your memorandum of August 21, as well as your letter of July 24. As indicated to you by phone, for reasons unknown, your earlier communication did not reach this office. Nevertheless, I apologize for the delay in response.

You referred initially to minutes of the Joint Village of Schuylerville/Victory Water Commission, a creation of a statute, and the minutes of its meetings, which apparently are not available for a month following meetings. You asked what the consequences might be if minutes are not prepared within the statutory time. Additionally, you questioned whether the minutes should include reference to those who offer comments at meetings and noted that the minutes are "very subjective as to whose name and comments make it in the minutes."

In this regard, first, I believe that the Commission is required to comply with the Open Meetings Law. That statute is applicable to the 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."

The Commission is an entity consisting of more than two members; it is required in my view to conduct its business subject to quorum requirements (see General Construction Law, §41; and based

upon the information you provided, it conducts public business and performs a governmental function for two public corporations, the Villages of Schuylerville and Victory.

Second, with respect to minutes of meetings, §106 of the Open Meetings Law states that:

"1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.

2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.

3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

Based on the foregoing, minutes need not consist of a verbatim account of everything that was said; on the contrary, so long as the minutes include the kinds of information described in §106, I believe that they would be appropriate and meet legal requirements. Certainly if a public body wants to include more information than is required by law, it may do so. From my perspective, in view of the language of §106, there is no obligation to include reference to comments made at meetings or the names of those who offered comments. However, in my opinion, inherent in every law is the principle that it must be implemented reasonably and fairly. If, for example, reference is made only to speakers who offer positive commentary, and no reference is made to those who offer criticism, I believe that a practice of that nature would be unreasonable. Stated differently, if the minutes are to include reference to those who offer comments and their names, I believe that they should include reference to all who do so.

Third, although as a matter of practice, policy or tradition, many public bodies approve minutes of their meetings, there is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. Further, I do not believe that a public body may require that disclosure of minutes be delayed in a manner inconsistent with the Open Meetings Law. In the event that minutes have not been reviewed or 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 be marked "unapproved", "draft" or "preliminary", 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.

With respect to the consequences of a failure to prepare minutes within two weeks, it is possible that a public body or officer could be compelled by a court to comply with law, and that attorneys' fees could be awarded to the member of the public initiating the proceeding.

The next area of inquiry relates to the "absence of Village records from the Village office." That practice has resulted in delays in the disclosure of records to you and perhaps others. Here I direct you to the Freedom of Information Law. That statute pertains to all records of an agency, such as a village, 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 language quoted above, whether records are kept at Village Hall or at the home of the Mayor or the Village Engineer is irrelevant; they would fall within the coverage of the Freedom of Information Law.

In my opinion, if records are being used by the Mayor, the Engineer or another Village official, it would be reasonable for that person to maintain those records temporarily at his or her home during the time in which they are being used. However, when the records are not being actively used, I believe that they should be maintained by the Village Clerk. Section 4-402 of the Village Law states in part that the clerk "shall have custody of the corporate seal, books, records, and papers of the village and all the official reports and communications of the board of trustees." In addition, §57.19 of the Arts and Cultural Affairs Law states in part that village clerk is the "records management officer" for a village.

Further, §57.25 states in relevant part that:

"1. It shall be the responsibility of every local officer to maintain records to adequately document the transaction of public business and the services and programs for which such officer is responsible; to retain and have custody of such records for so long as the records are needed for the conduct of the business of the office' to adequately protect such records; to cooperate with the local government's records management officer on programs for the orderly and efficient management of records including identification and management of inactive records and identification and preservation of records of enduring value; to dispose of records in accordance with legal requirements; and to pass on to his successor records needed for the continuing conduct of business of the office..."

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 if she or someone else

designated as records access officer for purposes of responding to requests under the Freedom of Information Law, from complying with that statute.

Pursuant to subdivision (2) of §57.25 of the Arts and Cultural Affairs Law, local governments must retain records for certain periods before the records may be disposed of or destroyed. That provision states that:

“No local officer shall destroy, sell or otherwise dispose of any public record without the consent of the commissioner of education. The commissioner of education shall, after consultation with other state agencies and with local government officers, determine the minimum length of time that records need to be retained. Such commissioner is authorized to develop, adopt by regulation, issue and distribute to local governments 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 entity prepares detailed schedules indicating minimum retention periods for records typically maintained by villages. Records may be retained longer than the retention period.

With respect to your ability to obtain records, if it is clear that records are requested in the performance of one's official duties, the request might not be viewed as having been made under the Freedom of Information Law. In such a situation, if a request is reasonable, and in the absence of a rule or policy to the contrary, I believe that a member of a public body should not generally be required to resort to the Freedom of Information Law in order to seek or obtain records.

However, viewing the matter from a more technical perspective, one of the functions of a public body involves acting collectively, as an entity. A public body generally act by means of motions carried by an affirmative vote of a majority of its total membership (see General Construction Law, §41). In my view, in most instances, a member acting unilaterally, without the consent or approval of a majority of the total membership of the public body, has the same rights as those accorded to a member of the public, unless there is some right conferred upon a member by means of law or rule. In such a case, a member seeking records could presumably be treated in the same manner as the public generally. When that is so, a request by a member of a public body could, in my opinion, be considered as a request made under the Freedom of Information Law by a member of the public, and that person could be assessed at the same rate as any member of the public.

When a request is made under the Freedom of Information Law, that statute 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:

Trustee Wendy Lukas

August 24, 2000

Page - 5 -

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Lastly, you asked whether it is proper for the Mayor to serve as the paid secretary to the Commission. Since the advisory jurisdiction of this office is limited to matters relating to public access to government information, that question is beyond the scope of our expertise or jurisdiction. It is suggested that you raise the issue with the Village Attorney or contact the Division of Appeals and Opinions at the Office of the Attorney General at 474-3429.

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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FOIA-00-12296

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Executive Director

Robert J. Freeman

August 28, 2000

Mr. John W. Kane

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Kane:

I have received your letter of July 24 and the correspondence attached to it. You have asked whether a response to your appeal by the records access officer for the Fulton County Industrial Development Agency "constitute[d] a violation of [your] rights...as to [your] use [of] the Freedom of Information Law appeals process.

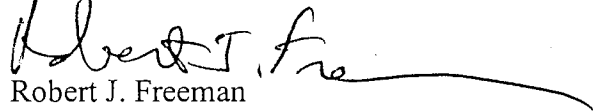
In this regard, by way of background, you requested from the Agency "A reasonably detailed list of all bonds and notes issued by this agency as the name to whom they were issued too, the amount, and the status as to being paid in full or the amount still outstanding." The Agency's records access officer responded soon thereafter "with a list of 13 bonds issued and one note." You contended that you received a "partial list" and that "31 some bonds" have been issued by the agency since 1980, and you appealed on the ground that records were withheld. The records access officer wrote to you soon thereafter and indicated that "the records [he has] do not indicate this number of issuances", and he asked that you provide your list of 31 bond issuances for his review in order verify the number of bond issuances.

In consideration of the records access officer's response, it appears that he did not believe that records were withheld, and that he supplied you with the information sought. From my perspective, his response to you of July 7 did not circumvent the appeal process; it appears rather to represent an effort to acquire information to better enable him to comply with law in consideration of his belief that no aspect of your initial request was denied.

Mr. John W. Kane
August 28, 2000
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:tt

cc: James E. Mraz



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FOI - 40 - 12297

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Executive Director

Robert J. Freeman

August 28, 2000

Ms. Gisele Guerre



Dear Ms. Guerre:

I have received your letter of July 24 and the correspondence attached to it. As I understand your comments, an assistant district attorney wrote that you had been charged with assault, but you contend that no such charge ever was made. You asked what steps may be taken against the Office of the New York County District Attorney in relation to the foregoing.

In my view, the most appropriate course of action would involve proving to the Office of the District Attorney that you were not charged. In this regard, the general repository of criminal history records in New York is the Division of Criminal Justice Services. That agency maintains a database including information relating to all arrests and convictions in New York. While criminal history records are not generally available to the public under the Freedom of Information Law, the subject of those records may gain access to the records pertaining to himself or herself pursuant to the regulations promulgated by the Division. Further, if there is no record of an arrest or conviction, the Division will indicate such a finding in writing. If the Division indicates that you have not been charged, you may present that statement to the Office of the District Attorney.

To engage in a criminal history record search, the subject of the search must provide certain identifiers to prove his or her identity and pay a fee. To obtain the necessary information concerning a search, it is suggested that you write to the Division of Criminal Justice Services, Identification and Criminal History Operations, 4 Tower Place, Stuyvesant Plaza, Albany, NY 12203-3764 or contact the Division by phone at (518)457-6113.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt



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FOIL-AU-12298

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August 28, 2000

Executive Director

Robert J. Freeman

Hon. Bonnie Lee Hahn
Alderwoman 1st Ward
1 Broadway
Rensselaer, NY 12144

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Alderwoman Hahn:

I have received your memorandum of July 20 in which you sought an advisory opinion.

Attached to the memorandum is a resolution that was approved by the Common Council of the City of Rensselaer that provides as follows:

“RESOLVED, that the Common Council of the City of Rensselaer authorizes the execution and delivery of a certain Stipulation of Settlement and Order which resolves currently pending tax assessment proceedings initiated by the BASF Corporation. The Corporation Counsel may approve modifications to the stipulation and Order provided that the assessed value for the years 2000 and 2001 are not modified.”

You indicated that the Common Council was advised by Corporation Counsel “not to disclose the terms of the settlement”, and the resolution itself does not include the terms of the agreement. You wrote that “it seems odd that we would have the ability to withhold what the terms are.” In my opinion, the stipulation of settlement is accessible to the public, and in this regard, I offer the following comments.

First, situations have arisen in which the parties to an agreement or stipulation of settlement have agreed to refrain from speaking about or disclosing the terms of the agreement or stipulation on their own initiative. In my view, it is likely that the parties may validly agree not to speak about a settlement or agreement. However, the Freedom of Information Law pertains to records, not to speech. In a decision that may be pertinent 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)].

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. Unless records may justifiably be withheld in accordance with one or more of the grounds for denial, a claim, a promise or an agreement to maintain confidentiality would, based on judicial decisions, be meaningless.

In Geneva Printing Co. v. Village of Lyons (Supreme Court, Wayne County, March 25, 1981), a public employee charged with misconduct and in the process of an arbitration hearing engaged in a settlement agreement with a municipality. One aspect of the settlement was an agreement to the effect that its terms would remain confidential. Notwithstanding the agreement of confidentiality, which apparently was based on an assertion that "the public interest is benefited by maintaining harmonious relationships between government and its employees", the court found that no ground for denial could justifiably be cited to withhold the agreement. In 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..."

In a more recent decision, the matter involved the subject of a settlement agreement with a town that included a confidentiality clause who 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.

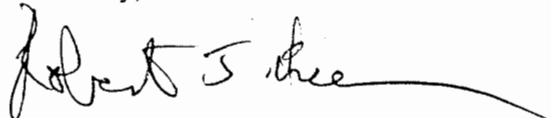
“Although exceptions to disclosure are provided in §§87 and 89, plaintiff has not met his burden of demonstrating that the financial provisions of this agreement fit within one of these statutory exceptions (see Matter of Washington Post v New York State Ins. Dept. 61 NY2d 557, 566). While partially 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 provided” (Hansen v. Town of Walkill, Supreme Court, Orange County, December 9, 1998).

In short, absent the proper assertion of a ground for denial appearing in §87(2) of the Freedom of Information Law, I believe that the stipulation of settlement must be disclosed on request, notwithstanding a claim of confidentiality.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FJIL-AU-12299

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August 28, 2000

Executive Director

Robert J. Freeman

Sergeant Robert C. Gabriel
Central Records
County of Suffolk Police Department
30 Yaphank Avenue
Yaphank, NY 11980

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Sergeant Gabriel:

As you are aware, I have received your letter of July 19 in which you focused on public access to the contents of domestic incident reports. You described three scenarios that commonly arise, and I am in general agreement with your approach to disclosure.

The first involves requests by "involved parties", the complainant or victim and the subject of the complaint, each of whom would in most instances have unrestricted access to the reports. The second involves a request by an "interested party", such as a person seeking a report relating to an ex-spouse and that person's new spouse or "significant other." You indicated that in those instances, the reports are reviewed "on a case by case basis", for the person seeking the record may have valid concerns pertaining to the safety of his or her children, for example. You wrote that reports may be released in that kind of situation, but that in others, the report may be "heavily redacted" prior to disclosure. The case by case analysis is, in my view, fully appropriate.

As we have discussed, the standard in the Freedom of Information Law pertinent to the matter, the ability to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy" [§87(2)(b)], offers flexibility that enables government officials to make reasoned decisions based on the facts and the effects of disclosure. You referred in your letter to your "gut feeling", and in considering issues involving privacy, it has been suggested that the "gut reaction" usually will lead to the correct legal conclusion. As stated by the Court of Appeals, "the essence of the exemption" involves details "that would ordinarily and reasonably regarded as intimate, private information" [*Hanig v. State Department of Motor Vehicles*, 79 NY2d 106, 112 (1992)]. The "gut feeling" that you described is, in my view, consistent with the direction of the state's highest court, and should be applied in situations involving the second scenario.

Sergeant Robert C. Gabriel
August 28, 2000
Page - 2 -

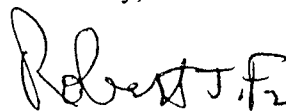
The third scenario involves requests by members of the public and the news media. You wrote that the reports are heavily redacted to protect personal privacy, and that names are not ordinarily disclosed, unless an arrest or some other significant police intervention occurs. Again, I am in general agreement with your position. Names of those involved in a domestic dispute need not be disclosed in my opinion, unless there is an arrest, in which case the identity of the person charged would clearly be public, or some other event in which disclosure would result in a permissible rather than an unwarranted invasion of personal privacy.

Becoming common, however, is the request "for any and all reports involving police calls involving a particular family or address." You referred to a request in which the Department located fifteen domestic incidents pertaining to the parties named and questioned whether, even after the deletion of identifying details, "the simple confirmation of so many domestic incidents may arguably be unwarranted." From my perspective, it is unlikely that a denial of a request analogous to that described could be justified. While the details of an event or the names of those involved might justifiably withheld, the fact that an event occurred involving the presence of a police officer would, in my view, be public. In short, the presence of a police vehicle at a particular time and location due to a call from a complainant, a family member or a neighbor is not secret, and a record that makes reference to the event would, in my opinion, be public. That there may have been a number of events at a certain location would not, in my view, alter rights of access to records.

In a related vein, although there is no legal definition of the phrase "police blotter", based on custom, it has been held that a police blotter is typically a log or diary in which events recorded by or to a police department are recorded. Assuming that the blotter includes no names or investigative information, but merely consists of a summary of events or occurrences, such a record has been found to be accessible under the Freedom of Information Law [see Sheehan v. City of Binghamton, 59 AD2d 808 (1977)]. Disclosure of the portions of the reports at issue that indicate that an event occurred would appear to be analogous to the disclosure of the contents of the traditional police blotter.

I hope that I have been of assistance. If you would like to discuss the matter, please feel free to contact me.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm



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OML-A - 3200
FOIL-A - 12300

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Executive Director

Robert J. Freeman

August 28, 2000

Ms. Linda Mangano

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Mangano:

I have received your letter of July 26. You complained that the agendas prepared prior to meetings of the Board of Trustees of the Village of Ossining are incomplete and frequently changed, and that the documents to be used by the Board at meetings are not disclosed before meetings. You asked whether "there [is] anything that can be done about the Village's failure to FULLY INFORM the public 72 hours prior to a meeting as to what PRECISELY will be discussed at a meeting" (emphasis yours).

From my perspective, there is no requirement that a public body fully inform the public of the subjects to be considered at a meeting. In this regard, I offer the following comments.

First, §104 of the Open Meetings Law pertains to notice of meetings, and that provision merely requires that notice of a meeting indicate the time and place of the meeting; there is no requirement that the subjects to be considered be included in the notice.

Second, in a similar vein, there is nothing in the Open Meetings Law or any other statute of which I am aware that requires that an agenda be prepared prior to a meeting. Further, even if an agenda has been prepared, there is no general requirement that a public body follow the agenda.

Third, with respect to the materials prepared or distributed to Board members prior to a meeting, which some have characterized as an "agenda packet", I direct your attention to the Freedom of Information Law. As you are aware, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, the contents of the records in question serve as the factors relevant to an analysis of the extent to which the records may be withheld or must be disclosed. In my view, several of the grounds for denial may be relevant to such an analysis.

Records prepared by Village staff and forwarded to members of the Board would constitute intra-agency materials that fall within the coverage of §87(2)(g) of the Freedom of Information Law. That provision states that an agency may withhold records that:

"are inter-agency or intra-agency materials which are not:

- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations; or
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

It is emphasized that the Court of Appeals, the State's highest court, has specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

"While the reports in principle may be exempt from disclosure, on this record - which contains only the barest description of them - we cannot determine whether the documents in fact fall wholly within the scope of FOIL's exemption for 'intra-agency materials,' as claimed by respondents. To the extent the reports contain 'statistical or factual tabulations or data' (Public Officers Law section 87[2][g][i], or other material subject to production, they should be redacted and made available to the appellant" [Xerox Corp. v. Town of Webster, 65 NY 2d 131, 133 (1985)].

Therefore, as indicated earlier, intra-agency materials may be accessible or deniable in whole or in part, depending upon their specific contents.

Also relevant may be §87(2)(b), which enables an agency to withhold records or portions thereof which if disclosed would result in an unwarranted invasion of privacy. That provision might be applied with respect to a variety of matters relating to hiring, evaluation or discipline of employees, for example.

Section 87(2)(c) of the Freedom of Information Law permits an agency to withhold records to the extent that disclosure "would impair present or imminent contract awards or collective

Ms. Linda Mangano
August 28, 2000
Page - 3 -

bargaining negotiations". Items within an agenda packet might in some instances fall within that exception.

In short, while a blanket denial of an agenda packet may be inconsistent with the Freedom of Information Law, there would likely be one or more grounds for denial that could appropriately be cited withhold portions of those records.

I point out that although records or perhaps portions of records may be withheld, there is no requirement that they must be withheld. The Court of Appeals, the state's highest court, has confirmed that the exceptions to rights of access are permissive, rather than mandatory, stating that:

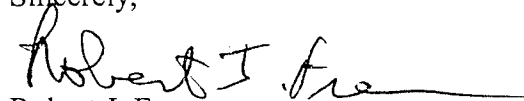
"while an agency is permitted to restrict access to those records falling within the statutory exemptions, the language of the exemption provision contains permissible rather than mandatory language, and it is within the agency's discretion to disclose such records, with or without identifying details, if it so chooses" [Capital Newspapers v. Burns, 67 NY 2d 562, 567 (1986)].

Consequently, even if it is determined that a record may be withheld under §87(2)(g), for example, an agency would have the authority to disclose the record.

It is also emphasized that the grounds for withholding records under the Freedom of Information Law and the grounds for entry into executive session are separate and distinct, and that they are not necessarily consistent. In some instances, although a record might be withheld under the Freedom of Information Law, a discussion of that record might be required to be conducted in public under the Open Meetings Law, and vice versa. For instance, if an administrator transmits a memorandum to the Board suggesting a change in policy, that record could be withheld. It would consist of intra-agency material reflective of an opinion or recommendation. Nevertheless, when the Board discusses the recommendation at a meeting, there would be no basis for conducting an executive session. Consequently, there may be no significant reason for withholding the record even though the Freedom of Information Law would so permit.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Trustees



STATE OF NEW YORK
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FOIL-AU-12301

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August 29, 2000

Executive Director

Robert J. Freeman

Mr. Frank J. Ginther
Publisher
The Rensselaer Beacon
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Rensselaer, NY 12144-2822

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Ginther:

I have received your letter of July 20 in which you sought an advisory opinion concerning rights of access to a stipulation of settlement between the City of Rensselaer and the BASF Corporation that was approved by resolution by the Common Council. You wrote that the public was informed that the stipulation would not be disclosed due to ongoing negotiations between the City and BASF.

From my perspective, the stipulation of settlement is accessible to the public, and in this regard, I offer the following comments.

First, situations have arisen in which the parties to an agreement or stipulation of settlement have agreed to refrain from speaking about or disclosing the terms of the agreement or stipulation on their own initiative. In my view, it is likely that the parties may validly agree not to speak about a settlement or agreement. However, the Freedom of Information Law pertains to records, not to speech. In a decision that may be pertinent 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)].

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. Unless records may justifiably be withheld in accordance with one or more of the grounds for denial, a claim, a promise or an agreement to maintain confidentiality would, based on judicial decisions, be meaningless.

In Geneva Printing Co. v. Village of Lyons (Supreme Court, Wayne County, March 25, 1981), a public employee charged with misconduct and in the process of an arbitration hearing engaged in a settlement agreement with a municipality. One aspect of the settlement was an agreement to the effect that its terms would remain confidential. Notwithstanding the agreement of confidentiality, which apparently was based on an assertion that "the public interest is benefited by maintaining harmonious relationships between government and its employees", the court found that

no ground for denial could justifiably be cited to withhold the agreement. In 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..."

In a more recent decision, the matter involved the subject of a settlement agreement with a town that included a confidentiality clause who 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 provided" (Hansen v. Town of Wallkill, Supreme Court, Orange County, December 9, 1998).

In short, absent the proper assertion of a ground for denial appearing in §87(2) of the Freedom of Information Law, I believe that the stipulation of settlement must be disclosed on request, notwithstanding a claim of confidentiality.

Since the denial was apparently based on the contention that negotiations are ongoing, pertinent to an analysis of the matter is §87(2)(c), which 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 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 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

Mr. Frank J. Ginther

August 29, 2000

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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)].

If I understand the matter accurately, §87(2)(c) would not apply. 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)].

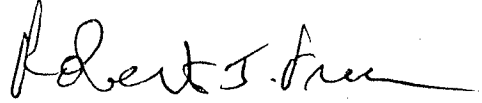
Based on the foregoing, assuming that the record at issue is known to both parties, the rationale described above and the judicial decisions rendered to date suggest that §87(2)(c) could not justifiably be asserted to withhold the record.

In an effort to resolve the matter, a copy of this opinion will be forwarded to the Common Council.

Mr. Frank J. Ginther
August 29, 2000
Page - 6 -

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: Common Council



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DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL Ac-12302

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August 29, 2000

Executive Director

Robert J. Freeman

Mr. Warren J. Sonne
40 Wall Street
Suite 5600
New York, NY 10005

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Sonne:

As you are aware, I have received your letter and the materials relating to it in which you described ongoing difficulties in obtaining motor vehicle accident reports from the Nassau County Police Department. The County has continually denied access to the reports, citing §66-a of the Public Officers Law, stating that "you are not an interested party." You added that Police Department officials are familiar with opinions prepared by this office on the subject and that they disagree with them.

In this regard, the opinions rendered by the Committee on Open Government are based on the language of applicable statutes and judicial decisions. In this instance, essence of the issue was determined by the Court of Appeals, the state's highest court. While it is our hope that opinions rendered by this office are influential and educational, there is no requirement that government agencies heed those opinions. The issue in this case, however, was considered directly by the Court of Appeals, and in my view, a government agency cannot justifiably ignore the direction provided in its determination.

By way of background, first, the Freedom of Information Law pertains to agency records and §86(4) of the Law defines the term "record" to mean:

"any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Mr. Warren J. Sonne

August 29, 2000

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Based on the foregoing, written materials comprising an accident report, including photographs taken at the scene, would in my opinion clearly constitute "records" subject to rights conferred by the Freedom of Information Law.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Second, §66-a of the Public Officers Law has required the disclosure of accident reports, except to the extent that their release would interfere with a criminal investigation, since its enactment in 1941. You indicated that the report in which you are specifically interested relates to a closed case "that did not result in an arrest, or criminal charges being filed." As such, the exception to rights of access conferred by §66-a would not be applicable or pertinent.

Subdivision (1) of §66-a states that:

"Notwithstanding any inconsistent provisions of law, general, special of local or any limitation contained in the provision of any city charter, all reports and records of any accident, kept or maintained by the state police or by the police department or force of any county, city, town, village or other district of the state, *shall be open to the inspection of any person having an interest therein*, or of such person's attorney or agent, even though the state or a municipal corporation or other subdivision thereof may have been involved in the accident; except that the authorities having custody of such reports or records may prescribe reasonable rules and regulations in regard to the time and manner of such inspection, and may withhold from inspection any reports or records the disclosure of which would interfere with the investigation or prosecution by such authorities of a crime involved in or connected with the accident" (emphasis mine).

The Freedom of Information Law is consistent with the language quoted above, for while accident reports are generally available, §87(2)(e)(i) of the Freedom of Information Law states in relevant part that records compiled for law enforcement purposes may be withheld to the extent that disclosure would "interfere with law enforcement investigations or judicial proceedings."

Third and most importantly, the Court of Appeals directly addressed the meaning of the phrase that is italicized and upon which the Police Department has relied in restricting access. Specifically, the Court found that a right of access to accident reports "is not contingent upon the showing of some cognizable interest other than that inhering in being a member of the public" [Scott, Sardano & Pomeranz v. Records Access Officer, 65 NY 2d 294, 491 NYS 2d 289, 291 (1985)]. Therefore, unless disclosure would interfere with a criminal investigation, an accident report would be available to any person, including one who had no involvement in an accident.

Mr. Warren J. Sonne
August 29, 2000
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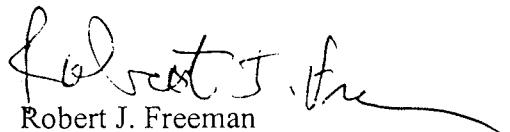
Lastly, aside from the broad definition of the term "record" appearing in the Freedom of Information Law, I point out that it has been held that records other than an MV-104 prepared during the course of an investigation of an accident are considered part of the accident report and are therefore available under §66-a of the Public Officers Law [see Fox v. New York, 28 AD 2d (1967); Romanchuk v. County of Westchester, 42 AD 2d 783, aff'd 34 NY 2d 906 (1973)].

In sum, based on the direction given by the state's highest court, I believe that your status as a member of the public provides you with rights of access to records under both §66-a of the Public Officers Law and the Freedom of Information Law.

In an effort to enhance compliance with and understanding of applicable law, copies of this opinion will be forwarded to County officials.

I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:jm

cc: William J. Willett, Commissioner of Police
John G. Kennedy, Second Deputy Commissioner
Bruce Duryee, Detective Sergeant
Officer Berry, Legal Bureau



STATE OF NEW YORK
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FOIL-AO-12303

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Executive Director

Robert J. Freeman

August 31, 2000

Professor Robert L. Arnold
412 Sibley Hall
Plattsburgh State University
101 Broad Street
Plattsburgh, NY 12901

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Professor Arnold:

As you are aware, I have received your letter of July 26 and a variety of related materials. You have sought an opinion and guidance concerning your attempts to gain access to the "re-certification" document (including all "statements and assurances") that was submitted by the State University at Plattsburgh to the State Education Department. Both the State University and the Education Department have denied the request pursuant to §87(2)(g) of the Freedom of Information Law.

In this regard, I offer the following comments.

First, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. I point out that the introductory language of §87(2) refers to the ability to withhold "records or portions thereof" that fall within the grounds for denial that follow. The phrase quoted in the preceding sentence indicates that records may include both accessible and deniable information, and that an agency is required to review records sought in their entirety to determine the extent, if any, to which they may properly be withheld.

Second, records addressed to one agency from another, i.e., communications between the State University to the State Education Department, would constitute "inter-agency materials" that fall within the scope of §87(2)(g). I am unfamiliar with the contents of the records at issue. However, due to its structure, the cited provision frequently requires substantial disclosure. Specifically, §87(2)(g) permits an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations; or
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is emphasized that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. If the report is indeed the work of a consultant, it would be available or deniable, in whole or in part, based on its specific contents.

I note that the denial by the State University is based on a contention that the record is not final. Nevertheless the content of the record would determine the extent to which it may be withheld. I point out that one of the contentions offered by the New York City Police Department in a 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)]. 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 record is not final or has not been accepted or approved would not represent an end of an analysis of rights of access or an agency's obligation to review the entirety of its contents.

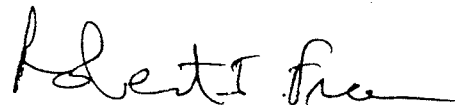
Mr. Robert Arnold
August 31, 2000
Page - 3 -

The Court also dealt with the issue of what constitutes "factual data" that must be disclosed under §87(2)(g)(i). In its consideration of the matter, the Court found that:

"...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][i]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182)" (id., 276-277).

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: L. Jeffrey Perez
Leslie Templeman



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12304

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Executive Director

Robert J. Freeman

August 31, 2000

Ms. Mea Knapp



The staff of the Committee on 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. Knapp:

I have received your letter of July 27. On behalf of the Suffolk County Electrical Agency, you have sought an opinion "as to the parameters regarding public accessibility of Long Island Power Authority customers, namely certain Suffolk businesses and their electrical energy usage." You indicated that the Agency is specifically interested in obtaining "a list from LIPA of all Suffolk County businesses that have an energy demand of 200kw per month or more."

In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to agencies, and §86(3) defines the term "agency" to include:

"any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Since a public authority constitutes an "agency", I believe that the LIPA clearly falls within the coverage of the Freedom of Information Law.

Second, it is emphasized that the Freedom of Information Law pertains to existing records, and that §89(3) states in part that an agency is not required to create a record in response to a request. It is emphasized, however, 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.”

Based upon the language quoted above, if information is maintained in some physical form, it would constitute a “record” subject to rights of access conferred by the Law. Further, the definition of “record” includes specific reference to computer tapes and discs, and it was held in the early days of the Freedom of Information Law that “[i]nformation is increasingly being stored in computers and access to such data should not be restricted merely because it is not in printed form” [Babigian v. Evans, 427 NYS 2d 688, 691 (1980); aff’d 97 AD 2d 992 (1983); see also, Szikszay v. Buelow, 436 NYS 2d 558 (1981)].

When information is maintained electronically, it has been advised that if the information sought is available under the Freedom of Information Law and may be retrieved by means of existing computer programs, an agency is required to disclose the information. In that kind of situation, the agency would merely be retrieving data that it has the capacity to retrieve. Disclosure may be accomplished either by printing out the data on paper or perhaps by duplicating the data on another storage mechanism, such as a computer tape or disk. On the other hand, if information sought can be retrieved from a computer or other storage medium only by means of new programming or the alteration of existing programs, those steps would be the equivalent of creating a new record. As stated earlier, since §89(3) does not require an agency to create a record, an agency is not required to reprogram or develop new programs to retrieve information that would otherwise be available [see Guerrier v. Hernandez-Cuebas, 165 AD 2d 218 (1991)].

Often information stored electronically can be extracted by means of a few keystrokes on a keyboard. While some have contended that those kinds of minimal steps involve programming or reprogramming, and, therefore, creating a new record, so narrow a construction would tend to defeat the purposes of the Freedom of Information Law, particularly as information is increasingly being stored electronically. If electronic information can be extracted or generated with reasonable effort, if that effort involves less time and cost to the agency than engaging in manual deletions, it would seem that an agency should follow the more reasonable and less costly and labor intensive course of action.

In my view, there is clearly a distinction between extracting information and creating it. If an applicant knows that an agency’s database consists of 10 items or “fields”, asks for items 1, 3 and 5, but the agency has never produced that combination of data, would it be “creating” a new record? The answer is dependent on the nature of the agency’s existing computer programs; if the agency has the ability to retrieve or extract those items by means of its existing programs, it would not be creating a new record; it would merely be retrieving what it has the ability to retrieve in conjunction with its electronic filing system. An apt analogy may be to a filing cabinet in which files are stored alphabetically and an applicant seeks items “A”, “L” and “X”. Although the agency may never have retrieved that combination of files in the past, it has the

Ms. Mea Knapp
August 31, 2000
Page - 3 -

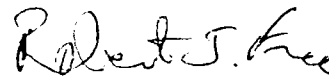
ability to do so, because the request was made in a manner applicable to the agency's filing system.

In the context of your inquiry, if the LIPA has the ability to generate the data of your interest, and if you are willing to pay the actual cost of reproduction as envisioned by §87(1)(b)(iii) of the Freedom of Information Law, I believe that it, would be obliged to do so. On the other hand, if LIPA does not maintain a list of businesses that have an energy demand of 200kw per month or more, and if it cannot generate such a list, I do not believe that it would be required to prepare or generate the list on your behalf.

Third, in terms of rights of access, when a record exists or can be generated, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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, in view of the nature of the information sought, it is unlikely that any of the grounds for denial would be applicable or pertinent. If that is so, it would be accessible under the law.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt
cc: Records Access Officer, LIPA



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-A0-12305

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September 1, 2000

Executive Director

Robert J. Freeman

Hon. Bernard Kessler

The staff of the Committee on 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:

I have received your letter of August 25. In your capacity as attorney for the Town of Rhinebeck, you have sought an advisory opinion concerning a request made under the Freedom of Information Law by Wallace S. Nolen. Mr. Nolen has sent the same request to numerous entities of municipal government and state agencies.

The first element of Mr. Nolen's request involves "a complete listing containing the full names, titles, salaries and public office address of each and every employee of your Town". The second involves a "complete listing containing the voice and fax telephone numbers of every employee of your Town", and in the third, he requested the e-mail address "of each employee in which an email address is known and used by such person."

With respect to each aspect of the request, he asked that the records be e-mailed to him or, in the alternative, faxed to him via his toll free fax number. Mr. Nolen suggested that sending a record to him by e-mail or fax should not involve any fee, for he is not seeking paper records. If a listing that he is requesting is not kept in a computer or other electronic format, citing Key v. Hynes [205 AD2d 779 (1994)], he asked that he "be provided with a certificate in the form of an affidavit by a person with knowledge attesting to such fact..." Further, since he contended that no fee should be assessed if records are e-mailed or faxed to him, Mr. Nolen "advised that N.Y.S. Penal Law section 200.35 and other statutes makes it a crime (class A misdemeanor) for a public official to demand, solicit, and/or receive any fee greater than allowed by law." He also added the following admonition in relation to the foregoing:

"Rest assured that if any attempt is made to delay this request for payment of any fee and/or any solicitation of a fee, I will not hesitate to file a formal criminal complaint as well as to take other lawful steps to protect my rights."

In this regard, I offer the following comments.

First, 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, the first record sought by Mr. Nolen, is included among the records required to be kept pursuant to "subdivision three of section eighty-seven" of the Law. Specifically, that provision states in relevant part that:

"Each agency shall maintain...

(b) a record setting forth the name, public office address, title and salary of every officer or employee of the agency... "

As such, a payroll record that identifies all officers or employees by name, public office address, title and salary must be prepared to comply with the Freedom of Information Law. Moreover, I believe that a payroll list identifying employees, must be disclosed.

In analyzing rights of access, of primary relevance is §87(2)(b), of the Freedom of Information Law, which permits an agency to withhold record or portions of records when disclosure would result in "an unwarranted invasion of personal privacy." However, payroll information has been found by the courts to be available [see e.g., Miller v. Village of Freeport, 379 NYS 2d 517, 51 AD 2d 765, (1976); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NYS 2d 954 (1978)]. In addition, this Committee has advised and the courts have upheld the notion that records that are relevant to the performance of the official duties of public employees are generally available, for disclosure in such instances would result in a permissible as opposed to an unwarranted invasion of personal privacy [Gannett, supra; Capital Newspapers v. Burns, 109 AD 2d 292, aff'd 67 NY 2d 562 (1986) ; Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980; Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975) ; and Montes v. State, 406 NYS 664 (Court of Claims 1978)]. As stated prior to the enactment of the Freedom of Information Law, payroll records:

"...represent important fiscal as well as operational information. The identity of the employees and their salaries are vital statistics kept in the proper recordation of departmental functioning and are the primary sources of protection against employment favoritism. They are subject therefore to inspection" Winston v. Mangan, 338 NYS 2d 654, 664 (1972)].

In short, a record identifying agency officers and employees by name, public office address, title and salary must in my view be maintained and made available.

With respect to the "complete listing" of the voice and fax numbers of Town employees, if there is no such listing, the Town, in my view, would not be required to create such a record on behalf of an applicant. Insofar as such a listing exists, it is possible that some portions of the record may be accessible, while others might properly be withheld.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, two of the grounds for denial may be pertinent to an analysis of rights of access. Section 87(2)(b), to which reference was made above, could not be cited, in my opinion, to withhold employee office phone numbers in most instances, for the phone numbers relate to the performance of a public employee's duties. In some circumstances, however, certain telephone and particularly fax lines may be dedicated to certain uses. If those lines were to become tied up by an outsider and could not be used as intended, an agency could be precluded from carrying out its duties in a manner in which the public would be adequately served or protected. For example, if a telephone or fax number is used by a municipality to engage in law enforcement functions or emergency communications, and if the municipality cannot transmit or receive information due to incoming faxed transmissions that tie up the line, I believe that §87(2)(f) would likely serve as a basis for a denial of a request. That provision authorizes an agency to withhold records when disclosure "would endanger the life or safety of any person."

As you are aware, 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)]. However, in cases involving the assertion of §87(2)(f), the standard developed by the courts is somewhat less stringent, for 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]. In sum, insofar as there is a possibility that disclosure of phone or fax numbers could endanger life or safety, based on judicial decisions, I believe that §87(2)(f) could properly be asserted.

If an agency has a central telephone number and calls are forwarded to employees through the use of a switchboard or other transfer mechanism, it would appear that disclosure of the central telephone number would be adequate to comply with the request.

A similar contention might be made with regard to the disclosure of e-mail addresses. While I am not an expert in computer technology, it has become widely known due to events that became international in their effects that e-mail and the use of an e-mail address can transmit viruses that can cripple an electronic information or communication system or obliterate information stored electronically. A virus attached to a single e-mail address can be transmitted to every other e-mail address that has been contacted. That being so, again, it might be contended that a wholesale disclosure of e-mail addresses, which in turn could result in an inability to carry out critical governmental functions, could jeopardize the lives and safety of members of the public, as well as government employees.

I note, too, that §87(2)(i) permits an agency to withhold "computer access codes". While an e-mail address might not have been created to be used as a computer access code, it can be used in to gain unauthorized access to a computer or to transmit a virus, for example, to one or perhaps many more computers. Although there is no judicial decision of which I am aware that deals with the situation raised, the cited provision might justifiably be asserted to withhold e-mail addresses.

Second, in seeking the records by e-mail or fax and suggesting that no fee should be charged because there is no reproduction of a paper record, Mr. Nolen, in my view, has misconstrued the Freedom of Information Law and sought to extend agencies' obligations beyond their statutory duties. From my perspective, there is a distinction in an agency's responsibilities relative to the *format* in which records are made available and *the means by which they are transmitted*.

As indicated earlier, the Freedom of Information Law pertains to existing records. It is emphasized, however, that §86(4) defines the term "record" expansively to include:

"any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based upon the language quoted above, if information is maintained by or for an agency in some physical form, it constitutes a "record" subject to rights of access conferred by the Freedom of Information Law. The definition includes specific reference to computer tapes and discs, and it was held soon after the reenactment of the statute 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 NYS2d 688, 691 (1980); aff'd 97 AD2d 992 (1983); see also, Szikszay v. Buelow, 436 NYS2d 558 (1981)]. "Form" or "format" in my view involves the medium by which information is stored; whether information is stored on paper or on a computer tape or in a computer disk, it constitutes a "record."

In what may be the leading decision relating to an agency's obligations regarding disclosure in an electronic medium, Brownstone Publishers Inc. v. New York City Department of Buildings [166 AD2d 294 (1990)], the question involved an agency's duty to transfer electronic information from one electronic storage medium to another when it had the technical capacity to do so and when the applicant was willing to pay the actual cost of the transfer. As stated by the Appellate Division:

"The files are maintained in a computer format that Brownstone can employ directly into its system, which can be reproduced on computer tapes at minimal cost in a few hours time-a cost Brownstone agreed to assume (see, POL [section] 87[1] [b] [iii]). The DOB, apparently intending to discourage this and similar requests, agreed to provide the information only in hard copy, i.e., printed out on over a million sheets of paper, at a cost of \$10,000 for the paper alone, which would take five or six weeks to complete. Brownstone would then have to reconvert the data into computer-usable form at a cost of hundreds of thousands of dollars.

"Public Officers Law [section] 87(2) provides that, 'Each agency shall...make available for public inspection and copying all records...' Section 86(4) includes in its definition of 'record', computer tapes or discs. The policy underlying the FOIL is 'to insure maximum public access to government records' (Matter of Scott, Sardano & Pomerantz v. Records Access Officer, 65 N.Y.2d 294, 296-297, 491 N.Y.S.2d 289, 480 N.E.2d 1071). Under the circumstances presented herein, it is clear that both the statute and its underlying policy require that the DOB comply with Brownstone's reasonable request to have the information, presently maintained in computer language, transferred onto computer tapes" (id. at 295).

In another decision, 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]; aff'd 190 AD2d 1067 (4th Dept., 1993)].

In short, assuming that the conversion of format can be accomplished, that the data sought is available under FOIL, and that the data can be transferred from the format in which it is maintained to a format in which it is requested, an agency would be obliged to do so.

Mr. Nolen's request to have records e-mailed or faxed to him does not involve the format in which the records are or may be kept. If the payroll record discussed at the outset can be made available on a computer disk, and an applicant pays a fee based on the actual cost of reproduction [see §87(1)(b)(iii)], I believe that an agency would be required to make the record available in that kind of information storage medium. Mr. Nolen, however, is not asking that the records be made available in a particular information storage medium; rather, he is asking that they be *transmitted*

Hon. Bernard Kessler
September 1, 2000
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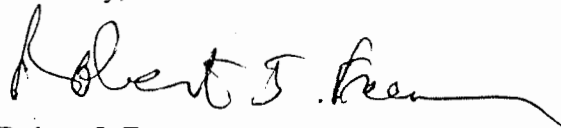
to him in a certain way. In my view, there is nothing in the Freedom of Information Law that requires that records be transmitted via fax or e-mail. An agency may choose to make records available via those methods of transmission, but there is no *obligation* to do so. An agency's responsibility under §§87(2) and 89(3) involves making records available for inspection and copying, and to make copies of records available upon payment of the appropriate fee.

Third, I believe that Mr. Nolen's construction of Key v. Hynes, supra, is misplaced. As I understand that decision, when an agency indicates that it cannot locate a record sought, an applicant can request that a certification be prepared indicating that a diligent search was made for the record. Key imposes a requirement that the certification must be made, in affidavit or similar form, by the person who actually conducted the search.

Lastly, in the twenty-six years in which the Freedom of Information Law has been in effect, I know of no situation in which a public officer has been charged with a crime in relation to his or her duties associated with the implementation of that statute.

Should any questions arise in relation to the foregoing, please feel free to contact me. 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: Wallace S. Nolen



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OTL-AD-12306

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September 1, 2000

Executive Director

Robert J. Freeman

Ms. Lila 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 Ms. Martin:

I have received your recent e-mail in which you asked whether the Freedom of Information Law "encompass[es] certain information concerning adoptees" and whether "the NYS courts [can] be made to answer specific queries under the FOIA."

In this regard, first, the Freedom of Information Law is applicable to agency records, and §86(3) of that statute defines the term "agency" to include:

"any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines the term "judiciary" to mean:

"the courts of the state, including any municipal or district court, whether or not of record."

In view of the foregoing, the courts and court records are not subject to the Freedom of Information Law. As such, they are not required to honor requests made under that statute.

Second, although the Freedom of Information Law grants broad rights of access, in this instance, a different statute takes precedence.

Ms. Lila Martin
September 1, 2000
Page - 2 -

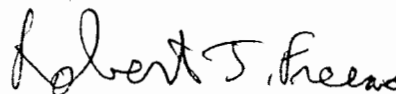
As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. The first ground for denial of access, §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 the preceding remarks enhance your understanding of the issues you raised 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

FOIA-DO-12307

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September 5, 2000

Executive Director

Robert J. Freeman

Hon. Gary L. Flaherty

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Flaherty:

I have received your letter of August 4. In your capacity as a member of the Canaan Town Board, you have raised several issues relating to the "FOIA Program of New York."

Before dealing with the issues, since your letter was addressed to my attention at the Office of the Secretary of State and the Association of Town Clerks, I point out that the Association of Town Clerks, like the Association of Towns, is a private organization. The Committee on Open Government is a unit of the Department of State upon which the Secretary of State serves as a member. Further, the "FOIA" is the federal Freedom of Information Act, which applies to federal agencies only. Each state has enacted its own version of an access to records to law, and in New York, it is the "Freedom of Information Law."

With respect to the issues, first, the Freedom of Information Law pertains to agency records, and §86(4) of the Law defines the term "record" expansively to include:

"any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, assuming that an agency, such as the Town, 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].

If the Town has the ability to prepare a duplicate recording, I believe that it would be obliged to do so [see §89(3)] upon payment of the requisite fee. I note that §87(1)(b)(iii) indicates that the fee for copies of records other than photocopies should be based on the actual cost of reproduction.

Second, with regard to the retention or destruction of a tape recording of a meeting, I direct your attention to Article 57-A of the Arts and Cultural Affairs Law, which deals with the management, custody, retention and disposal of records by local governments. For purposes of those provisions, §57.17(4) of the Arts and Cultural Affairs Law defines "record" to mean:

"...any book, paper, map, photograph, or other information-recording device, regardless of physical form or characteristic, that is made, produced, executed, or received by any local government or officer thereof pursuant to law or in connection with the transaction of public business. Record as used herein shall not be deemed to include library materials, extra copies of documents created only for convenience of reference, and stocks of publications."

Further, §57.25 of the Arts and Cultural Affairs Law states in relevant part that:

"1. It shall be the responsibility of every local officer to maintain records to adequately document the transaction of public business and the services and programs for which such officer is responsible; to retain and have custody of such records for so long as the records are needed for the conduct of the business of the office; to adequately protect such records; to cooperate with the local government's records management officer on programs for the orderly and efficient management of records including identification and management of inactive records and identification and preservation of records of enduring value; to dispose of records in accordance with legal requirements; and to pass on to his successor records needed for the continuing conduct of business of the office...

2. No local officer shall destroy, sell or otherwise dispose of any public record without the consent of the commissioner of education. The commissioner of education shall, after consultation with other state agencies and with local government officers, determine the

minimum length of time that records need to be retained. Such commissioner is authorized to develop, adopt by regulation, issue and distribute to local governments retention and disposal schedules establishing minimum retention periods..."

Based on the foregoing, records cannot be destroyed without the consent of the Commissioner of Education, and local officials must "have custody" and "adequately protect" records until the minimum period for the retention of the records has been reached. In the case of a tape recording of a meeting, I believe that the minimum retention period is four months.

Third, I do not believe that the Town could generally require you or any member of the public to state the reason for requesting records sought under the Freedom of Information Law. From my perspective, that statute is clearly 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)].

Fourth, 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 town board, as the governing body of a public corporation, generally acts by means of motions carried by an affirmative vote of a majority of its total membership (see General Construction Law, §41). In my view, in most instances, a board, including a 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.

Next, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests and appeals. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Lastly, I note that the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), which govern the procedural aspects of the Law, state that:

"(a) The governing body of a public corporation or the head, chief executive or governing body of other agencies shall hear appeals or shall designate a person or body to hear appeals regarding denial of access to records under the Freedom of Information Law.

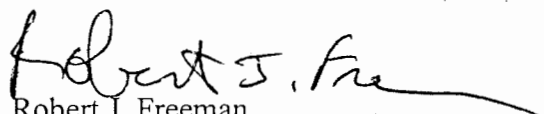
(b) Denial of access shall be in writing stating the reason therefor and advising the person denied access of his or her right to appeal to the person or body established to hear appeals, and that person or body shall be identified by name, title, business address and business telephone number. The records access officer shall not be the appeals officer" (§1401.7).

As such, the person making an initial determination to grant or deny access to records cannot be the same as the person designated to determine appeals.

Hon. Gary L. Flaherty
September 5, 2000
Page - 5 -

I hope that the foregoing serves to clarify your understanding of the Freedom of Information Law and that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Hon. Charlotte Cowan, Town Clerk



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

7071-AD-12308

Committee Members

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Executive Director

Robert J. Freeman

September 5, 2000

Mr. Dean Shuler
Carey New Orleans
Signature Livery, Inc.
P.O. Box 9020
Metairie, LA 70055

Dear Mr. Schuler:

I have received your letter and the materials attached to it. You have sought assistance concerning your requests made to the Department of Motor Vehicles for a list of livery plates. According to a response by the Department, there is no list of "livery vehicles only", and it would require programming to generate such a list.

In this regard, it is noted at the outset that the Freedom of Information Law pertains to existing records. Section 89(3) of that statute provides in part that an agency is not required to create a record in response to a request. I point out, however, that §86(4) of the Freedom of Information Law defines the term "record" expansively to include:

"any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based upon the language quoted above, if information is maintained in some physical form, it would in my opinion constitute a "record" subject to rights of access conferred by the Law. Further, the definition of "record" includes specific reference to computer tapes and discs, and it was held some fifteen years ago that "[i]nformation is increasingly being stored in computers and access to such data should not be restricted merely because it is not in printed form" [*Babigian v. Evans*, 427 NYS 2d 688, 691 (1980); *aff'd* 97 AD 2d 992 (1983); see also, *Szikszay v. Buelow*, 436 NYS 2d 558 (1981)].

When information is maintained electronically, it has been advised that if the information sought is available under the Freedom of Information Law and may be retrieved by means of existing

Mr. Dean Shuler
September 5, 2000
Page - 2 -

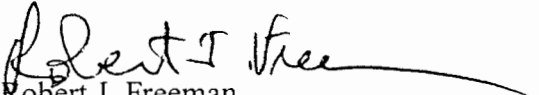
computer programs, an agency is required to disclose the information. In that kind of situation, the agency in my view would merely be retrieving data that it has the capacity to retrieve. Disclosure may be accomplished either by printing out the data on paper or perhaps by duplicating the data on another storage mechanism, such as a computer tape or disk. On the other hand, if information sought can be retrieved from a computer or other storage medium only by means of new programming or the alteration of existing programs, those steps would, in my opinion, be the equivalent of creating a new record. As stated earlier, since §89(3) does not require an agency to create a record, I do not believe that an agency would be required to reprogram or develop new programs to retrieve information that would otherwise be available [see Guerrier v. Hernandez-Cuebas, 165 AD 2d 218 (1991)].

If the information that you seek does not now exist or cannot be retrieved or extracted without significant reprogramming, an agency would not, in my opinion, be obliged to develop new programs or modify its existing programs in an effort to generate the data of your interest.

In sum, since the Department of Motor Vehicles does not maintain the list that you are seeking, it would not be required to create a list on your behalf. Further, if the Department cannot generate a list based on its existing computer programs, it would not be obliged to develop a new computer program to accommodate you.

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: Alexandra K. Sussman



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI - AO - 12309

Committee Members

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Executive Director

Robert J. Freeman

September 5, 2000

Ms. Casey Myers

Dear Ms. Myers:

I have received your letter of July 27, which again deals with your treatment by law enforcement officials.

While I believe that portions of records containing the names, titles and badge numbers of police department and other government agency employees involved in the incident you described must be disclosed, for reasons expressed in my letter to you of July 18, I do not believe that training records pertaining to particular police officers are accessible. It is reiterated that §50-a of the Civil Rights Law states that personnel records pertaining to police officers that are used to evaluate performance toward continued employment or promotion cannot be disclosed unless the subject of the records consents to disclosure or a court orders disclosure.

It is noted that the kinds of records in which you are interested would be available under the Freedom of Information Law regarding most public employees, and that §50-a creates an area of confidentiality that in most instances does not exist. I point out, too, that the Committee on Open Government has recommended legislation that would amend §50-a and require disclosure of records pertaining to police officers in the same manner and achieving the same level of accountability as other public employees. If you believe that legislation of that nature is worthwhile, it is suggested that you express your views to your State Senator and Assembly member.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL 20-12310

Committee Members

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September 5, 2000

Executive Director

Robert J. Freeman

Mr. George A. Mayes

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Mayes:

I have received your letter of August 2, as well as the materials attached to it. I note that you referred to a letter of August 2 addressed to the Warrensburg Town Clerk, Donna Combs, but that the letter was not attached. Nevertheless, based on a review of the other materials, I offer the following comments.

As you are likely aware, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

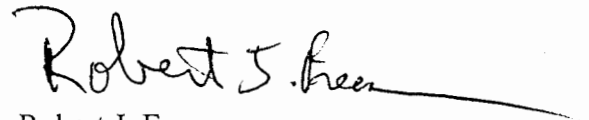
While an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days, when such acknowledgement is given, there is no precise time period within which an agency must grant or deny access to records. The time needed to do so may be dependent upon 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. George A. Mayes
September 5, 2000
Page - 2 -

I know of no provision that specifies that a letter acknowledging the receipt of a request must include reference to the date that a request was received. In my view, so long as the receipt of a request is in fact acknowledged within five business days of its receipt, again, I believe that the agency would be acting in a manner consistent with law. I agree, however, with your inference that it would be appropriate to include the date of receipt of a request in an acknowledgment that a request was received.

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. Donna Combs, Town Clerk



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI No. 12311

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Executive Director

Robert J. Freeman

September 5, 2000

Mr. Bruce T. Reiter



Dear Mr. Reiter:

I have received your letter of August 1 and the materials attached to it. You have asked whether the records that you requested from the Enlarged School District of the City of Watervliet must be retained for seven years or similar period.

In this regard, I offer the following comments.

First, you cited 5 USC §§552 and 552a as the basis for your request to the District. Those statutes are, respectively, the federal Freedom of Information and Privacy Acts, and they apply only to records maintained by federal agencies. The statute dealing with access to records of state and local government in New York is the New York Freedom of Information Law.

Second, the Freedom of Information Law does not address issues involving the retention and disposal of records. 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."

Further, §57.25 of the Arts and Cultural Affairs Law states in relevant part that:

"1. It shall be the responsibility of every local officer to maintain records to adequately document the transaction of public business and the services and programs for which such officer is responsible; to

retain and have custody of such records for so long as the records are needed for the conduct of the business of the office; to adequately protect such records; to cooperate with the local government's records management officer on programs for the orderly and efficient management of records including identification and management of inactive records and identification and preservation of records of enduring value; to dispose of records in accordance with legal requirements; and to pass on to his successor records needed for the continuing conduct of business of the office...

2. No local officer shall destroy, sell or otherwise dispose of any public record without the consent of the commissioner of education. The commissioner of education shall, after consultation with other state agencies and with local government officers, determine the minimum length of time that records need to be retained. Such commissioner is authorized to develop, adopt by regulation, issue and distribute to local governments retention and disposal schedules establishing minimum retention periods..."

Based on the foregoing, records cannot be destroyed without the consent of the Commissioner of Education, and local officials must "have custody" and "adequately protect" records until the minimum period for the retention of the records has been reached. The functions of the Commissioner in relation to the foregoing are carried out by the State Archives and Records Administration (SARA), a unit of the State Education Department. A copy of the applicable retention schedule is likely maintained by the District Clerk, or alternatively, it can be obtained from SARA, which can be reached at 474-6926.

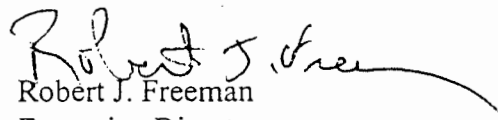
Lastly, you referred to an appeal made to this office. In this regard, the Committee on Open Government is authorized to provide advice concerning public access to government records; it is not empowered to determine appeals or compel an agency to grant or deny access to records. The provision dealing with 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 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. Bruce T. Reiter
September 5, 2000
Page - 3 -

I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:jm

cc: Carol Carlson
Stephen F. Bailly



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMC. AO - 3202
FOI. AO - 12312

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September 5, 2000

Executive Director

Robert J. Freeman

Ms. Sandra G. Mallah
Superintendent of Schools
Greenburgh Eleven Union Free School District
P.O. Box 501
Dobbs Ferry, NY 10522-0501

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 Superintendent Mallah:

I appreciate having received a copy of your determination of an appeal made under the Freedom of Information Law rendered on August 4. In response to a request for minutes of an executive session, you wrote that "the records and minutes of an executive session conducted pursuant to the provisions of Section 105 of the Public Officers Law are exempt from disclosure under the Freedom of Information Law."

From my perspective, your understanding of the matter is inaccurate. In this regard, §106 of the Open Meetings Law pertains to minutes and states that:

"1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.

2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.

3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings

Ms. Sandra G. Mallah
September 5, 2000
Page - 2 -

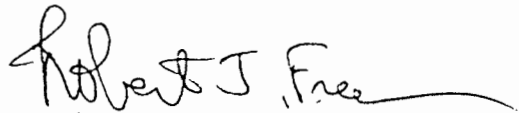
except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

As a general rule, a public body may take action during a properly convened executive session [see Open Meetings Law, §105(1)]. In the case of most public bodies, if action is taken during an executive session, minutes reflective of the action, the date and the vote must be recorded in minutes pursuant to §106(2) of the Law. Those minutes are available to the extent required by the Freedom of Information Law. If no action is taken, there is no requirement that minutes of the executive session be prepared.

I note, too, that various interpretations of the Education Law, §1708(3) indicate that, except in situations in which action during a closed session is permitted or required by statute, a school board cannot take action during an executive session [see United Teachers of Northport v. Northport Union Free School District, 50 AD 2d 897 (1975); Kursch et al. v. Board of Education, Union Free School District #1, Town of North Hempstead, Nassau County, 7 AD 2d 922 (1959); Sanna v. Lindenhurst, 107 Misc. 2d 267, modified 85 AD 2d 157, aff'd 58 NY 2d 626 (1982)]. Stated differently, based upon judicial interpretations of the Education Law, a school board generally cannot vote during an executive session, except in rare circumstances in which a statute permits or requires such a vote. If no vote is taken, again, there is no requirement that minutes of the executive session be prepared.

I hope that 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-3203
FOIL-AO-12313

Committee Members

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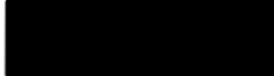
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Executive Director

Robert J. Freeman

September 5, 2000

Ms. Judy Freeman



Dear Ms. Freeman:

I have received your letter of August 9. In your capacity as a member of the City of Auburn Board of Education, you have sought an advisory opinion concerning the propriety of an executive session held to discuss two matters.

With regard to the first, you wrote that the administration wanted to know whether the Board favored "reinstating bus aides who were eliminated in the 2000-2001 budget", that the Board "was polled and each member was given the opportunity to express an opinion and vote yes or no", and that "[t]he majority favored not reinstating the bus aides." The second involved an explanation of the "the interview process for the assistant principal position" at a certain school and "the desire to offer the position to one individual whose name was given." Again, the Board was polled, and a majority "favored offering that individual the position."

In this regard, I offer the following comments.

First, by way of background, 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. While one of the grounds for entry into executive session often relates to personnel matters, from my perspective, the term "personnel" is overused and is frequently cited in a manner that is misleading or causes unnecessary confusion. To be sure, some issues involving "personnel" may be properly considered in an executive session; others, in my view, cannot. Further, certain matters that have nothing to do with personnel may be discussed in private under the provision that is ordinarily cited to discuss personnel.

The language of the so-called "personnel" exception, §105(1)(f) of the Open Meetings Law, is limited and precise. In terms of legislative history, as originally enacted, the provision in question permitted a public body to enter into an executive session to discuss:

"...the medical, financial, credit or employment history of any person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of any person or corporation..."

Under the language quoted above, public bodies often convened executive sessions to discuss matters that dealt with "personnel" generally, tangentially, or in relation to policy concerns. However, the Committee consistently advised that the provision was intended largely to protect privacy and not to shield matters of policy under the guise of privacy.

To attempt to clarify the Law, the Committee recommended a series of amendments to the Open Meetings Law, several of which became effective on October 1, 1979. The recommendation made by the Committee regarding §105(1)(f) was enacted and states that a public body may enter into an executive session to discuss:

"...the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..." (emphasis added).

Due to the insertion of the term "particular" in §105(1)(f), I believe that a discussion of "personnel" may be considered in an executive session only when the subject involves a particular person or persons, and only when at least one of the topics listed in §105(1)(f) is considered.

When a discussion concerns matters of policy, such as the manner in which public money will be expended or allocated, the functions of a department or perhaps the creation or elimination of positions, I do not believe that §105(1)(f) could be asserted, even though the discussion may relate to "personnel".

In the context of the issues that you described, the first concerning the reinstatement of bus aides should, in my opinion, have been discussed in public. The focus would not have apparently involved any "particular person"; on the contrary, the matter appears to have related to the needs and resources of the District. With regard to the second, an explanation of the interview process should have been considered in public in my opinion; again, that aspect of the discussion would not have

focused on a particular person, but rather a procedure. The other aspect of the discussion apparently did focus on a named individual, and if that is so, it could have been conducted in executive session pursuant to §105(1)(f).

Third, it is unclear on the basis of your letter whether votes were cast or action taken. Here I direct your attention to §106 of the Open Meetings Law, which pertains to minutes and states that:

"1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.

2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.

3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

As a general rule, a public body may take action during a properly convened executive session [see Open Meetings Law, §105(1)]. In the case of most public bodies, if action is taken during an executive session, minutes reflective of the action, the date and the vote must be recorded in minutes pursuant to §106(2) of the Law. Those minutes are available to the extent required by the Freedom of Information Law. If no action is taken, there is no requirement that minutes of the executive session be prepared.

Lastly, if a public body reaches a consensus upon which it relies, I believe that minutes reflective of decisions reached must be prepared and made available. In Previdi v. Hirsch [524 NYS 2d 643 (1988)], the issue involved access to records, i.e., minutes of executive sessions held under the Open Meetings Law. Although it was assumed by the court that the executive sessions were properly held, it was found that "this was no basis for respondents to avoid publication of minutes pertaining to the 'final determination' of any action, and 'the date and vote thereon'" (id., 646). The court stated that:

"The fact that respondents characterize the vote as taken by 'consensus' does not exclude the recording of same as a 'formal vote'. To hold otherwise would invite circumvention of the statute.

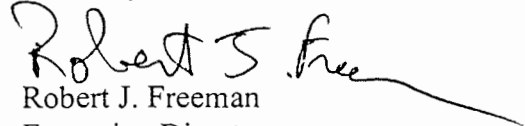
Ms. Judy Freeman
September 5, 2000
Page - 4 -

"Moreover, respondents' interpretation of what constitutes the 'final determination of such action' is overly restrictive. The reasonable intendment of the statute is that 'final action' refers to the matter voted upon, not final determination of, as in this case, the litigation discussed or finality in terms of exhaustion or remedies" (id. 646).

Therefore, if the Board reached a "consensus" reflective of its final determination of an issue, I believe that minutes must be prepared that indicate its action, as well as the manner in which each member voted. I note that §87(3)(a) of the Freedom of Information Law states that: "Each agency shall maintain...a record of the final vote of each member in every agency proceeding in which the member votes." As such, members of public bodies cannot take action by secret ballot; on the contrary, if a final action is taken, a record must be prepared that indicates how each member cast his or her vote.

I hope that 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-12314

Committee Members

Mary O. Donohue
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Executive Director

Robert J. Freeman

September 7, 2000

Mr. Greg D. Lubow, Esq
Greene County Public Defender
P.O. Box 413
Main and Bridge Streets
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 facts presented in your correspondence.

Dear Mr. Lubow:

I have received your letter of August 8. You wrote that you represent inmates at the Greene and Coxsackie Correctional Facilities who are charged with additional crimes while incarcerated. In an effort to serve your clients, you generally attempt to gain access to records of or pertaining to disciplinary proceedings as well as others, and the clients sign authorizations to enable you acquire them. Obtaining the records quickly is important, for they are necessary in preparing for judicial proceedings. Nevertheless, you indicated that disclosure of the records "is often delayed more than two weeks", and you asked whether a delay of that nature is "reasonable and lawful."

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

Mr. Greg D. Lubow, Esq.

September 7, 2000

Page - 2 -

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 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 following the passage of five business days or some other period after the date of acknowledgement, such a practice or policy would, in my opinion, be contrary to the intent of the Freedom of Information Law. If a request is voluminous and a significant amount of time is needed to locate records and review them to determine rights of access, a delay, in view of those 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).

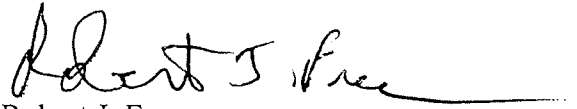
Mr. Greg D. Lubow, Esq.

September 7, 2000

Page - 3 -

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

cc: Anthony J. Annucci



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-A0-12315

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September 7, 2000

Executive Director

Robert J. Freeman

Mr. Jeremy Weir Alderson



The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Alderson:

I have received your letter of August 7, as well as the materials attached to it. Having sought records from the School of Agriculture and Life Sciences at Cornell University pertaining to its "research into biotechnology", you were informed that the state's highest court "recently determined that Cornell University, in its operation of the four state supported statutory or compact colleges (which include the College of Agriculture and Life Sciences and its component, the Agricultural Experiment Station at Geneva), is not a state agency subject to FOIL." You have requested "a judgment...as to whether Cornell's refusal to provide documents is in line with the law."

In this regard, it is emphasized at the outset that the Committee on Open Government is authorized to offer advice and opinions concerning the Freedom of Information Law; it is not empowered to render a "judgment" that is binding. Consequently, although it is our hope that opinions rendered by the Committee are educational and persuasive, the following remarks should be considered advisory.

From my perspective, while the statement quoted above indicating that Cornell University is not a state agency is accurate based on the decision to which reference was made [Stoll v. New York State College of Veterinary Medicine at Cornell University, 94 NY2d 162 (1999)], the Court of Appeals did not determine that all records maintained by or for Cornell fall beyond the coverage of the Freedom of Information Law.

That statute pertains to agency records, and §86(3) defines the term "agency" to include:

"any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In considering the scope of the term “agency” in relation to Cornell, the Court of Appeals in Stoll indicated that SUNY is an agency, but that “[w]hether Cornell’s statutory colleges also qualify as agencies of the State for FOIL purposes is an open question” (id., 166). Although the Court stated that “the law is settled that, for a number of purposes, the statutory colleges are *not* state agencies”(id.), it was also found that “[t]he statutory colleges are, however, subject to certain oversight by the SUNY Board of Trustees” (id., 167). The Court referred to the “hybrid statutory character of the colleges”, stating that “[a]t issue is the threshold question whether the statutory colleges are subject to FOIL in the first place” and that “[t]his question cannot be answered by reference to broad classifications, but rather turns on the particular statutory character of these *sui generis* institutions” (id.).

The request in Stoll involved a disciplinary record relating to a member of the faculty of one of the statutory colleges, and the Court found that discipline of employees is a university wide function, not a function special or unique to the statutory colleges. Specifically, it was found that:

“The principle that resolves the particular quandary here is that the Legislature has chosen to vest Cornell—the private institution—with discretion over the ‘maintenance of discipline’ at the four statutory colleges (*see*, Education Law § 5711[2]; § 5712[2]; § 5714[3]; § 5715[6]). In this respect, there is no statutory provision for oversight by the SUNY Trustees, or for any appeal to the SUNY Board. Consistent with that statutory mandate, Cornell has implemented a single system for administering discipline in the statutory colleges and in its private colleges. Indeed, as is manifest from petitioner’s own FOIL request, there is a University-wide Campus Code of Conduct and a Judicial Administrator to whom all such complaints are directed. Thus, the disciplinary records of the statutory colleges and private colleges are all held by the same private office of the University” (id., 167-168).

That disciplinary records maintained by Cornell are not subject to the Freedom of Information Law does not necessarily lead to the conclusion that all records of or pertaining to the statutory colleges fall beyond the scope of that statute. On the contrary, at the conclusion of its discussion, the majority wrote that:

“...we underscore that, by this decision and analysis, we do not ‘rule that the entire administration of the statutory colleges is not subject to FOIL’ (dissenting opn., at 169, – N.Y.S.2d at –, 723 N.E.2d at 70). We hold only that, given the unique statutory scheme applicable here, Cornell’s disciplinary records are not subject to FOIL disclosure. Other, more public aspects of the statutory colleges may well be subject to FOIL, but we need not and do not reach such issues today” (id., 168).

In so stating, I believe that the Court of Appeals left the door open to a finding that some records of or pertaining to the statutory colleges are subject to rights of access conferred by the Freedom of

Information Law, particularly in those situations in which records relate to or involve "State direction or oversight" (*id.*, 167).

"State direction and oversight" are described in §5712 of the Education Law concerning the College of Agriculture and Life Sciences. Subdivision (1) states in part that the College "shall continue to be under the supervision of the state university trustees." Additionally, subdivision (3) provides that "[t]he state university trustees shall maintain general supervision over the requests for appropriations, budgets, estimates and expenditures of such college." Further, subdivision (1) of §5713 of the Education Law states in relevant part that:

"[t]he institution known as the New York agricultural experiment station, located in the city of Geneva, for the purposes of promoting agriculture in its various branches by scientific investigation and experiment...shall continue to be controlled and managed by Cornell university under the supervision of the state university trustees. Said station shall be managed, controlled and administered by Cornell university, as the representative of the state university trustees, in the manner and with the powers provided by section fifty-seven hundred twelve of this chapter."

"Supervision", in my view, is the equivalent of "oversight", and based on Stoll, it appears that the Court of Appeals inferred that the functions, and therefore the records reflective of those functions, carried out by the statutory colleges, and in this instance, the Agricultural Experiment Station, under the supervision of the SUNY trustees, may be agency records subject to the Freedom of Information Law. Even if a statutory college is not an "agency", it might be concluded that records prepared by or acquired for such a college under the direction or oversight of the SUNY trustees would constitute "agency records." Potentially significant to an analysis of the matter is §86(4) of the Freedom of Information Law, which defines the term "record" expansively to include:

"any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

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, it was found that materials kept 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

Mr. Jeremy Weir Alderson
September 7, 2000
Page - 4 -

of the FOIL definition of 'records' as information kept or held 'by, with or for an agency'" [see Encore College Bookstores, Inc. v. Auxiliary Services Corporation of the State University of New York at Farmingdale, 87 NY 2d 410. 417 (1995)].

In short, insofar as the records are maintained for an agency, such as SUNY, they would fall within the coverage of the Freedom of Information Law.

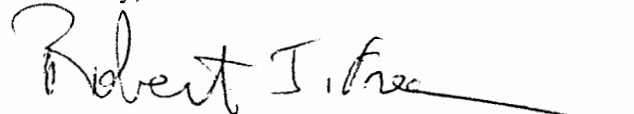
Lastly, in another decision rendered by the state's highest court, Westchester-Rockland Newspapers v. Kimball [50 NY2d 575 (1980)], the Court emphasized that the Freedom of Information Law must be construed broadly in order to achieve the goal of government accountability, for the court found that:

Key is the Legislature's own unmistakably broad declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (emphasis added; Public Officers Law, §84).

For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objections cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" (id. at 579].

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: James E. Hunter



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

7071-A0-12316

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Executive Director

Robert J. Freeman

September 7, 2000

Mr. Scott N. Fein
Whiteman Osterman & Hanna
One Commerce Plaza
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 facts presented in your correspondence.

Dear Mr. Fein:

I have received your letter of August 10, as well as the correspondence attached to it. According to the materials, having requested records from the Office of the Attorney General, you were advised as follows by Ms. Terryl L. Brown, the Records Access Officer:

“...90 boxes of files have been located in our archives that may contained [sic] documents responsive to your FOIL request. These boxes would have to be shipped to my office, and reviewed by staff so that confidential, grand jury or any other documents that are exempt from disclosure under FOIL are extracted from the files (emphasis Ms. Brown’s).

“Because F.O.I.L. does not require a government office to incur the expense of producing documents for public disclosure, the shipping cost, copying cost and personnel costs will be charged to your firm. You should also be aware that it appears that many of the documents you seek in you [sic] FOIL request may be exempt from disclosure.”

At the conclusion of her letter, Ms. Brown asked that you advise as to “whether you wish this office to proceed with the processing of your request.”

As of the date of your letter to this office, the request had neither been granted nor denied, and it is your belief that “the conditions imposed by the Office for the production of the documents are so onerous to effectively annul the provisions of the Freedom of Information Law.” You have sought guidance in relation to the foregoing, and in this regard, I offer the following comments.

First, I disagree with Ms. Brown's statement that the Freedom of Information Law "does not require a government office to incur the expense of producing documents for public disclosure..." While that statute permits agencies to assess fees for the reproduction of records, and although compliance with the Freedom of Information Law involves the use of public employees' time, the Court of Appeals has found that the Law is not intended to be given effect "on a cost-accounting basis", but rather that "Meeting the public's legitimate right of access to information concerning government is fulfillment of a governmental obligation, not the gift of, or waste of, public funds" [Doolan v. Boces, 48 NY 2d 341, 347 (1979)].

Second, however, from my perspective, the primary issue involves the extent to which the request "reasonably describes" the records sought as required by §89(3) of the Freedom of Information Law. I point out that it has been held by the Court of Appeals that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

The Court in Konigsberg found that the agency could not reject the request due to its breadth and also stated that:

"respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency']" (id. at 250).

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping system. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number.

I am unfamiliar with means by which the contents of the ninety boxes are filed or arranged. 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. That a request is specific, in my view, does not necessarily lead to the conclusion that it reasonably describes the records. For instance, if all correspondence "from the State Police Headquarters in Albany to Mr. Roth" is stored in three particular boxes, that portion of the request would, in my opinion, meet the requirement that the records be reasonably described.

However, if those records are kept throughout the ninety boxes and cannot be found except through a page by page review of the contents of the boxes, I do not believe that the requirement would be met, despite the specificity of the request.

Insofar as a request does not reasonably describe records, an agency in my view would not be obliged to engage in the kind of endeavor described above to locate the records that have been requested. To do so would involve an effort that exceeds the responsibilities imposed by the Freedom of Information Law. In that instance, if indeed an agency offers to engage in effort beyond the requirements of the law, I believe that it could seek to charge for expenses that ordinarily could not be assessed under the Freedom of Information Law. Presumably the agency and the applicant could establish an agreement or contract under which certain costs would be paid by the applicant.

On the other hand, to the extent that the request has met the standard of reasonably describing the records, the fees would be limited. In my opinion, unless a statute, an act of the State Legislature, authorizes an agency to charge a fee for personnel time, searching for records or charging more than twenty-five cents per photocopy for records up to nine by fourteen inches, no such fees may be assessed. In this instance, I know of no statute that would authorize the agency to do so.

By way of background, §87(1)(b)(iii) of the Freedom of Information Law stated until October 15, 1982, that an agency could charge up to twenty-five cents per photocopy unless a different fee was prescribed by "law". Chapter 73 of the Laws of 1982 replaced the word "law" with the term "statute". As described in the Committee's fourth annual report to the Governor and the Legislature of the Freedom of Information Law, which was submitted in December of 1981 and which recommended the amendment that is now law:

"The problem is that the term 'law' may include regulations, local laws, or ordinances, for example. As such, state agencies by means of regulation or municipalities by means of local law may and in some instances have established fees in excess of twenty-five cents per photocopy, thereby resulting in constructive denials of access. To remove this problem, the word 'law' should be replaced by 'statute', thereby enabling an agency to charge more than twenty-five cents only in situations in which an act of the State Legislature, a statute, so specifies."

As such, prior to October 15, 1982, a local law, an ordinance, or a regulation for instance, establishing a search fee or a fee in excess of twenty-five cents per photocopy or higher than the actual cost of reproduction was valid. However, under the amendment, only an act of the State Legislature, a statute, would in my view permit the assessment of a fee higher than twenty-five cents per photocopy, a fee that exceeds the actual cost of reproducing records that cannot be photocopied, or any other fee, such as a fee for search. In addition, it has been confirmed judicially that fees inconsistent with the Freedom of Information Law may be validly charged only when the authority to do so is conferred by a statute [see Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)].

The specific language of the Freedom of Information Law and the regulations promulgated by the Committee on Open Government indicate that, absent statutory authority, an agency may

Mr. Scott N. Fein
September 7, 2000
Page - 4 -

charge fees only for the reproduction of records. Section 87(1)(b) of the Freedom of Information Law states:

"Each agency shall promulgate rules and regulations in conformance with this article...and pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the availability of records and procedures to be followed, including, but not limited to...

(iii) the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by statute."

The regulations promulgated by the Committee states in relevant part that:

"Except when a different fee is otherwise prescribed by statute:

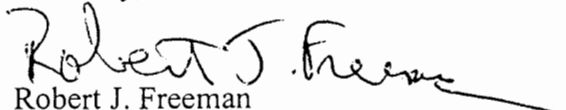
(a) There shall be no fee charged for the following:

- (1) inspection of records;
- (2) search for records; or
- (3) any certification pursuant to this Part" (21 NYCRR section 1401.8).

As such, the Committee's regulations specify that no fee may be charged for personnel time, for inspection of or search for records, except as otherwise prescribed by statute.

I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:tt

cc: Terryl L. Brown



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-A0-12317

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September 8, 2000

Executive Director

Robert J. Freeman

Hon. Joseph L. Peloso, Jr.
Putnam County Clerk
40 Gleneida Avenue
Carmel, NY 10512

Dear Mr. Peloso:

I have received your letter of August 11 in which you sought an opinion concerning the procedure to be followed when responding to requests made under the Freedom of Information Law.

Attached to your letter is a copy of a memorandum sent to department heads by the County Attorney. In brief, the County Attorney directed that, when a request is received by the County Clerk, it must be forwarded to the Law Department, which will acknowledge the receipt of the request. The Law Department then sends a copy to the Department that maintains the records, which in turn sends the records to the Law Department, which reviews the records and determines to grant or deny access. Essentially the same procedure is followed by other departments within County government.

As the designated records access officer for the County, it is your belief that the procedure prescribed by the County Attorney is "inconsistent" with law. I agree, and 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, such as a county, to adopt rules and regulations consistent with 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...”

In short, the records access officer has the authority and duty to "coordinate" an agency's response to requests. As I understand the procedure, you, in your capacity as the records access officer, are effectively stripped of your authority and responsibility.

Second, in my opinion, implementation of the procedure may be unnecessarily cumbersome, for there are many instances in which County officials can readily respond to requests pursuant to the direction given by the records access officer in an effort to “coordinate” the County’s response to requests. I would conjecture that most requests are routine and can be handled without review by the County Attorney. For instance, if it is clear and established that certain records are always public, such as permits, assessment records, code violations and others too numerous to mention, there is no reason in my view why the custodians of those records, pursuant to the direction given by the records access officer, cannot routinely disclose those records without review by the Law Department. Similarly, other records can clearly be withheld, such as pre-sentence reports maintained by a probation department and records pertaining to applicants or recipients of public assistance maintained by a department of social services. When it is known in advance that those records need not be disclosed, again, it is unnecessary that requests or records be forwarded to the Department of Law. If there is a question regarding rights of access that requires a legal opinion in attempting to determine the extent to which records should be disclosed or withheld, certainly consultation with an attorney would be appropriate. However, in other circumstances, I believe that the procedure outlined by the County Attorney is unnecessary and inefficient.

Third, it is likely that implementation of the procedure would delay granting access to records and thereby be inconsistent with the intent of the Freedom of Information Law. As you are aware, 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..."

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 delay in disclosure. As the Court of Appeals has asserted:

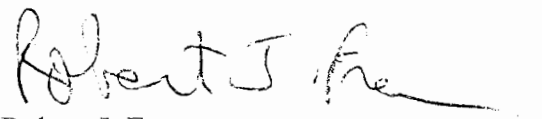
"...the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objectives cannot hope to be attained unless 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 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, 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 a delay. 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).

Hon. Joseph L. Peloso, Jr.
September 8, 2000
Page - 4 -

I hope that I have been of some 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: Carl F. Lodes



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI - 12318

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September 11, 2000

Executive Director

Robert J. Freeman

Mr. Todor Macordov

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Macordov:

I have received your letter of August 5 in which you asked whether you are entitled, as a crime victim, to gain access to photographs of yourself taken by law enforcement officers that show your injuries after being beaten. You indicated that the photographs are maintained "in a police agency sealed criminal file."

In this regard, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. The initial ground for denial, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute". One such statute is §160.50 of the Criminal Procedure Law (CPL).

Specifically, subdivision (1) of §160.50 states in relevant part that:

"Upon the termination of a criminal action or proceeding against a person in favor of such person...the record of such action or proceeding shall be sealed and the clerk of the court wherein such criminal action or proceeding was terminated shall immediately notify the commissioner of the division of criminal justice services and the heads of all appropriate police departments and other law enforcement agencies that the action has been terminated in favor of the accused, and unless the court has directed otherwise, that the record of such action or proceeding has been sealed. Upon receipt of notification of such termination and sealing..."

Mr. Todor Macordov
September 11, 2000
Page - 2 -

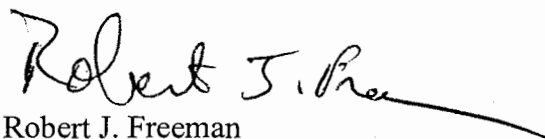
(c) all official records and papers, including judgments and orders of a court but not including published court decisions or opinions or records and briefs on appeal, relating to the arrest or prosecution, including all duplicates and copies thereof, on file with the division of criminal justice services, 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. If the records in question were sealed pursuant to §160.50, they would be exempt from disclosure to the public. In that circumstance, I believe that the only possibility under which you could gain access would involve an attempt to seek a court order unsealing the records and directing that the photographs be made available to you.

In the event that the records were not sealed under the CPL, if, for example, there was a conviction or if the matter is pending, it appears that the photographs would be available to you. In that situation, they would be subject to rights of access conferred by the Freedom of Information Law. While the photographs could, in my opinion, be withheld from the public on the ground that disclosure would result in "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §§87(2)(b) and 89(2)(b)], I believe that they would be available to you, if they have not been sealed, for you could not invade your own 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

OMC - AO - 3204
FOI - AO - 12319

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September 11, 2000

Executive Director

Robert J. Freeman

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 Ms. Berger:

I have received your letter of August 9 concerning difficulties that you have encountered relative to the Village of Elmsford Zoning Board of Appeals.

The first issue that you described concerns what appears to be an unwritten policy that receipts be presented as proof of mailing before the Board would approve your application to build a deck onto your home. In this regard, the advisory jurisdiction of the Committee relates to matters involving the Freedom of Information and Open Meetings Laws. Neither of those statutes deals with the issue, and I cannot appropriately address it.

The second issue involves your efforts in obtaining a stenographic transcript of a meeting, and I believe that both of the statutes cited above are pertinent.

It is noted at the outset that the Open Meetings Law offers direction on the subject and provides what might be characterized as minimum requirements concerning the contents of minutes. Specifically, §106 of that statute states that:

"1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.

2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.

3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

Based upon the foregoing, although minutes must be prepared and made available within two weeks, it is clear that minutes need not consist of a verbatim account of every comment that was made. A public body, such as the Zoning Board of Appeals, may choose to prepare a stenographic transcript of a meeting, but the transcript typically is separate from the minutes. Minutes are generally not verbatim, but rather a summary of the kinds of activities described in subdivision (1) of §106 that occur at a meeting.

As indicated in subdivision (3) of §106, the Open Meetings Law, minutes of open meetings must be prepared and made available within two weeks, and I point out there is nothing in that statute or any other statute of which I am aware that requires that minutes be approved. Nevertheless, as a matter of practice or policy, many public bodies approve minutes of their meetings. In the event that minutes have not been approved, to comply with the Open Meetings Law, it has consistently been advised that minutes be prepared and made available within two weeks, and that they may be marked "unapproved", "draft" or "non-final", for example. By so doing within the requisite time limitations, the public can generally know what transpired at a meeting; concurrently, the public is effectively notified that the minutes are subject to change.

Lastly, assuming that the minutes are separate from a stenographic transcript, I note that there is no requirement that a transcript be prepared. That being so, I do not believe that there is any time limit within which a transcript must be prepared. Once it is prepared, however, it would fall within the coverage of the Freedom of Information Law. That statute pertains to agency records, and §86(4) defines the term "record" 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."

Ms. Nancy Berger
September 11, 2000
Page - 3 -

Based on the foregoing, as soon as a transcript of a meeting of the Board exists, it would constitute a "record" subject to rights of access.

In brief, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, a transcript of an open meeting would be available, for none of the grounds of denial could justifiably be asserted. Further, anyone present would have had the right to record the proceedings [see e.g., Mitchell v. Board of Education, 113 AD2d 924 (1985)].

I hope that I have been of assistance.

RJF:jm

cc: Zoning Board of Appeals



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-A0-12320

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September 12, 2000

Executive Director

Robert J. Freeman

Mr. Farley Granger

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Granger:

I have received your letter of August 9. You indicated that your request for records maintained by the Westchester Department of Correction was denied without explanation. The request involved "documents and evidence presented against [you] as a party involved in [an] incident." The incident, according to your letter, was an attack by a co-worker that led to an investigation and a disciplinary hearing resulting in a loss of ten vacation days.

In this regard, I offer the following comments.

First, the regulations promulgated by the Committee on Open Government require that a denial of a request for records include the reasons for the denial [21 NYCRR §1401.2(b)(3)(ii)]. Moreover, when a request 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 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)].

Second, the Freedom of Information Law pertains to agency records, and §86(4) defines the term "record" to mean:

"any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

I point out that the definition, based on judicial decisions, does not include evidentiary material that is not documentary in nature, such as clothing [see e.g., Allen v. Strojnowski, 129 AD2d 700 (1989)].

Third, insofar as the request involves 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. Without knowledge of the contents of the records at issue, I cannot offer unequivocal guidance. However, at least three of the grounds for denial may be pertinent.

If any of those involved in the incident are correction officers, §50-a of the Civil Rights Law may be relevant, for that statute provides that personnel records pertaining to correction officers that are used to evaluate performance toward continued employment or promotion are confidential; they cannot be disclosed without the consent of the correction officer or a court order. Also significant may be §87(2)(b), which permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." That provision might be asserted in

Mr. Farley Granger
September 12, 2000
Page - 3 -

relation to witness statements, medical information identifiable to persons other than yourself, and similar information pertaining to others. Also significant may be §87(2)(g), which authorizes an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations; or
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

Lastly, notwithstanding the foregoing, if the hearing held to consider charges brought against you involved principles of due process, I believe that documentation presented or used in evidence would be available to you as the person charged.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Anthony Czarnecki



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL - Ad - 12321

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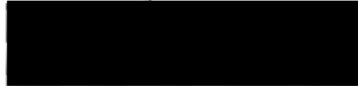
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September 12, 2000

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 9 and the materials attached to it. Having reviewed the memorandum prepared in 1994 reflective of the "Office Policy for Responding to FOIL Requests" adopted by the Special Commissioner of Investigation for the New York City School District, there is one area with which I have substantial disagreement.

Specifically, in referring to open cases, the policy is to deny access because "anything in our files would constitute intra-agency material that does not represent final agency policy or determinations." As you are likely aware, the Court of Appeals rejected a similar contention, stating that:

"...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87(2)(g)(iii)]. However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)..." [Gould et al. v. New York City Police Department, 87 NY2d 267, 276 (1996)].

In short, that a record "does not represent final agency policy or determinations" does not necessarily enable an agency to withhold inter-agency or intra-agency materials in their entirety. On the contrary, portions of those materials may be available under subparagraphs (i) through (iv) of §87(2)(g), unless a different exception applies.

The Court noted further that:

"...the Police Department argues that any witness statements contained in the reports, in particular, are not 'factual' because there is no assurance of the statements' accuracy and reliability. We decline to read such a reliability requirement into the phrase 'factual data', as the dissent would have us do, and conclude that a witness statement constitutes factual data insofar as it embodies a factual account of the witness's observations. Such a statement, moreover, is far removed from the type of internal government exchange sought to be protected by the intra-agency exemption (see, Matter of Ingram v. Axelrod, 90 AD2d 568, 569 [ambulance records, list of interviews, and reports of interviews available under FOIL as 'factual data']). By contrast, any impressions, recommendations, or opinions recorded in the complaint follow-up report would not constitute factual data and would be exempt from disclosure. The holding herein is only that these reports are not categorically exempt as intra-agency material. Indeed, the Police Department is entitled to withhold complaint follow-up reports, or specific portions thereof, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" (id., 277).

Based on the foregoing, if internal memoranda include expressions of opinion, recommendations and the like expressed by agency staff, those portions clearly can be withheld. Reference to comments by others, however, would not, according to the decision, be protected by §87(2)(g).

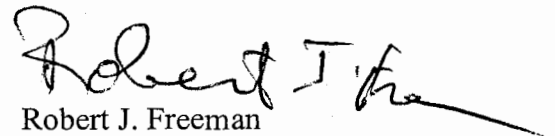
It is emphasized, however, that the Court was careful to point out that other grounds for denial of access might apply.

In consideration of the duties of the Special Commissioner, even if §87(2)(g) does not apply, other grounds for denial could likely be asserted to withhold records relating to open cases. For instance, §87(2)(b) concerning unwarranted invasions of personal privacy would likely apply as a basis for withholding records identifiable to witnesses or the subjects of allegations or investigations. Section 87(2)(e) would apparently be pertinent as well as a basis for withholding those kinds of records.

Mr. Harvey M. Elentuck
September 12, 2000
Page - 3 -

I hope that the foregoing serves to clarify your understanding of the Freedom of Information Law.

Sincerely,


Robert J. Freeman
Executive Director

RJF:jm

cc: Regina A. Loughran
Susanna Chu



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12322

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September 12, 2000

Executive Director

Robert J. Freeman

Mr. Joseph W. Sallustio, Jr.



The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Sallustio:

I have received your letter of August 12, as well as the materials attached to it. You have questioned the propriety of a denial of your request for records by the City of Rome. The records involve assessments of real property and the means by which the assessments were prepared. According to the correspondence, the City contracted with a local company which apparently developed software or computer programs used in the assessment process. Specifically, in justifying the denial of access, the City Clerk wrote that:

“The reason for this is that the data base and formula utilized by the city’s contractor, Tri-Ware, are considered a proprietary trade secret and therefore are exempt under the Freedom of Information Law.

“Further, because the proposed assessment was never implemented by the city of Rome, the data base requested is considered a ‘non-final policy or determination’ rendering such records exempt under the FOIL 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.

Pertinent with respect to the “trade secret” contention is §87(2)(d), which permits an agency to withhold records or portions thereof that:

Mr. Joseph W. Sallustio, Jr.

September 12, 2000

Page - 2 -

"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).

I do not have sufficient knowledge to suggest that §87(2)(d) would or would not be applicable. However, I believe that the considerations offered in the preceding remarks would be relevant in determining the propriety of the denial as it relates to the claim involving "a proprietary trade secret."

With respect to the proposed assessment, of likely significance is §87(2)(g). Although that provision serves as one of the grounds for denial of access to records, due to its structure, it often requires substantial disclosure. The cited provision permits an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations; or
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

It is unclear whether the record in question was prepared by City staff or by Tri-Ware acting on behalf of the city. Here I point out that in a discussion of the issue of records prepared by consultants for agencies, the Court of Appeals stated that:

"Opinions and recommendations prepared by agency personnel may be exempt from disclosure under FOIL as 'predecisional materials, prepared to assist an agency decision maker***in arriving at his decision' (McAulay v. Board of Educ., 61 AD 2d 1048, aff'd 48 NY 2d 659). Such material is exempt 'to protect the deliberative process of government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers (Matter of Sea Crest Const. Corp. v. Stubing, 82 AD 2d 546, 549).

"In connection with their deliberative process, agencies may at times require opinions and recommendations from outside consultants. It would make little sense to protect the deliberative process when such reports are prepared by agency employees yet deny this protection when reports are prepared for the same purpose by outside consultants retained by agencies. Accordingly, we hold that records may be considered 'intra-agency material' even though prepared by an outside consultant at the behest of an agency as part of the agency's deliberative process (see, Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD 2d 546, 549, supra; Matter of 124 Ferry St. Realty Corp. v. Hennessy, 82 AD 2d 981, 983)" [Xerox Corporation v. Town of Webster, 65 NY 2d 131, 132-133 (1985)].

Based upon the foregoing, records prepared by a consultant for an agency may be withheld or must be disclosed based upon the same standards as in cases in which records are prepared by the staff of an agency. It is emphasized that the Court in Xerox specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

"While the reports in principle may be exempt from disclosure, on this record - which contains only the barest description of them - we cannot determine whether the documents in fact fall wholly within the scope of FOIL's exemption for 'intra-agency materials,' as claimed by respondents. To the extent the reports contain 'statistical or factual tabulations or data' (Public Officers Law section 87[2][g][i], or other material subject to production, they should be redacted and made available to the appellant" (id. at 133).

I note that in another case that reached the Court of Appeals, the state's highest court, one of the contentions was that certain records could be withheld because they were not final and because they related to incidents for which no final determination had been made. The Court rejected that finding and stated that:

"...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87(2)(g) [111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)..." [Gould et al. v. New York City Police Department, 87 NY2d 267, 276 (1996)].

In short, that the records are "non-final" would not represent an end of an analysis of rights of access or an agency's obligation to review the entirety of their contents to determine rights of access..

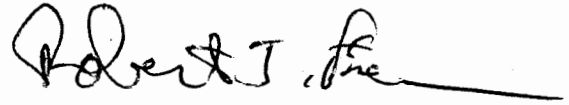
The Court also dealt with the issue of what constitutes "factual data" that must be disclosed under §87(2)(g)(i). In its consideration of the matter, the Court found that:

"...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87(2)(g)(i). Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182)" (id., 276-277).

Mr. Joseph W. Sallustio, Jr.
September 12, 2000
Page - 7 -

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: Jeannette D. Reid



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12323

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September 14, 2000

Executive Director

Robert J. Freeman

Mr. Stanley Tukes
94-A-4142
Greenhaven Correctional Facility
Drawer B
Stormville, NY 12582

Dear Mr. Tukes:

I have received your letter in which you requested a copy of the rules that must be followed by correction officers at the Greenhaven Correctional Facility.

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning public access to records. This office does not maintain records generally, and we do not have the rules in which you are interested. However, according to the regulations promulgated by the Department of Correctional Services, a request for records kept at a correctional facility may be made to the facility superintendent or his designee.

With respect to your ability to obtain the records in question, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more of the grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, three of the grounds for denial are relevant to an analysis of rights of access.

Specifically, §87(2)(g) states that an agency may withhold records that:

"are inter-agency or intra-agency materials which are not:

- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations; or
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different basis for denial is applicable. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. It would appear that the records sought would consist of instructions to staff that affect the public or an agency's policy. Therefore, I believe that they would be available, unless a different basis for denial could be asserted.

A second provision of potential significance is §87(2)(e), which permits an agency to withhold records that:

"are compiled for law enforcement purposes and which, if disclosed, would:

- i. interfere with law enforcement investigations of judicial proceedings...
- ii. deprive a person of a right to a fair trial or impartial adjudication;
- iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
- iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

Under the circumstances, most relevant is §87(2)(e)(iv). The leading decision concerning that provision is Fink v. Lefkowitz, which involved access to a manual prepared by a special prosecutor that investigated nursing homes, in which the Court of Appeals held that:

"The purpose of this exemption is obvious. Effective law enforcement demands that violators of the law not be apprised the nonroutine procedures by which an agency obtains its information (see Frankel v. Securities & Exch. Comm., 460 F2d 813, 817, cert den 409 US 889). However beneficial its thrust, the purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution.

"To be distinguished from agency records compiled for law enforcement purposes which illustrate investigative techniques, are those which articulate the agency's understanding of the rules and regulations it is empowered to enforce. Records drafted by the body

charged with enforcement of a statute which merely clarify procedural or substantive law must be disclosed. Such information in the hands of the public does not impede effective law enforcement. On the contrary, such knowledge actually encourages voluntary compliance with the law by detailing the standards with which a person is expected to comply, thus allowing him to conform his conduct to those requirements (see Stokes v. Brennan, 476 F2d 699, 702; Hawkes v. Internal Revenue Serv., 467 F2d 787, 794-795; Davis, Administrative Law [1970 Supp], section 3A, p 114).

"Indicative, but not necessarily dispositive of whether investigative techniques are nonroutine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel (see Cox v. United States Dept. of Justice, 576 F2d 1302, 1307-1308; City of Concord v. Ambrose, 333 F Supp 958). It is no secret that numbers on a balance sheet can be made to do magical things by scrupulous nursing home operators the path that an audit is likely to take and alerting them to items to which investigators are instructed to pay particular attention, does not encourage observance of the law. Rather, release of such information actually countenances fraud by enabling miscreants to alter their books and activities to minimize the possibility or being brought to task for criminal activities. In such a case, the procedures contained in an administrative manual are, in a very real sense, compilations of investigative techniques exempt from disclosure. The Freedom of Information Law was not enacted to furnish the safecracker with the combination to the safe" (id. at 572-573).

In applying those criteria to specific portions of the manual, which was compiled for law enforcement purposes, the Court found that:

"Chapter V of the Special Prosecutor's Manual provides a graphic illustration of the confidential techniques used in a successful nursing home prosecution. None of those procedures are 'routine' in the sense of fingerprinting or ballistic tests (see Senate Report No. 93-1200, 93 Cong 2d Sess [1974]). Rather, they constitute detailed, specialized methods of conducting an investigation into the activities of a specialized industry in which voluntary compliance with the law has been less 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

Mr. Stanley Tukes
September 14, 2000
Page - 4 -

information detailed on pages 481 and 482 of the manual, on the other hand, is merely a recitation of the obvious: that auditors should pay particular attention to requests by nursing homes for Medicaid reimbursement rate increases based upon projected increase in cost. As this is simply a routine technique that would be used in any audit, there is no reason why these pages should not be disclosed" (id. at 573).

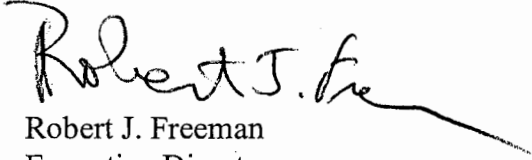
While I am unfamiliar with the records in question, it would appear that those portions which, if disclosed, would enable potential lawbreakers to evade detection could likely be withheld. It is noted that in another decision which dealt with a request for certain regulations of the State Police, the Court of Appeals found that some aspects of the regulations were non-routine, and that disclosure could "allow miscreants to tailor their activities to evade detection" [De Zimm v. Connelie, 64 NY 2d 860 (1985)]. Nevertheless, other portions of the records might be "routine" and might not if disclosed preclude employees from carrying out their duties effectively.

The remaining ground for denial of possible relevance is §87(2)(f). That provision permits an agency to withhold records when disclosure "would endanger the life of safety of any person." To the extent that disclosure would endanger the life of safety of officers or others, it appears that §87(2)(f) would be applicable.

In sum, while some aspects of the records might be deniable, others must in my opinion be disclosed in conjunction with the preceding commentary.

I hope that 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-AJ-3206
FOIL-AJ-12324

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September 18, 2000

Executive Director

Robert J. Freeman

Ms. Sally Sonne

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Sonne:

I have received your letter of September 17 in which you questioned the sufficiency of motions by the Board of Trustees of the Village of Tuxedo Park to enter to executive session that described the subject matter as "litigation" and "personnel." Additionally, you asked whether the Board may "conduct all of their discussion of a 3-year police contract in executive session....and not reveal its content to the public at the next public meeting."

In this regard, as you are likely aware, the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

"Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed, and the motion must be carried by majority vote of a public body's membership before such a session may validly be held. The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session.

The 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 Village of Tuxedo Park."

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 confirmed the advice rendered by this office. In discussing §105(1)(f) in relation to a matter involving the establishment and functions of a position, the Court stated that:

"...the public body must identify the subject matter to be discussed (See, Public Officers Law § 105 [1]), and it is apparent that this must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette Co. v Town Bd., Town of Cobleskill, 111 Misc 2d 303, 304-305). Additionally, the topics discussed during the executive session must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsburgh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY 2d 807).

"Applying these principles to the matter before us, it is apparent that the Board's stated purpose for entering into executive session, to wit, the discussion of a 'personnel issue', does not satisfy the requirements of Public Officers Law § 105 (1) (f). The statute itself requires, with respect to personnel matters, that the discussion involve the 'employment history of a particular person' (id. [emphasis supplied]). Although this does not mandate that the individual in question be identified by name, it does require that any motion to enter into executive session describe with some detail the nature of the proposed discussion (see, State Comm on Open Govt Adv Opn dated Apr. 6, 1993), and we reject respondents' assertion that the Board's reference to a 'personnel issue' is the functional equivalent of identifying 'a particular person'" [Gordon v. Village of Monticello, 620 NY 2d 573, 575; 207 AD 2d 55 (1994)].

Based on the foregoing, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in my opinion have to identify the person or persons who may be the subject of a discussion [see Doolittle v. Board of Education, Supreme Court, Chemung County, July 21, 1981; also Becker v. Town of Roxbury, Supreme Court, Chemung County, April 1, 1983]. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

With respect to the discussion of the police contract, it is assumed that the matter involves a public employee union. If that is so, §105(1)(e) would be pertinent. That provision permits a public body to enter into executive session to discuss "collective negotiations pursuant to article fourteen of the civil service law." Article 14 is commonly known as the Taylor Law, and it deals with the relationship between a public employer (i.e., a village) and a public employee union. Therefore, insofar as the Board discussed or engaged in collective bargaining negotiations involving a police union, I believe that executive sessions could properly have been held. If there is no union, it is unlikely that there would have been any basis for conducting an executive session.

Lastly, with respect to rights of access to the content of a contract that has been approved, I direct your attention to the Freedom of Information Law. That statute, in brief, is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

From my perspective, only one of the grounds for denial would be relevant. Section 87(2)(c) permits an agency to withhold records to the extent that disclosure "would impair present or imminent contract awards or collective bargaining negotiations." Since an agreement would effectively end the negotiations, I believe that the contents of records reflective of the elements of the agreement would be accessible. I recognize that there may be no written contract immediately

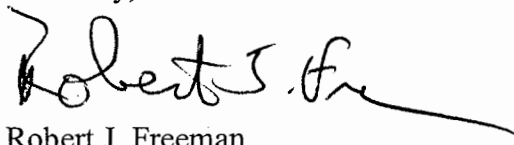
Ms. Sally Sonne
September 18, 2000
Page - 5 -

in existence; nevertheless, in my view, other records that contain the points upon which there was agreement must in my view be disclosed.

In an effort to enhance compliance with and understanding of the Open Meetings and Freedom of Information Laws, a copy of this response will be sent to the Board of Trustees.

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

OML-AO - 3207
FOIL-AO - 12325

From: Robert Freeman
To: Internet:tbarnes@suffolk.lib.ny.us
Date: 9/18/00 5:18PM
Subject: You have asked what term "available" means in the context of minutes of meetings being made "availab

You have asked what term "available" means in the context of minutes of meetings being made "available" under the Open Meetings Law.

In this regard, subdivision of (3) of §106 of the Open Meetings Law requires that minutes of open meetings be prepared and made available within two weeks. Based on the direction provided by the Freedom of Information Law, "available" in my view means being made accessible to the public for inspection and copying, again, within two weeks of a meeting to which the minutes pertain.

If you have additional questions, 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
Website - www.dos.state.ny.us/coog/coogwww.html

FOIL-AJ-12326

From: Robert Freeman
To: [REDACTED]
Date: 9/19/00 4:08PM
Subject: Re: FOIL question

Dear Ms. Drielak:

In my opinion, the blank evaluation form would be accessible. Portions of the completed form would, in my view, be public; others could be withheld.

In brief, most evaluations consist of three parts. First is a list of duties or goals. That part would be either factual in nature or would reflect the policy of a school district relative to the duties inherent in the position of superintendent and would be accessible under subparagraphs (i) or (iii) of §87(2)(g) of the FOIL. The second typically is the subjective expression of opinion offered by the reviewer (i.e., the board of education or, in a different context, an employee's supervisor) and may be withheld. Those portions of intra-agency materials consisting of opinion, advice, recommendation and the like may be withheld under §87(2)(g). Often there is a third part, a final rating. For instance, a box may be checked off indicating a rating of "outstanding", "fair" or "poor." If indeed that is final, I believe that it would be accessible, for "final agency determinations" are accessible under §87(2)(g)(iii).

To obtain more expansive information on the subject, go to the index to opinions rendered under FOIL on our website, click on to "p" and scroll down to "Performance evaluation". The higher the number of the opinion, the more recent it is. #8664 deals specifically with the evaluation of a superintendent.

I hope that I have been of assistance. Should any further questions arise, 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
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI-AD - 12327

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Carole E. Stone
Alexander F. Treadwell

September 22, 2000

Executive Director

Robert J. Freeman

Mr. Elijah Weathersby
95-B-1687
P.O. Box 2001
Malone, NY 12953

Dear Mr. Weathersby:

I have received your letter of September in which you requested statistical data from this office involving Niagara County.

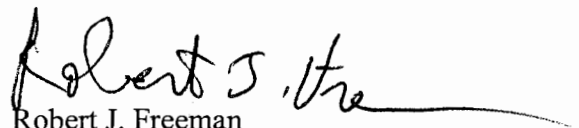
In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee does not maintain custody or control of records generally, and in this instance, this office does not maintain the statistics of your interest.

When seeking records under the Freedom of Information Law, a request should be directed to the "records access officer" at the agency that maintains or would most likely maintain the records of your interest. The records access officer has the duty of coordinating an agency's response to requests. I am unaware of the identity of the records access officer for Niagara County, but it is suggested that you direct a request to the Clerk of the County Legislature. If he or she is not designated as records access officer, you should ask that the request be forwarded to the proper person.

It is also noted that the Freedom of Information Law pertains to existing records, and that §89(3) states in part that an agency is not required to create a record in response to a request. Therefore, insofar as the statistics in which you are interested do not exist, County officials would not, in my view, be required to prepare statistics on your behalf. On the other hand, insofar as statistics exist, I believe that they would be accessible [see Freedom of Information Law, §87(2)(g)(i)].

I hope that the foregoing serves to clarify your understanding of the operation of the Freedom of Information Law and that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

7071.40-12328

Committee Members

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September 23, 2000

Executive Director

Robert J. Freeman

Mr. John L. McCarthy
Risk Metrics Corporation
1595 N.W. 1st Court
Boca Raton, FL 33432

The staff of the Committee 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. McCarthy:

As you are aware, I have received a variety of material pertaining to your efforts in obtaining "proof of coverage" records from the New York State Workers' Compensation Board. It is your contention that there "can be no valid reason" for the Board to withhold the records, and you wrote that:

- "1) Any NY citizen or business can call 518-474-6967 and confirm coverage on one or more businesses. The data has been public record for decades for a variety of good public interest reasons.
- 2) Advertising from the NY bureau (the states collection agent) clearly shows they seek expiration date lists via IBBSNET.
- 3) A copy of Mitchell Pearlman's final decision that the CT Workers Compensation Commission must disclose proof of coverage records for which the industry owned bureau acts as compiling agent."

Since our initial discussion of the matter, I have conferred with a variety of officials, and although the statement quoted above had been accurate, that is no longer so.

As you may recall, I indicated to you that I met with attorneys for the Board in relation to your inquiry and shared with them the marketing materials published by IBBSnet. I asked at that time whether IBBSnet acquired or made available data in the aggregate, or rather whether information was acquired or made available only on the basis of a single name search. My suggestion at the time was that if IBBSnet or any other entity has the capacity to acquire data in the

Mr. John L. McCarthy

September 23, 2000

Page - 2 -

aggregate, that your firm should have the same opportunity, and that the Board would likely be required to disclose the records of your interest. Upon further inquiry, I learned that the primary repository of what may be characterized as policyholder data is the New York Compensation Rating Board. Soon thereafter, I was informed, as were the Workers' Compensation Board and the State Insurance Fund for the first time, that the Compensation Rating Board provided policyholder data in the aggregate to IBBSnet for marketing purposes. Upon obtaining that information, the Executive Director of the State Insurance Fund, who serves as a member of the Compensation Rating Board, contended that the dissemination of the data to IBBSnet was unauthorized and improper, and the Compensation Rating Board immediately suspended its disclosure of data to IBBSnet. It my understanding that data will no longer be made available to IBBSnet, except on a one by one, per policyholder, basis.

The reason for the quick suspension of the disclosure the data to IBBSnet was due, in my view, to the status of the State Insurance Fund as a New York State agency, as well as an insurer and competitor in the marketplace with other insurance companies. Further, as you may be aware, the State Insurance Fund is the essentially the insurer of last resort; it must write and offer insurance coverage for any employer in New York. The wholesale disclosure of data involving the clients of the State Insurance Fund, particularly the expiration dates of their coverage, would be and was, according to its Executive Director, damaging to the Fund's competitive position.

Since you referred to the State of Connecticut and a determination rendered by its Freedom of Information Commission requiring the disclosure of equivalent data, I point out that there are twenty-seven states that have established entities analogous to the State Insurance Fund in New York. Connecticut, however, is not among them. Consequently, the considerations pertinent to the operation of the State Insurance Fund appear to be different from those relevant in Connecticut. Further, the language of the law dealing with access to records differs from one state to another.

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. Relevant to an analysis of rights of access is §87(2)(d), which permits an agency to withhold records that:

“are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise.”

Again, 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. I note, too, 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, since 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 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 decision rendered by the Court of Appeals, the State's highest court, which, for the first time, considered the phrase "substantial competitive injury" in 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])...

"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

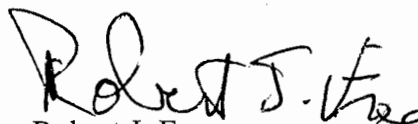
Mr. John L. McCarthy
September 23, 2000
Page - 5 -

contemplated as part of FOIA's principal aim of promoting openness in government (id., 419-420).”

If IBBSnet or any other entity could obtain policyholder data in the array as of right under the Freedom of Information Law, I would agree that your company should have the same opportunity. Nevertheless, based on several conversations, the disclosure of aggregate data to IBBSnet represented an error and was not authorized by the members of the Compensation Ratings Board. To reiterate, when it was learned that the Board had been disclosing the data to IBBSnet, that practice was suspended in an effort to protect the competitive position of the State Insurance Fund. In my opinion, the erroneous disclosure did not create a right of access to equivalent information in the future. On the contrary, it appears that disclosure of the data would “cause substantial injury to the competitive position” of the State Insurance Fund and that, therefore, the Workers’ Compensation Board could justifiably deny your request. At the present time, it is my understanding that no entity is acquiring policyholder data in the array; rather, the data is being disclosed, as it always has been disclosed by the Board, based on a search using the name of a particular policyholder.

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: Neal Conolly
Peter J. Molinaro
Monte Almer

FOIL-A0-12329

From: Robert Freeman
To: [REDACTED]
Date: 9/29/00 1:11PM
Subject: Dear Mr. Frankel:

Dear Mr. Frankel:

I agree with your view that information available to the public should be as readily accessible as possible. Further, the Freedom of Information Law states in its legislative declaration that government should make records available "wherever and whenever feasible." Nevertheless, there is neither a statutory provision nor any judicial decision of which I am aware that requires that government agencies make records available online.

My sense, however, is that agencies are increasingly making records available online, and this office has encouraged them to do so. By making records available in that manner, agencies will not be required to deal with conventional requests made under the Freedom of Information Law. In short, while there is no statutory obligation to make records available online, I believe that agencies will do so as time progresses in an effort to enhance efficiency and diminish labor intensive burdens.

I hope that I have been of assistance.

Happy New Year!

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518 - Phone
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Website - www.dos.state.ny.us/coog/coogwww.html

FOIL-A0-12330

From: Robert Freeman
To: Internet:murphymj@Cobleskill.edu
Date: 9/29/00 1:00PM
Subject: Dear Mr. Murphy:

Dear Mr. Murphy:

I have received your letter regarding access to union records by members of their unions. In this regard, the Freedom of Information Law pertains to agencies, and §86(3) of that statute defines the term "agency" to mean, in brief, an entity of state or local government. Since a union is not a governmental entity, it would not be subject to the Freedom of Information Law. Further, I know of no other statute that provides rights of access to union members to records of their unions.

I hope that I have been of assistance.

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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

707L-140-12331

Committee Members

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Executive Director

Robert J. Freeman

Mr. Domingo Heredia
97-A-3557
Fishkill Correctional Facility
Box 1245
Beacon, NY 12508-0901

Dear Mr. Heredia:

I have received your letter in which you appealed to this office because your request for records sent to the New York City Police Department has not been answered.

In this regard, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law; it is not empowered to determine appeals or compel an agency to grant or deny access to records. Nevertheless, in an effort to offer guidance, I offer the following comments.

The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully

Mr. Domingo Heredia
October 2, 2000
Page -2-

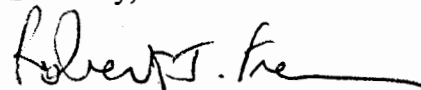
explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

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 to determine appeals at the Police Department is William Tessler, Special Counsel.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12332

Committee Members

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October 5, 2000

Executive Director

Robert J. Freeman

Mrs. Rose M. Fries

The staff of the Committee on 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. Fries:

I have received your recent letter in which you questioned the propriety of a requirement imposed by the Dryden Central School District that you must complete its form in order to seek records under the Freedom of Information Law.

In this regard, it has consistently been advised that an agency cannot require that a request be made on a prescribed form. The Freedom of Information Law, §89(3), as well as the regulations promulgated by the Committee (21 NYCRR §1401.5), 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.

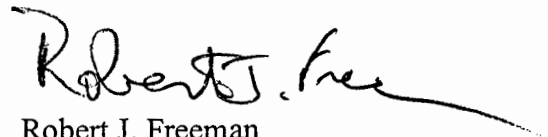
Mrs. Rose M. Fries
October 5, 2000
Page - 2 -

While the Law does not preclude an agency from developing a standard form, as suggested earlier, I do not believe that a failure to use such a form can be used to delay a response to a written request for records reasonably described beyond the statutory period. However, a standard form may, in my opinion, be utilized so long as it does not prolong the time limitations discussed above. For instance, a standard form could be completed by a requester while his or her written request is timely processed by the agency. In addition, an individual who appears at a government office and makes an oral request for records could be asked to complete the standard form as his or her written request.

In sum, it is my opinion that the use of standard forms is inappropriate to the extent that is unnecessarily serves to delay a response to or deny a request for records.

I hope that 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: Freedom of Information Officer

OML-AO - 3208
FOIL-AO - 12333

From: Robert Freeman
To: [REDACTED]
Date: 10/6/00 9:47AM
Subject: Dear Ms. Cudequest:

Dear Ms. Cudequest:

This a mountain out of a molehill. Anyone can tape record an open meeting so long as the device is used in a manner that is not disruptive or obtrusive. Also, regulations indicate that tape recordings of meetings must be retained for a minimum of four months; after that time, they can be erased or destroyed.

Robert J. Freeman
Executive Director
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIA-AD-12334

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October 11, 2000

Executive Director
Robert J. Freeman

Mr. Sal Cataldo



The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Cataldo:

I have received your letter of August 15 and apologize for the delay in response. You complained that your requests for records of the Village of Mineola have been met with delays and denials of access. You referred specifically to a request for "IRS 1099 forms" issued by the Village "to anyone or to any entity" for 1998 and 1999, which was denied on the basis of §1146 of the Tax Law.

Similar issues have arisen in the past, and although I believe that some aspects of the forms in question may be withheld, others 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.

Although tangential to your inquiry, I point out that §87(3)(b) of the Freedom of Information Law states in relevant part that:

"Each agency shall maintain...

(b) a record setting forth the name, public office address, title and salary of every officer or employee of the agency... "

As such, a payroll record that identifies all officers or employees by name, public office address, title and salary must be prepared to comply with the Freedom of Information Law. Moreover, payroll information has been found by the courts to be available [see e.g., Miller v. Village of Freeport, 379

NYS 2d 517, 51 AD 2d 765, (1976); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NYS 2d 954 (1978)]. In Gannett, supra, the Court of Appeals held that the identities of former employees laid off due to budget cuts, as well as current employees, should be made available. In addition, this Committee has advised and the courts have upheld the notion that records that are relevant to the performance of the official duties of public employees are generally available, for disclosure in such instances would result in a permissible as opposed to an unwarranted invasion of personal privacy [Gannett, supra; Capital Newspapers v. Burns, 109 AD 2d 292, aff'd 67 NY 2d 562 (1986) ; Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980; Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975) ; and Montes v. State, 406 NYS 664 (Court of Claims 1978)]. As stated prior to the enactment of the Freedom of Information Law, payroll records:

"...represent important fiscal as well as operational information. The identity of the employees and their salaries are vital statistics kept in the proper recordation of departmental functioning and are the primary sources of protection against employment favoritism. They are subject therefore to inspection" Winston v. Mangan, 338 NYS 2d 654, 664 (1972)].

Based on the foregoing, a record identifying agency employees by name, public office address, title and salary must in my view be maintained and made available.

It has been contended that W-2 forms are specifically exempted from disclosure by statute on the basis of 26 USC 6103 (the Internal Revenue Code) and §697(e) of the Tax Law. In my opinion, those statutes are not applicable, nor is §1146 of the Tax Law, which pertains to sales records. In an effort to obtain expert advice on the matter, I contacted the Disclosure Litigation Division of the Office of Chief Counsel at the Internal Revenue Service to discuss the issue. I was informed that the statutes requiring confidentiality pertain to records received and maintained by the Internal Revenue Service; those statutes do not pertain to records kept by an individual taxpayer [see e.g., Stokwitz v. Naval Investigation Service, 831 F.2d 893 (1987)], nor are they applicable to records maintained by an employer, such as a school district. In short, the attorney for the Internal Revenue Service said that the statutes in question require confidentiality only with respect to records that it receives from the taxpayer. In discussions with representatives of the State Department of Taxation and Finance, the same conclusion was reached, that those associated with the Department could not disclose, but that the forms in question maintained by a government agency as an employer are subject to rights conferred by the Freedom of Information Law.

In conjunction with the previous commentary concerning the ability to protect against unwarranted invasions of personal privacy, I believe that portions of either 1099 or W-2 forms may 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 names and gross wages or payments must be disclosed. Further, in a judicial decision, the same conclusion was reached, and the court cited an advisory opinion rendered by this office (Day v. Town of Milton, Supreme Court, Saratoga County, April 27, 1992).

Mr. Sal Cataldo
October 11, 2000
Page - 3 -

Second, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

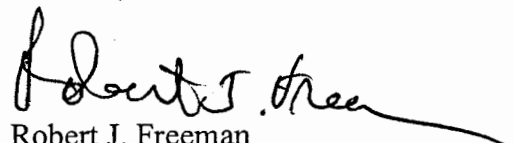
"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

In an effort to enhance compliance with and understanding of the Freedom of Information Law, a copy of this response will be sent to the Village Clerk.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Louis M. DiDomenico



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

70 JL - 10 - 12335

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October 12, 2000

Executive Director

Robert J. Freeman

Ms. Tamara O'Bradovich

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. O'Bradovich:

I have received your letter of August 18 and the materials attached to it. You asked whether, under the Freedom of Information Law, you "must pay for duplicate copies? Or poor or unreadable copies?" You also questioned whether the information made available must be "decipherable."

In this regard, first, §87(1)(b)(iii) of the Freedom of Information Law authorizes an agency to charge up to twenty-five cents per photocopy up to nine by fourteen inches. If a photocopy machine is faulty and produces illegible copies, I believe that it would be reasonable for an agency to prepare legible copies at no additional charge. Second, I am not sure of what you mean by "decipherable." If you are asking whether a record must be understandable or if it must be interpreted or explained, I do not believe that an agency would be obliged to do so by the Freedom of Information Law. In short, an agency's responsibility under that statute is to make records that must be disclosed available to an applicant; in my view, the agency is not required to explain the contents of records.

I hope that the foregoing serves to clarify your understanding of the law and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Michael Yazurlo, Superintendent



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

707L100-12336

Committee Members

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Executive Director
Robert J. Freeman

October 12, 2000

Mr. Mickey Mayes



The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence, unless otherwise indicated.

Dear Mr. Mayes:

I have received your letter of August 16 and the materials attached to it. You have asked whether, in my view, Donna Combs, Warrensburg Town Clerk, responded appropriately to your requests for requests.

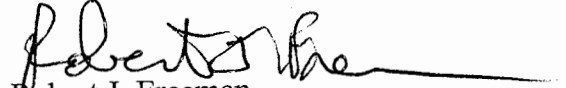
Having reviewed the requests and your letter to Ms. Combs, I contacted her to learn more of the matter. In short, she indicated that your requests were repetitious and involved the same records, and it is her belief that she responded properly to your requests. She also indicated that the delay in disclosure was due to the press of other responsibilities. If her contentions are accurate, I do not believe that she would have acted in a manner inconsistent with law.

I note, too, that 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. Mickey Mayes
October 12, 2000
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: Donna Combs, Town Clerk



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOII-10-12337

Committee Members

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Executive Director

Robert J. Freeman

October 12, 2000

Mr. Dan Weiner

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Weiner:

I have received your letter of August 15 and the correspondence attached to it. Please accept my apologies for the delay in response.

You have complained that the New York City Department of Parks and Recreation has denied your request for communications between that agency and the Office of the Comptroller in relation to a review of an application for a franchise. The denial indicates that the records were withheld under §87(2)(g) of the Freedom of Information Law.

From my perspective, the contents of the records serve as the basis for determining the extent to which they may be withheld. In this regard, I offer the following comments.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

The provision upon which the Department ruled potentially serves as a basis for denial of access. However, due to its structure, it often requires substantial disclosure. Specifically, §87(2)(g) enables an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

One of the contentions offered by New York City in a decision that reached 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)].

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

Mr. Dan Weiner
October 12, 2000
Page - 3 -

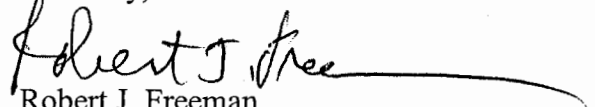
opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182)(id., 276-277).

In short, insofar as the records at issue consist of statistical or factual information, an agency's policy or final determinations, I believe that they should be disclosed.

In an effort to share this opinion with the Department, a copy will be sent to its records access officer.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Laura LaVelle, Records Access Officer



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI - AO - 12338

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Executive Director

Robert J. Freeman

October 12, 2000

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 facts presented in your correspondence.

Dear Mr. Philippo:

I have received your letter of August 15 and apologize for the delay in response. As I understand the matter, you have sought confirmation concerning your right to obtain records pursuant to §373-a of the Social Services Law in conjunction with the Freedom of Information Law.

In this regard, first, while the Freedom of Information Law includes a broad statement of intent relative to the public's right to gain access to government records, and while I believe that the thrust of that statute and its judicial interpretation are instructive, §373-a of the Social Services Law is, in my view, the governing statute in the context of your inquiry. As you are aware, records relating to adoption are exempt from disclosure to the general public under §114 of the Domestic Relations Law; medical records are exempt from public disclosure under various provisions of the Public Health Law (see e.g., §§18 and 2803-c); records relating to foster care and "abandoned, delinquent, destitute, neglected or dependent children" are confidential under the §372 of the Social Services Law. In each of those instances, the records would, in my opinion, be "specifically exempted from disclosure by...statute" pursuant to §87(2)(a) of the Freedom of Information Law and, therefore, beyond rights of access of the general public. Any disclosures of the records subject to those statutes would be made based only on specific exceptions that may authorize disclosure appearing in those or other statutes. In short, the rights that you may have would, in my opinion, be conferred by provisions other than the Freedom of Information Law.

Second, what I consider to be the pertinent language in §373-a of the Social Services Law is as follows:

"To the extent they are available, the medical histories of a child in foster care and of his or her natural parents shall be provided by an authorized agency to such child when discharged to his or her own care and upon request to any adopted former foster child; provided, however, medical histories of natural parents shall be provide

Mr. Christopher K. Philippo
October 12, 2000
Page - 2 -

to an adoptee with information identifying such natural parents eliminated. Such medical histories shall include all available information setting forth conditions or diseases believed to be hereditary, any drugs or medication taken during pregnancy by the child's natural mother and any other information, including any psychological information in the case of a child legally freed for adoption or when such child has been adopted..."

One of your questions in relation to the foregoing involves "what might constitute identifying information regarding [your] biological parents." "Identifying information" is not, to my knowledge, defined in any provision of law. However, in federal regulations dealing with unrelated records, those pertaining to students, the phrase "personally identifiable information" is defined in part to mean any information that would make a student's identity easily traceable." Consequently, even if a name or an address is deleted, for example, insofar as other details or characteristics in a records would, if disclosed, make a person's identity easily traceable, those details may be withheld. From my perspective, that kind of standard serves as an appropriate guide in determining the extent to which information within a record should be disclosed or withheld.

Lastly, with respect to your apparent contention that you may enjoy rights of access to "all records", except to the extent they contain identifying details, it is questionable whether your rights are as broad as you suggest. Section 373-a of the Social Services Law is entitled "Medical histories" and appears to provide rights of access, with conditions, only to medical histories; it does not appear to apply to records other than medical histories. With respect to those other records, I would conjecture that many would be exempted from disclosure by statute. If that is so, according to the state's highest court, they may be withheld in their entirety; an agency would not be obliged to disclose after having deleted identifying details [Short v. Board of Managers of Nassau County Medical Center, 57 NY2d 399 (1982)] On the other hand, insofar as the records are not exempted from disclosure by statute, I believe that the Freedom of Information Law would apply. In that event, an agency would be required to review the contents of the records to determine which portions, if any, may justifiably 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

OML-A-3210
FOIL-AO-12339

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October 12, 2000

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 facts presented in your correspondence.

Dear Ms. Adams:

I have received your letter of August 16 and the materials attached to it. You have raised a series of issues relating to the implementation of the Freedom of Information and Open Meetings Laws by the Town of Southold.

You referred initially to an agenda listing subjects to be considered by the Town Board in executive session and asked whether more specificity is required. The subjects were identified as "real estate", "contracts", "litigation" and "negotiations." In this regard, there is nothing in the Open Meetings Law or any other statute of which I am aware that requires that an agenda be prepared or followed. As such, there is no obligation that an agenda include more specific information than that presented.

However, as you may be aware, §105(1) of the Open Meetings Law requires that an executive session may be held only after having accomplished a procedure during an open meeting, and one element of the procedure includes a motion for entry into executive session that indicates the subject to be discussed. In my view, irrespective of the manner in which items appear on an agenda, a public body would be complying with that aspect of the law if its motions for entry into executive session include sufficient detail to enable the public to know, with reasonable certainty, that the subject may properly be considered during an executive session. For instance, it has been held that a motion that merely reiterates the statutory of an exception, i.e., "proposed, pending or current litigation", is inadequate, and that a motion under that provision should name the litigation [see Daily Gazette v. Town of Cobleskill, 444 NYS2d 44 (1981)]. A proper motion might be: "I move to enter into executive session to discuss the case of the XYZ Corp. v. the Town of Southold." Similarly, if a matter involves collective bargaining negotiations, it has been held that a motion should identify the union with which the agency is negotiating, i.e., "I move to enter into executive session to discuss the negotiations with the police union" (Doolittle v. Board of Education, Supreme Court, Chemung County, July 21, 1981).

Your next area of inquiry involves the "legally mandated procedure" in relation to the disclosure of certain records prior to a public hearing. The procedure relative to hearings may differ from one situation to the next; there is no generally applicable "legally mandated procedure" of which I am aware. For example, towns, villages and school districts must conduct public hearings prior to the adoption of their budgets; those hearings are not held under any general provision of law, but rather under specific provisions of the Town Law, the Village Law and the Education Law, and each such provision is unique. Moreover, the question does not directly involve within the advisory jurisdiction of the Committee on Open Government.

Next, you referred to the time in which agencies should respond to requests for records and asked who enforces the requirements imposed by the Freedom of Information Law. That statute provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

Based on the foregoing, an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date indicating when it can be anticipated that a request will be granted or denied. The acknowledgement by the records access officer did not make reference to such a date.

I note that there is no precise time period within which an agency must grant or deny access to records. The time needed to do so may be dependent upon the volume of a request, the possibility that other requests have been made, the necessity to conduct legal research, the search and retrieval techniques used to locate the records and the like. In short, when an agency acknowledges the receipt of a request because more than five business days may be needed to grant or deny a request, so long as it provides an approximate date indicating when the request will be granted or denied, and that date is reasonable in view of the attendant circumstances, I believe that the agency would be acting in compliance with law.

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully

Mr. Laury L. Dowd
December 8, 1997
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)].

There is no agency that enforces the Freedom of Information Law. If a person believes that an agency has failed to comply with law, he or she may initiate a proceeding under Article 78 of the Civil Practice Law and Rules.

Lastly, you asked what you might do if you are informed that a request is "too general." From my perspective, the issue involves whether or the extent to which a request "reasonably describes" the records sought as required by §89(3) of the Freedom of Information Law. I point out that it has been held by the Court of Appeals that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

The Court in Konigsberg found that the agency could not reject the request due to its breadth and also stated that:

"respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency']" (id. at 250).

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping system. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number.

While I am unfamiliar with the recordkeeping systems of the 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

Mr. Laury L. Dowd

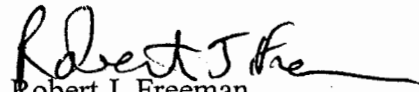
December 8, 1997

Page -4-

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, a request is made for complaints made to the Building Department, and the Department maintains all complaints in a single central file, I believe that the request would meet the standard that a request be reasonably described. If, however, complaints are filed with records pertaining to individual properties and can be located only by reviewing records individually relating to every property in the Town, I do not believe that the request would meet that standard. It is suggested that you ascertain how records are kept or filed in order to attempt to ensure that requests are made in a manner consistent with an agency's filing or record-keeping system.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board

Elizabeth A. Neville, Town Clerk

FOIL-AO-12340

From: Robert Freeman
To: [REDACTED]
Date: 10/16/00 8:26AM
Subject: Dear Ms. DiMasi:

Dear Ms. DiMasi:

Access to genealogical records is not governed by the Freedom of Information Law. Birth and death records are generally confidential under the Public Health Law, §§4173 and 4174. However, genealogical records are accessible through a registrar or town or city clerk pursuant to rules adopted by the Commissioner of the Department of Health. In short, I do not believe that you have the right to personally search through genealogical records.

To obtain more information on the subject, it is suggested that you go to the Department of Health website or contact the Bureau of Vital Records at (518)474-3077.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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STATE OF NEW YORK
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FOI-DO-12341

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October 17, 2000

Executive Director

Robert J. Freeman

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. Ravnitzky:

As you are aware, I have received your correspondence concerning your efforts in obtaining certain appraisals of property owned by the Town of Carmel. Please accept my apologies for the delay in response.

Although you appear to be familiar with opinions rendered by this office relating involving access to appraisals, for purposes of clarification, I offer the following comments.

As as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, two of the grounds for denial are relevant to an analysis of rights of access.

Section 87(2)(c) permits an agency to withhold records to the extent that disclosure would "impair present or imminent contract awards or collective bargaining negotiations." As it relates to the impairment of "contract awards", §87(2)(c) is, in my opinion, generally cited and applicable in two types of circumstances.

One involves a situation in which an agency is involved in the process of seeking bids or proposals concerning the purchase of goods and services. If, for example, an agency seeking bids or proposals has received a number of bids, but the deadline for their submission has not been reached, premature disclosure for the bids to another possible submitter might provide that person or firm with an unfair advantage vis a vis those who already submitted bids. Further, disclosure of the identities of bidders or the number of bidders might enable another potential bidder to tailor his bid in a manner that provides him with an unfair advantage in the bidding process. In such a situation, harm or "impairment" would likely be the result, and the records could justifiably be denied. However, after the deadline for submission of bids or proposals are available after a contract has been awarded, and that, in view of the requirements of the Freedom of Information Law, "the

Mr. Gerald Ravnitzky

October 17, 2000

Page - 2 -

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)]. From my perspective, disclosure of an appraisal prior to the consummation of a transaction 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 transaction has been completed, any impairment that might have existed prior to the consummation of an agreement would essentially have disappeared. In that event, §87 (2)(c), in my opinion, would not be applicable as a basis for a denial of access.

The other provision of relevance is §87(2)(g), which pertains to the authority to withhold "inter-agency or intra-agency materials." If an appraisal or survey is prepared by agency officials, it could be characterized as "intra-agency material." Further, the Court of Appeals has held that appraisals and other reports prepared by consultants retained by agencies may also be considered as intra-agency materials subject to the provisions of §87(2)(g) [see Xerox Corporation v. Town of Webster, 65 NY 2d 131 (1985)].

More specifically, §87(2)(g) states that an agency may withhold records that:

"are inter-agency or intra-agency materials which are not:

- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations; or
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could

appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

It has been held that factual information appearing in narrative form, as well as those portions appearing in numerical or tabular form, is available under §87(2)(g)(i). For instance, in Ingram v. Axelrod, the Appellate Division held that:

"Respondent, while admitting that the report contains factual data, contends that such data is so intertwined with subject analysis and opinion as to make the entire report exempt. After reviewing the report in camera and applying to it the above statutory and regulatory criteria, we find that Special Term correctly held pages 3-5 ('Chronology of Events' and 'Analysis of the Records') to be disclosable. These pages are clearly a 'collection of statements of objective information logically arranged and reflecting objective reality'. (10 NYCRR 50.2[b]). Additionally, pages 7-11 (ambulance records, list of interviews) should be disclosed as 'factual data'. They also contain factual information upon which the agency relies (Matter of Miracle Mile Assoc. v. Yudelson, 68 A2d 176, 181 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 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. Therefore, if §87(2)(c) does not apply, insofar as an appraisal includes statistical or factual information, those portions of the appraisal must, in my view be disclosed.

Mr. Gerald Ravnitzky

October 17, 2000

Page - 4 -

Lastly, I note that the Freedom of Information Law is permissive; even though an agency *may* withhold records or portions thereof based on a ground for denial of access, there is no obligation to do so, and the agency may choose to disclose [see Capital Newspapers v. Burns, 67 NY2d, 562, 567 (1986)].

I hope that I have been of assistance.

cc: Hon. Frank J. DelCampo, Supervisor

Hon. Connie Munday, Clerk



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMC AD - 3212
FOIL AD - 12342

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October 17, 2000

Executive Director

Robert J. Freeman

E-Mail

TO: Elizabeth Passer [REDACTED]

FROM: Robert J. Freeman, Executive Director *RSF*

The staff of the Committee 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. Passer:

I have received your letter of August 18 in which you sought assistance in obtaining the names of individuals who purchased bricks to be placed in a walkway at the Mexico High School whose bricks were removed. You indicated that letters were sent by the District to those persons, and that it is your understanding that the letters do not include the language of the inscriptions that had appeared on the bricks. You added that the District might have indicated in the letters that the bricks had been removed and destroyed "due to religious or political content."

If your assumptions are accurate, I believe that the names of the individuals in question must be disclosed. In this regard, I offer the following comments.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. I point out 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 highlighted in the preceding sentence in my view evidences a recognition on the part of the State Legislature that in some instances a single record might include both accessible and deniable information, and that it is an agency's duty to disclose those portions that do not fall within an exception to rights of access..

Under the circumstances, it appears that only one of the grounds for denial is pertinent to the matter. Specifically, §87(2)(b) states that an agency may withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." According to the Court of Appeals, the State's highest court, "the essence of exemption" involves an intent to enable an agency to withhold items "that would ordinarily and reasonably be regarded as intimate, private information" [*Hanig v. State Department of Motor Vehicles*, 79 NY2d 106, 112 (1992)].

From my perspective, insofar as information found within a record names an individual and also expresses a religious belief, for example, since such belief is inherently personal, either the name or the expression of the religious belief could be withheld; the combination of the name and the indication of one's personal belief would, in my view, constitute information of an intimate, personal nature, and therefore, would result in an unwarranted invasion of personal privacy if disclosed. Similarly, if a record of the inscription on a brick included a statement reflective of one's views on a political matter (i.e., in favor of or against abortion, gun control, a particular candidate or office holder), that information coupled with one's identity would in my opinion constitute an unwarranted invasion of privacy if made available to the general public.

However, if the portion of a record indicating one's religious or political belief is deleted, and the remainder of the record merely includes a name, I do not believe that disclosure of the name alone would, if disclosed, result in an unwarranted invasion of personal privacy. In short, without the information reflective of one's personal belief, there would be nothing intimate involved in merely disclosing the name. For that reason, if the District maintains a record or records indicating that bricks had been removed, the names of those whose bricks were removed should be disclosed. If such a record or records also include intimate, personal information, such as an indication of one's religious or personal beliefs, those portions may in my view be withheld in accordance with commentary offered in the preceding paragraphs.

You also referred by phone to a recent executive session held by the Board of Education prior to a meeting, and you indicated that the Superintendent asserted that it was proper to do so. If that is his contention, I respectfully disagree.

I point out that the phrase "executive session" is defined in §102(3) of the Open Meetings Law to mean a portion of an open meeting during which the public may be excluded. As such, an executive session is not separate and distinct from a meeting, but rather is a portion of an open meeting. The Law also contains a procedure that must be accomplished during an open meeting before an executive session may be held. Specifically, §105(1) states in relevant part that:

"Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

As indicated in the language quoted above, a motion to enter into an executive session must be made during an open meeting and include reference to the "general area or areas of the subject or subjects to be considered" during the executive session.

It has been consistently advised 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

Ms. Elizabeth Passer

October 17, 2000

Page - 3 -

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, it cannot be known in advance of that vote that the motion will indeed be approved.

In an effort to enhance compliance with and understanding of the Freedom of Information and Open Meetings Laws, copies of this opinion will be sent to the Board of Education and the Superintendent.

I hope that I have been of assistance.

RJF:jm

cc: Board of Education
Superintendent



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

1071-AO-12343

Committee Members

Mary O. Donohue
Alan Jay Gerson
Walter W. Grunfeld
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October 17, 2000

Executive Director
Robert J. Freeman

Ms. Carol Smith
Vice President, Operations
Due Diligence, Inc.
P.O. Box 8366
Missoula, MT 59807

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Smith:

I have received your letter of August 22, as well as the correspondence associated with it. Please accept my apologies for the delay in response.

In brief, you requested the "criminal records database" maintained by the Office of Court Administration (hereafter "OCA"), including "updates on a monthly basis", under the Freedom of Information Law. That agency denied the request on the ground that the database consists of court records that are not subject to the Freedom of Information Law. Mr. John Eiseman, Deputy Counsel, wrote that court records remain beyond the coverage of that statute, even though they may be in possession of the OCA, which "maintains those records in an electronic format for the courts." You have sought an advisory opinion concerning the propriety of the denial of your request.

In this regard, I offer the following comments.

First, even if the Freedom of Information Law applies, I do not believe that an agency must honor a request that is prospective in nature, i.e., a request in which an applicant asks that certain records be made available on a periodic basis. That statute pertains to existing records, and §89(3) states in part that an agency is not required to prepare a record that does not exist or that it does not maintain. In my view, since, in a technical sense, an agency can neither grant nor deny access to records that do not yet exist, an agency is not required to honor a request that is prospective.

Second, as you are aware, the Freedom of Information Law 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,

Mr. Carol Smith
October 17, 2000
Page - 2 -

office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines the term "judiciary" to mean:

"the courts of the state, including any municipal or district court, whether or not of record."

Based on the foregoing, the courts and court records are not subject to the Freedom of Information Law. However, it has been determined that OCA is not a court, but rather is an "agency" that falls within the coverage of that statute [see Babigian v. Evans, 427 NYS2d 699, aff'd 97 AD2d 992 (1983) and Quirk v. Evans, 455 NYS2d 918, 97 AD2d 992 (1983)]. In Babigian, the initial decision concerning the issue, the matter involved records relating to employees; it did not deal with what would typically be records maintained by a court that were also maintained by OCA. I point out that the court in Babigian in a footnote cited and apparently relied on an advisory opinion rendered by this office concerning the development of the legislation that was later enacted as the Freedom of Information Law. A portion of the passage cited by the court referred to the negotiations on the bill that became law that suggested that:

"During the negotiations, the status of the administrative branches of the court system were discussed in relation to the definitions of both 'judiciary' and 'agency.' The reason for the exclusion of the courts from the Freedom of Information Law is based upon the notion that there are numerous statutes in the Judiciary Law and court acts which specifically direct that records be available or confidential. Consequently, neither the original Freedom of Information Law nor the Law as amended would affect rights of access to court records, even if the courts were included in the Law" (id., 690).

From my perspective, the early opinion and the Babigian decision established a line of demarcation between those records maintained by OCA as an agency carrying out its administrative functions and, by implication, others which may ordinarily be characterized as court records.

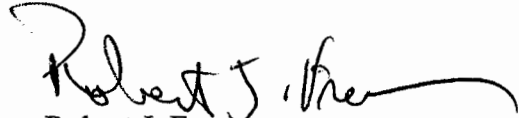
While I know of no judicial decision that deals directly with the records at issue, I note that it has been held that the office of a district attorney, which clearly is an "agency" subject to the Freedom of Information Law, "is not required to make available for inspection or copying any suppression hearing or trial transcripts of a witness' testimony in its possession, because the transcripts are court records not agency records" [Moore v. Santucci, 151 AD2d 677, 680 (1989)].

In consideration of the legislative history cited by the court in Babigian and the holding in Moore, it appears that possession of court records by OCA does not transform the records into agency records. If that is so, I believe that the response to your request by OCA was consistent with law.

Mr. Carol Smith
October 17, 2000
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, sweeping horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Judge Ann T. Pfau
Michael Colodner
John Eiseman



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL A0-12344

Committee Members

Mary O. Donohue
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October 17, 2000

Executive Director

Robert J. Freeman

Mr. Charles Leahey



The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Leahey:

I have received your letter of August 21. You have sought an opinion concerning your contention that the New York City Police Department is "dragging their feet" in relation to your requests for records made under the Freedom of Information Law.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Further, in a situation in which requests were made and the agency engaged in continual delays and failed to grant or deny access to the records sought, the applicant initiated a judicial proceeding, but the agency contended that petitioner had failed to exhaust her administrative remedies. The court, however, held to the contrary. 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...

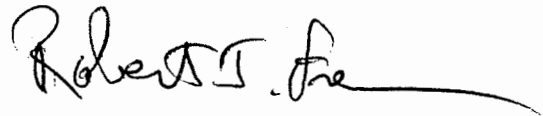
"It, therefore, appears that respondent's failure in this particular proceeding to neither grant nor deny the petitioner's request may be construed as a denial of access that may be appealed to the agency head" (Bernstein v. City of New York, Supreme Court, New York County, NYLJ, November 7, 1990).

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.).

Mr. Charles Leahey
October 17, 2000
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



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3213
FOIL-AO-12345

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October 18, 2000

Executive Director

Robert J. Freeman

Mr. Howard I. Block



The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Block:

I have received your letter in which you wrote that the Franklin Square & Munson Fire District failed to produce the records that you requested and asked which department might assist you. The records sought include minutes of meetings and copies "fuel inventory forms" and reports of mileage on vehicles.

In this regard, this office, the Committee on Open Government, a unit of the Department of State, is authorized by law to offer advice and guidance concerning the Freedom of Information Law. While the advisory opinions rendered by the Committee are not binding, it is our hope that they are educational and persuasive, and that they encourage compliance with law when transmitted to agencies.

With respect to the matter that you described, first, the Freedom of Information Law is applicable to agency records, and §86(3) of that statute defines the term "agency" to mean:

"any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

A fire district is a public corporation [see General Construction Law, §66, and Town Law, §174(7)]. Consequently, I believe that a fire district is required to comply with the Freedom of Information Law.

Second, I point out that the Freedom of Information Law, pertains to existing records, and that §89(3) states in part that an agency is ordinarily not required to create a record in response to a request. Therefore, if, for example, there are no records indicating mileage on vehicles, the District would not be obliged to prepare new records containing the information sought.

Third, insofar as records exist, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

From my perspective, if fuel inventory forms or records indicating mileage exist for the periods to which you referred, they must be disclosed, for none of the grounds for denial would apply. It is noted that §87(2)(g)(i) specifies that "statistical or factual tabulations or data" found within internal agency materials must be disclosed, unless a separate basis for denial may be properly cited.

With regard to minutes of meetings, I direct your attention to the Open Meetings Law. Section 106 of that statute provides that:

"1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.

2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.

3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

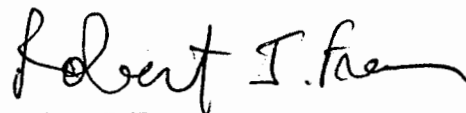
Based on the foregoing, it is clear that minutes of meetings of the Board of Fire Commissioners must be prepared and made available within two weeks.

As suggested above, in an effort to enhance compliance with and understanding of applicable law, a copy of this opinion will be sent to the Board of Fire Commissioners.

Mr. Howard I. Block
October 18, 2000
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 at the end.

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Fire Commissioners



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO -
FOIL-AO - 12346

Committee Members

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October 18, 2000

Executive Director

Robert J. Freeman

Hon. Barbara Fink
Mayor
Village of Owego
178 Main Street
Owego, NY 13827

Dear Mayor Fink:

Thank you for transmitting your determination of an appeal made under the Freedom of Information Law by Ms. Connie Nogas rendered on August 23. At the end of the determination, you wrote that Ms. Nogas could seek judicial review "under Section 97 of Art. 6-A of the Public Officers Law."

Article 6-A of the Public Officers Law is the Personal Privacy Protection Law, and that 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 village. I point out that a provision in the Freedom of Information Law, §89(4)(b), indicates that a person whose appeal has been denied may seek judicial review under Article 78 of the Civil Practice Law and Rules.

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



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12347

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October 18, 2000

Executive Director

Robert J. Freeman

Mr. Gary Kaskel
Shelter Reform Action Committee
P.O. Box 268
New York, NY 10028

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Kaskel:

I have received your letter of August 22 and the materials attached to it. You referred to requests for records of the Center for Animal Care and Control ("the Center") and asked "(1) whether CACC's denial of our request for CACC's employee separation agreements is lawful, and (2) whether CACC has the right to state that it is merely voluntarily (yet selectively) complying with FOIL under its own corporate policy and is not legally bound by FOIL as an agency."

In this regard, in consideration of your second question first, as you suggested in your letter, it has been determined judicially that the Center is an "agency" that falls within the coverage of the Freedom of Information Law (Van Ness v. The Center for Animal Care and Control, Supreme Court, New York County, January 28, 1999). As you are aware, the court cited an opinion rendered by this office in which was advised that the Center is subject to the Freedom of Information Law and adopted the "impeccable reasoning set forth in that opinion." In consideration of the holding in Van Ness, I believe that the Center must comply with and cannot "selectively" give effect to that statute.

With respect to rights of access to "employee separation agreements", while I know of no judicial decision specifically addressing those records, there are many that have dealt with similar records, and I believe that the principles expressed in those decisions may be applied in the context of your inquiry. In this regard, I offer the following comments.

First, I point out 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)].

Second, I believe that agreements 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..."

Also of possible relevance is a decision 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).

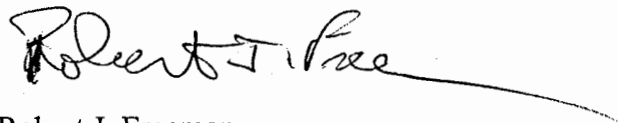
"Therefore, this Court finds that the disclosure made by the defendant Supervisor was 'required by law', whether or not the contract so provided" (Hansen v. Town of Wallkill, Supreme Court, Orange County, December 9, 1998).

Mr. Gary Kaskel
October 18, 2000
Page - 5 -

In sum, if my understanding of the matter is accurate, the agreements at issue should be made available, for disclosure would result in a permissible rather than an unwarranted invasion of personal privacy, and because they represent final agency determinations.

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: Marilyn Haggerty-Blohm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

Oml-AO-3214
FOIL-AO-12348

Committee Members

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October 19, 2000

Executive Director

Robert J. Freeman

Mr. Robert Williams

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Williams:

I have received your letter of August 30 in which you raised a series of questions relating to the Village of Elmsford.

First, if a member of the Board of Trustees "E-Mails the Village Clerk instructing her to perform tasks and pass on instructions to the Building Inspector and the Mayor", you asked whether the e-mail is "subject to FOIL." In this regard, the Freedom of Information Law pertains to all agency records, and §86(4) of that statute defines the term "record" expansively to include:

"any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, I believe that an e-mail communication between Village officials would clearly constitute a "record" that falls within the coverage of the Freedom of Information Law.

As a general matter, that law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Pertinent to the matter is §87(2)(g), which enables an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

Mr. Robert Williams

October 19, 2000

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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. Whether a single trustee has the authority to "instruct" is questionable. Nevertheless, if the communication could be characterized as an "instruction to staff that affects the public", I believe that it would be accessible under §87(2)(g)(ii).

Second, if three trustees meet or otherwise communicate and instruct the clerk to carry out certain activities, you asked whether "this is in violation of the Open Meetings Law." In my view, a board of trustees may exercise its authority only at a meeting during which a majority is physically present that is preceded by notice to all of the members.

The Open Meetings Law pertains to meetings of public bodies, and §102(2) of that statute defines the phrase "public body" to mean:

"...any entity for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

Based on the foregoing, a village board of trustees clearly constitutes a "public body."

Especially relevant in my view is §41 of the General Construction Law which provides guidance concerning quorum and voting requirements. Specifically, the cited provision states that:

"Whenever three 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, gathered together in the presence of each other or through the use of videoconferencing, at a meeting duly held at a time fixed by law, or

Mr. Robert Williams

October 19, 2000

Page - 3 -

by any by-law duly adopted by such board of body, or at any duly adjourned meeting of such meeting, or at any meeting duly held upon reasonable notice to all of them, shall constitute a quorum and not less than a majority of the whole number may perform and exercise such power, authority or duty. For the purpose of this provision the words 'whole number' shall be construed to mean the total number which the board, commission, body or other group of persons or officers would have were there no vacancies and were none of the persons or officers disqualified from acting."

Based upon the language quoted above, a public body cannot carry out its powers or duties except by means of an affirmative vote of a majority of its total membership taken at a meeting duly held upon reasonable notice to all of the members. Therefore, even if a majority of the Board is present, but they convene without informing the other two members, there would be no quorum, and the three would have no authority, in my view, to vote or otherwise take action.

Third, you asked whether you must submit separate requests for each record sought under the Freedom of Information Law. There is no statutory limitation on the number of records that may be requested in a single application for records, and there is no requirement that each record sought must be requested separately.

Fourth, if I understand the question accurately, you asked whether draft minutes may be changed before a meeting and then later approved with the alteration. Pursuant to the Village Law, §4-402, the village clerk has the duty to "act as clerk of the board of trustees...and shall keep a record of their proceedings." Based on that provision, I believe that the clerk is responsible for preparing minutes, and that the minutes that he or she prepares can be amended or altered only at a meeting of the board of trustees.

Lastly, you referred to a meeting that "doesn't get noticed anywhere." In this regard, the Open Meetings Law requires that notice be posted and given to the news media prior to every meeting of a public body, such as a board of education. Specifically, §104 of that statute provides that:

"1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.

2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.

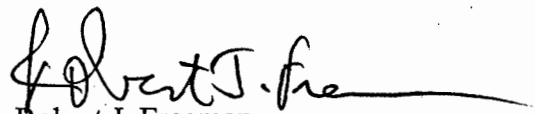
3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

Mr. Robert Williams
October 19, 2000
Page - 4 -

Stated differently, if a meeting is scheduled at least a week in advance, notice of the time and place must be given to the news media and to the public by means of posting in one or more designated public locations, not less than seventy-two hours prior to the meeting. If a meeting is scheduled less than a week an advance, again, notice of the time and place must be given to the news media and posted in the same manner as described above, "to the extent practicable", at a reasonable time prior to the meeting. Although the Open Meetings Law does not make reference to "special" or "emergency" meetings, if, for example, there is a need to convene quickly, the notice requirements can generally be met by telephoning the local news media and by posting notice in one or more designated locations.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees
Village Clerk

FOIL-A0-12349

From: Robert Freeman
To: [REDACTED]
Date: 10/19/00 11:11AM
Subject: Dear Ms. Gilbert:

Dear Ms. Gilbert:

If I understand your inquiry correctly, the Town Attorney has received a communication from the Attorney General's office that contains suggestions relating to a draft affidavit. If my interpretation of the matter is accurate, the suggestions could be withheld, but perhaps not based on the provision to which you referred.

Section 87(2)(e)(i) enables an agency to withhold records compiled for law enforcement purposes when disclosure would interfere with an investigation. Likely more applicable would be §87(2)(g), which enables an agency to withhold inter-agency materials, such as those transmitted from a state agency to a municipality, insofar as they consist of advice, recommendations, opinions, etc. As such, suggestions offered by the AG's office could, in my view, be withheld.

If you would like to discuss the matter, 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
Website - www.dos.state.ny.us/coog/coogwww.html



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12350

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October 19, 2000

Executive Director

Robert J. Freeman

Mr. Alfred R. Maccabee



Dear Mr. Maccabee:

I have received a copy of your letter addressed to Mr. Timothy J. Hopkins of the Suffolk County Water Authority in which you raised a series of questions and indicated that your earlier questions had not been answered.

It appears that your belief may be that Mr. Hopkins is required to supply answers to your questions in order to comply with the Freedom of Information Law. If that is so, it is likely that you misunderstand that statute. From my perspective, its title, the Freedom of Information Law, may be somewhat misleading, for that law does not deal with information *per se*; rather it deals with records. Further, §89(3) states that an agency is not required to create a record in response to a request. In short, while the staff of an agency may choose to supply information in response to questions, it is not required to do so by the Freedom of Information Law. Its responsibility under that statute involves disclosing existing records to the extent required by law.

I hope that the foregoing serves to clarify your understanding of the Freedom of Information Law and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Timothy J. Hopkins



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

POT 1-AP-12351

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October 19, 2000

Executive Director

Robert J. Freeman

Margaret P. Kuebler, Esq.
P.O. Box 487
Batesville, MS 38606-0487

The staff of the Committee 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. Kuebler:

I have received your letter as well as the correspondence attached to it. You have raised a series of issues relating to your attempts to obtain copies of records pertaining to a parcel in East Massapequa.

Based on a review of the materials, requests for records were sent to three entities of government: the New York State Department of Environmental Conservation ("DEC"), the Town of Oyster Bay (the Department of Planning and Development) and the Richmond County Surrogate's Court. I note that your letter addressed to Mr. Alan Landman refers to him as the Superintendent of the Nassau County Department of Planning and Development. However, Mr. Landman is an official of the Town of Oyster Bay. As I understand the situation, your requests sent to Ms. Mary Ann Stark and Mr. Landman involve different records maintained by separate units within the government of the Town of Oyster Bay.

In consideration of the materials that you provided, as well as a conversation with Ms. Stark, I offer the following comments and suggestions. I point out that the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law; neither this office nor any other agency is empowered to compel a unit of government to comply with that law.

It is noted initially 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."

Consequently, while the Freedom of Information Law clearly applies to the Town entities with which you corresponded and the DEC, it does not apply to the courts or court records. This is not to suggest that court records are not generally public, for other statutes often require the disclosure of those records (see e.g., Surrogate's Court Procedure Act, §2501).

Second, based on my discussion with Ms. Stark, I do not believe that the Town is resistant to disclosure. She indicated that her office maintains three series of files that fall within the coverage of your request, that those maintained by Mr. Landman are more voluminous, and that she does not know which among them are those in which you are interested. Ms. Stark also said that many of the records have already been made available to you. She added that she would mail the records to you if you can provide additional detail that would enable her to locate those of your interest, so long as the proper fee is paid. Alternatively, she said that all of the records can be sent to you upon payment of the requisite fee. Due to their volume, it was suggested that the fee could be substantial.

Ms. Stark emphasized that the records could be inspected by the representative of your choice in order to identify those that you would like to have copied and sent to you, and she expressed the belief of all of the records in which you are interested are maintained by and could be acquired from a Mr. DeGennaro in Massapequa.

In sum, it appears that you may have several options: you may better identify the records in order to enable Town officials to ascertain which you want to be copied and sent upon payment of a fee; you could obtain copies of all of the records of the Town that fall within your request; you could designate a representative to review and thereafter seek copies of the records of your choice; or you might seek copies of the records from an alternative source.

Third, the correspondence refers to fees in several areas. For instance, there is mention of a "research" fee of twenty-five dollars, and Ms. Stark referred to a fee of six dollars per foot for the reproduction of maps or similar large records. In this regard, in my view, unless a statute, an act of the State Legislature, authorizes an agency to charge a fee for searching for records or more than twenty-five cents per photocopy for records up to nine by fourteen inches, or more than the actual cost of reproducing other records (i.e., those that are larger, or computer tapes, disks, etc.), no such fees may be assessed.

I point out that §87(1)(b)(iii) of the Freedom of Information Law stated until October 15, 1982, that an agency could charge up to twenty-five cents per photocopy unless a different fee was prescribed by "law". Chapter 73 of the Laws of 1982 replaced the word "law" with the term "statute". As described in the Committee's fourth annual report to the Governor and the Legislature of the Freedom of Information Law, which was submitted in December of 1981 and which recommended the amendment that is now law:

"The problem is that the term 'law' may include regulations, local laws, or ordinances, for example. As such, state agencies by means of regulation or municipalities by means of local law may and in some instances have established fees in excess of twenty-five cents per photocopy, thereby resulting in constructive denials of access. To remove this problem, the word 'law' should be replaced by 'statute', thereby enabling an agency to charge more than twenty-five cents only in situations in which an act of the State Legislature, a statute, so specifies."

As such, prior to October 15, 1982, a local law, an ordinance, or a regulation for instance, establishing a search fee or a fee in excess of twenty-five cents per photocopy or higher than the actual cost of reproduction was valid. However, under the amendment, only an act of the State Legislature, a statute, would in my view permit the assessment of a fee higher than twenty-five cents per photocopy, a fee that exceeds the actual cost of reproducing records that cannot be photocopied, or any other fee, such as a fee for search. In addition, it has been confirmed judicially that fees inconsistent with the Freedom of Information Law may be validly charged only when the authority to do so is conferred by a statute [see Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)].

Further, the specific language of the Freedom of Information Law and the regulations promulgated by the Committee indicate that, absent statutory authority, an agency may charge fees only for the reproduction of records. Section 87(1)(b) of the Freedom of Information Law states:

"Each agency shall promulgate rules and regulations in conformance with this article...and pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the availability of records and procedures to be followed, including, but not limited to...

(iii) the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by statute."

The regulations promulgated by the Committee state in relevant part that:

"Except when a different fee is otherwise prescribed by statute:

(a) There shall be no fee charged for the following:

(1) inspection of records;

(2) search for records; or

(3) any certification pursuant to this Part" (21 NYCRR section 1401.8).

Margaret P. Kuebler, Esq.

October 19, 2000

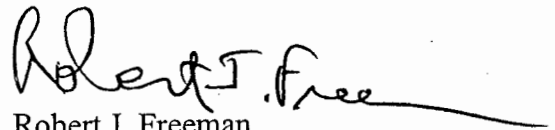
Page - 4 -

As such, the Committee's regulations specify that no fee may be charged for inspection of or search for records, except as otherwise prescribed by statute.

Lastly, in your request to the DEC, you sought certain records, and in addition, you asked that the agency "advise [you] of the current legal status of all environmental regulations that currently impact directly" on a certain parcel. In my opinion, 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 may "impact", 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, regulations that might "impact" on a parcel of land that is not, in my view, a request for a record as envisioned by the Freedom of Information Law."

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: Mary Ann Stark
Rosa J. Colomba
Alan Landman



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI L. NO - 12352

Committee Members

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October 20, 2000

Mr. Bernard J. Blum, President
Friends of Rockaway Beach, Inc.
67-11 Beach Channel Drive
Arverne, NY 11692

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Blum:

I have received your letter of August 17, which reached this office on August 31. Please accept my apologies for the delay in response. You have sought assistance in obtaining copies of court orders from the New York City Department of Sanitation involving the "confiscation of topsoil and living vegetation in Rockaway."

In this regard, it is noted at the outset that the Freedom of Information Law pertains to existing records maintained by or for an agency. If there are no such court orders, that statute would not apply.

Insofar as the records of your interest exist and are maintained by the Department of Sanitation, I believe that they 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. From my perspective, none of the grounds for denial could be asserted to withhold the records of your interest.

Lastly, since it is unclear whether the Department responded to a request made in June, 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

Mr. Bernard J. Blum, President
Friends of Rockaway, Inc.
October 20, 2000
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)].

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Francis J. Valentino



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

encl. 10-3215
FOIA 10-12353

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Executive Director

Robert J. Freeman

October 23, 2000

TO: Amy Csorny [REDACTED]

FROM: Robert J. Freeman, Executive Director *RF*

The staff of the Committee 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. Csorny:

I have received your letter, as well as a videotape of a meeting held by the Shoreham-Wading River School District Board of Education. The Board is considering the adoption of a policy that would enable a person present at an open meeting to ask that the use of audio or video equipment be discontinued. Such a request could be granted by the Board president, unless overruled by a majority of the Board.

During the Board's discussion of the issue, the Superintendent suggested that videotapes of meetings may be intended to be used as a "political mechanism" and would cause divisiveness in the District. A Board member echoed that view and suggested that videotaping a meeting is "inherently more obtrusive" and "inherently more likely to detract from the deliberative process" than audio recording. In essence, he opined that the use of video recording devices discourages people from speaking at meetings, for it is intimidating to some. It was also stated that the Board was advised that the proposed policy would "pass legal muster."

Based on judicial decisions, the proposed policy would not, in my view, pass legal muster. While it is true that the terms used during the discussion by the Board appear in those decisions, the courts have referred to the nature and use of the equipment being obtrusive or disruptive, rather than the impact on or sensibilities or preferences of persons who might speak at meetings. You have raised a variety of issues relating to the matter, and although I will not address them separately or conjecture as to the questions dealing with the possibility of arrests, the following paragraphs will deal the substance of those issues.

It is noted at the outset that the Open Meetings Law is applicable to meetings of public bodies, such as boards of education, and that any gathering of a public body for the purpose of

conducting public business, collectively, as a body constitutes a "meeting" that falls within the coverage of that statute [see Open Meetings Law, §102(1) and (2)].

The decision to which you referred, Peloquin v. Arsenault [162 Misc. 2d 306, 616 NYS2d 716 (1994)], is the only decision of which I am aware that deals with the use of video recording devices at open meetings. However, it is the latest in a series of decisions pertaining to the use of recording equipment at meetings. In my opinion, those decisions consistently apply certain principles. One is that a public body has the ability to adopt reasonable rules concerning its proceedings. The other involves whether the use of the equipment would be disruptive.

By way of background, until 1978, there had been but one judicial determination regarding the use of the recording devices at meetings of public bodies. The only case on the subject was Davidson v. Common Council of the City of White Plains, 244 NYS 2d 385, which was decided in 1963. In short, the court in Davidson found that the presence of a tape recorder, which at that time was a large, conspicuous machine, might detract from the deliberative process. Therefore, it was held that a public body could adopt rules generally prohibiting the use of tape recorders at open meetings.

Notwithstanding Davidson, however, the Committee advised that the use of tape recorders should not be prohibited in situations in which the devices are unobtrusive, for the presence of such devices would not detract from the deliberative process. In the Committee's view, a rule prohibiting the use of unobtrusive tape recording devices would not be reasonable if the presence of such devices would not detract from the deliberative process.

This contention was initially confirmed in a decision rendered in 1979. That case arose when two individuals sought to bring their tape recorders at a meeting of a school board in Suffolk County. The school board refused permission and in fact complained to local law enforcement authorities who arrested the two individuals. In determining the issues, the court in People v. Ystuenta, 418 NYS 2d 508, cited the Davidson decision, but found that the Davidson case:

"was decided in 1963, some fifteen (15) years before the legislative passage of the 'Open Meetings Law', and before the widespread use of hand held cassette recorders which can be operated by individuals without interference with public proceedings or the legislative process. While this court has had the advantage of hindsight, it would have required great foresight on the part of the court in Davidson to foresee the opening of many legislative halls and courtrooms to television cameras and the news media, in general. Much has happened over the past two decades to alter the manner in which governments and their agencies conduct their public business. The need today appears to be truth in government and the restoration of public confidence and not 'to prevent star chamber proceedings'...In the wake of Watergate and its aftermath, the prevention of star chamber proceedings does not appear to be lofty enough an ideal for a legislative body; and the legislature seems to have recognized as much when it passed the Open Meetings Law, embodying principles

which in 1963 was the dream of a few, and unthinkable by the majority"(id., 509-510; emphasis mine).

Several years later, the Appellate Division, Second Department, which includes Suffolk County, unanimously affirmed a decision of Supreme Court, Nassau County, which annulled a resolution adopted by a board of education prohibiting the use of tape recorders at its meetings and directed the board to permit the public to tape record public meetings of the board [Mitchell v. Board of Education of Garden City School District, 113 AD 2d 924 (1985)]. In so holding, the Court stated that:

"While Education Law sec. 1709(1) authorizes a board of education to adopt by-laws and rules for its government and operations, this authority is not unbridled. Irrational and unreasonable rules will not be sanctioned. Moreover, Public Officers Law sec. 107(1) specifically provides that 'the court shall have the power, in its discretion, upon good cause shown, to declare any action *** taken in violation of [the Open Meetings Law], void in whole or in part.' Because we find that a prohibition against the use of unobtrusive recording goal of a fully informed citizenry, we accordingly affirm the judgement annulling the resolution of the respondent board of education" (id. at 925).

In consideration of the "obtrusiveness" or distraction caused by the presence of a tape recorder, it was determined by the Court that " the unsupervised recording of public comment by portable , hand-held tape recorders is not obtrusive, and will not distract from the true deliberative process" (id., 925). Further, the Court found that the comments of members of the public, as well as public officials, may be recorded. As stated in Mitchell:

"[t]hose who attend such meetings, who decide to freely speak out and voice their opinions, fully realize that their comments and remarks are being made in a public forum. The argument that members of the public should be protected from the use of their words, and that they have some sort of privacy interest in their own comments, is therefore wholly specious" (id.).

In short, the nature and use of the equipment were the factors considered by the Court in determining whether its presence affected the deliberative process, not the privacy or sensibilities of those who chose to speak.

In view of the judicial determination rendered by the Appellate Division, a member of the public may tape record open meetings of public bodies, so long as tape recording is carried out unobtrusively and in a manner that does not detract from the deliberative process. While Mitchell pertained to the use of audio tape recorders, I believe that the same points as those offered by the Court would be applicable in the context of the use of video recorders. Just as the words of members of the public can be heard at open meetings, those persons can also be seen by anyone who attends.

In Peloquin, supra, the court focused primarily on the manner in which camera equipment is physically used and found that the unobtrusive use of cameras at open meetings could not be prohibited by means of a "blanket ban." The Court expansively discussed the notion of what may be "obtrusive" and referred to the Mitchell holding and quoted from an opinion rendered by this office as follows:

"On August 26, 1986 the Executive Director of the Committee on Open Government opined (OML-AO-1317, p.3) with respect to *video* recording as follows:

'If the equipment is large, if special *lighting* is needed, and if it is obtrusive and distracting, I believe that a rule prohibiting its use under those circumstances would be reasonable. However, if advances in technology permit video equipment to be used without special lighting, in a stationary location and in an unobtrusive manner, it is questionable in my view whether a prohibition under those circumstances would be reasonable.'

On April 1, 1994, Mr. Freeman further opined (OML-AO-2324) that a county legislature's resolution limiting hand held camcorders to the spectator area in the rear of the legislative chamber was not per se unreasonable but rather, as challenged, it depended for its legitimacy on whether or not the camcorders could actually record the proceedings from that location.

Blanket prohibition of audio recording is not permissible, and it is likely that the appellate courts would find that also to be the case with blanket prohibitions of video recording. However, what might be reasonable in one physical setting - a village board restricting camcording to the rear area of *its* meeting room - might not be in another - the larger chambers of a county legislature (OML-AO-1317, supra). It might well be reasonable in a village or other space-restricted setting to restrict the number of camcorders to one, as the court system may with its pooling requirement for video coverage of trials (22 NYCRR Parts 22 and 131). Such a requirement might be viewed as unreasonable in a large county legislative chamber or where a local board of education is conducting a meeting in a school auditorium.

As Mr. Freeman observed with respect to video recording (OML-AO-1317, supra), if it is 'obtrusive and distracting', a ban on it is not unreasonable. It is here claimed to be distracting. Tupper Lake Village Board members and some segment of the public aver that they are distracted from the business at hand because they do not wish to appear on television - the sole justification offered in defense of the policy.

Mitchell, supra, held that fear of public airing of one's comments at a public meeting is insufficient to sustain a ban on audio recording.

Is Mr. Peloquin's (or anyone's else's) video recording of a village board proceedings obtrusive?...

"...Hand held audio recorders *are* unobtrusive (*Mitchell*, supra); camcorders may or may not be depending, as we have seen, on the circumstances. Suffice it to say, however, in the face of *Mitchell*, the Committee on Open Government's (Robert Freeman's) well-reasoned opinions supra and the court system's pooled video coverage rules/options, a blanket ban on all cameras and camcorders when the sole justification is a distaste for appearing on public access cable television is unreasonable. While "distraction" and "unobtrusive" are subjective terms, in the face of the virtual presumption of openness contained in Article 7 of the Public Officers law and the insufficient justification offered by the Village, the 'Recording Policy' in issue here must fall" (*id.*, 717, 718; emphasis added by the court).

From my perspective, since the basis for the denial of the use of video recording devices in Peloquin, "distaste for appearing on public access television", is analogous to the basis of the proposed policy, that policy would, if adopted, be found by a court to be equally unreasonable and void.

A second issue involves access to records indicating "costs related to consulting district attorneys for advice on this policy." The records were sought by Board members, but the request was denied, because, in your words, "it did not come from the majority of the Board." If I understand the situation accurately, the records in question should be disclosed to the Board members, and to any person who seeks them under the Freedom of Information Law.

That statute is based on a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. 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 at issue 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 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

Ms. Amy Csorny
October 23, 2000
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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 an effort to enhance compliance with and understanding of applicable law, copies of this opinion will be forwarded to the Board of Education and the Superintendent.

I hope that I have been of assistance.

cc: Board of Education
Superintendent of Schools



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL # - 12354

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Executive Director

Robert J. Freeman

October 25, 2000

Ms. Gail M. Caraccilo
Deputy Clerk
The Village of Seneca Falls
60 State Street
Seneca Falls, NY 13148

The staff of the Committee on 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. Caraccilo:

I have received your letter of September 1, as well as the materials attached to it. Please accept my apologies for the delay in response.

By way of background, you wrote that the Board of Trustees of the Village of Seneca Falls on May 18 terminated the employment of the Village's Administrator/Clerk. Soon after, the contents of that person's computer were downloaded, removed and in the possession of a trustee. Although you, the Interim Clerk and the Chief of Police sought to regain custody of the computer tapes that were taken in order that you may carry out your duties effectively, the tapes had not been returned to the Village Hall as of the date of your letter to this office. You added that you and others were denied access to all other records in the Clerk's office for a period of six weeks after the termination of the Administrator/Clerk, which was later found to be invalid. Further, the Village Attorney informed you, in your words, "that the tapes are in his possession to be kept under his legal custody." He has also contended that your approval of a request made under the Freedom of Information Law for invoices of his work performed for the Village was contrary to law, and he has refused to allow you to review copies of those documents, which are kept at his office in Syracuse. You enclosed samples of the invoices.

Based on a review of the correspondence attached to your letter, I believe that your understanding of the law is accurate. Nevertheless, I offer the following comments.

First, irrespective of where the records at issue may be kept, I believe that they fall within the scope of the Freedom of Information Law. It is emphasized that the Freedom of Information Law pertains to agency records and that §86(4) of the Law defines the term "record" expansively to mean:

"any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

In a case in which an agency contended, in essence, that it could choose which documents it considered to be "records" for purposes of the Freedom of Information Law, the state's highest court rejected that claim. As stated by the Court of Appeals:

"...respondents' construction -- permitting an agency to engage in a unilateral prescreening of those documents which it deems to be outside the scope of FOIL -- would be inconsistent with the process set forth in the statute. In enacting FOIL, the Legislature devised a detailed system to insure that although FOIL's scope is broadly defined to include all governmental records, there is a means by which an agency may properly withhold from disclosure records found to be exempt (see, Public Officers Law §87[2]; §89[2],[3]). Thus, FOIL provides that a request for access may be denied by an agency in writing pursuant to Public Officers Law §89(3) to prevent an unwarranted invasion of privacy (see, Public Officers Law §89[2]) or for one of the other enumerated reasons for exemption (see, Public Officers Law §87[2]). A party seeking disclosure may challenge the agency's assertion of an exemption by appealing within the agency pursuant to Public Officers Law §89(4)(a). In the event that the denial of access is upheld on the internal appeal, the statute specifically authorizes a proceeding to obtain judicial review pursuant to CPLR article 78 (see, Public Officers Law §89[4][b]). Respondents' construction, if followed, would allow an agency to bypass this statutory process. An agency could simply remove documents which, in its opinion, were not within the scope of the FOIL, thereby obviating the need to articulate a specific exemption and avoiding review of its action. Thus, respondents' construction would render much of the statutory exemption and review procedure ineffective; to adopt this construction would be contrary to the accepted principle that a statute should be interpreted so as to give effect to all of its provisions...

"...as a practical matter, the procedure permitting an unreviewable prescreening of documents -- which respondents urge us to engraft on the statute -- could be used by an uncooperative and obdurate public official or agency to block an entirely legitimate FOIL request. There would be no way to prevent a custodian of records from removing a public record from FOIL's reach by simply labeling it 'purely private'. Such a construction, which could thwart the entire objective of FOIL

by creating an easy means of avoiding compliance, should be rejected" [Capital Newspapers v. Whalen, 69 NY 2d 246, 253-254 (1987)].

The records would not come into the possession of a trustee or be prepared by the attorney, but for their roles in Village government. That being so, it is my opinion that the records in question are subject to rights conferred by the Freedom of Information Law.

I note that it has been found that records reflective of his compensation 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, but rather were in the possession of the attorney, 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)].

Second, and in a related vein, 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."

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..."

Third, while others may have physical possession of the records in question, I point out that §4-402 of the Village Law indicates that the Clerk shall "...have custody of the...records, and papers of the village." Consistent with that provision is §57.19 of the Arts and Cultural Affairs Law, which states in part that a village clerk is the "records management officer" for a village.

Third, the failure to share the records or to inform the clerk of their existence may effectively preclude the clerk from carrying out her duties as records management officer, or if she or someone else is so designated as records access officer for purposes of responding to requests under the Freedom of Information Law. In short, if the records access officer does not know the existence or location of Village records, or cannot obtain them, 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.

Fourth, with respect to the implementation of the Freedom of Information Law, §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 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."

As such, the Village Board has the duty to promulgate rules and ensure compliance. 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, I believe that other Village officials and employees are required to cooperate with the records access officer in an effort to enable him or her to carry out his or her official duties.

Lastly, if the copies of the attorney's statements are examples of the invoices or contain equivalent information, those records, based on judicial decisions, must be disclosed in great measure, if not in their entirety.

As you are aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records 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).

Pertinent with respect to the records in question 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, as has the Village Attorney, 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

Ms. Gail M. Caraccilo
October 25, 2000
Page - 8 -

or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

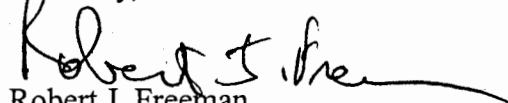
The court found that much of the information would likely consist of factual information available under §87(2)(g)(i) and stated that:

"...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.

I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Antonio Constantino, Mayor
Richard Capozza, Village Attorney



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AJ-12355

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October 25, 2000

Executive Director
Robert J. Freeman

E-Mail

TO: Fred Biggs <adeptax@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 Mr. Biggs:

I have received your letter in which you complained that Region 6 by of the Department of Environmental Conservation has failed to respond to your requests for records in a timely manner.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Mr. Fred Biggs
October 25, 2000
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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)].

I hope that I have been of assistance.

RJF:jm

cc: Mr. Moesel



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

1011-40-12356

Committee Members

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October 25, 2000

Executive Director

Robert J. Freeman

Mr. Bill Freda



The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Freda:

I have received your letter of September 1 and the documentation attached to it. Please accept my apologies for the delay in response.

According to the materials, the Village of Valley Stream created a "blue ribbon panel" in October of 1999 to review the salaries of elected officials and department heads. Several months later when a hearing on the proposed budget was published, it did not list the compensation of the members of the Board of Trustees as required by §5-508(3) of the Village Law. Approximately two weeks later, on the day of the budget hearing, you requested copies of any "reports, memos, minutes, or studies made by" the blue ribbon panel, and you were informed in response that "no such information is part of the Village files." Nevertheless, the budget presented at the hearing included raises for the Mayor and the Trustees. Two months later, the local newspaper published a story including passages from a report prepared by the blue ribbon panel. In your view, "this exposed the lie", and the "Village officials who prepared the budget used the Panel's report as the basis for the salary raises."

You have asked "what penalties are warranted in matters such as this." In this regard, I offer the following comments.

First, it is unclear from my perspective whether the response represented "a lie." It is possible that at the time of the request, the report in which you are interested had not been prepared.

Second, however, if the report was prepared at the time the request was made but it was not yet "part of the Village files", I believe that it would have fallen within the coverage of the Freedom of Information Law. That statute is applicable to agency records, and §86(4) defines the term "record" expansively to include:

Mr. Bill Freda
October 25, 2000
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, any report, study or similar documentation prepared by the panel, even if it was not in Village files or physically kept in Village Hall, would constitute an agency record subject to rights of access conferred by the Freedom of Information Law.

I am unaware of whether any such documentation had been prepared at the time of your request. If it had, I believe that it should have been disclosed to the extent required by law; contrarily, if no such documentation yet existed, the Freedom of Information Law would not have applied.

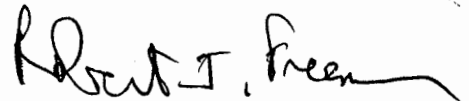
Lastly, §89(8) of the Freedom of the Freedom of Information Law and its companion statute, §240.65 of the Penal Law, deal with "unlawful prevention of public access to records." The latter states that:

"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."

In my opinion, the preceding may be applicable in two circumstances: first, when an agency employee receives a request for a record and indicates that the agency does not maintain the record even though he or she knows that the agency does maintain the record; or second, when an agency employee destroys a record following a request for that record in order to prevent public disclosure of the record.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Vincent W. Ang, Village Clerk



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12357

Committee Members

Mary O. Donohue
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October 26, 2000

Executive Director

Robert J. Freeman

Mr. Martin 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 September 4, as well as the correspondence attached to it. In short, you indicated that your requests and appeals directed to the New York City Board of Education under the Freedom of Information Law have not been answered.

In this regard, first, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

Based on the foregoing, an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date indicating when it can be anticipated that a request will be granted or denied.

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

Mr. Martin Freedman
October 26, 2000
Page - 2 -

that date is reasonable in view of the attendant circumstances, I believe that the agency would be acting in compliance with law.

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

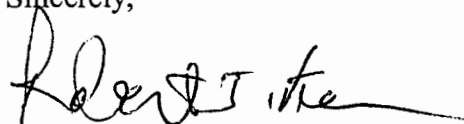
"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Second, having reviewed your requests, 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 for information. Similarly, although that statute may require the disclosure of records, it does not require that the staff of an agency provide information by answering questions. Therefore, if, for example, there is no record that specifies whether an employee is "allowed to refuse a fitness for duty examination", the Freedom of Information Law would not apply, and that statute would not require staff to provide an answer to the question.

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: Christine J. Kicinski
Ron LeDonni



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3219
FOIL-AO-12358

Committee Members

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October 26, 2000

Executive Director

Robert J. Freeman

Kevin A. Seaman, Esq.
Box 580
300 Rhododendron Road
Stony Brook, NY 11790

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Seaman:

I have received your letter of September 12. You have asked for an advisory opinion concerning a situation in which a member of a board of education "disagrees with a matter being discussed in executive session" and whether that person is "entitled to breach confidentiality" or opt to initiate an Article 78 proceeding to nullify any board action.

In this regard, I believe that the member of the board or any other person could initiate a judicial proceeding to challenge action taken by the board in accordance with §107 of the Open Meetings Law. Further, in general, I do not believe that what is said or heard during an executive session may be characterized as "confidential."

To put the issue in perspective, 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)].

Kevin A. Seaman, Esq.

October 26, 2000

Page - 2 -

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 generally confer or require confidentiality with respect to the matters discussed in executive session.

In a case in which the issue was whether discussions occurring during an executive session held by a school board could be considered "privileged", it was held that "there is no statutory provision that describes the matter dealt with at such a session as confidential or which in any way restricts the participants from disclosing what took place" (Runyon v. Board of Education, West Hempstead Union Free School District No. 27, Supreme Court, Nassau County, January 29, 1987).

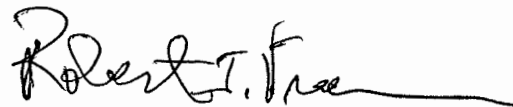
While there may be no prohibition against disclosure of the information acquired during executive sessions or records that could be withheld, the foregoing is not intended to suggest such disclosures would be uniformly appropriate or ethical. Obviously, the purpose of an executive session is to enable 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. 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.

Nevertheless, if a discussion occurring during an executive session should clearly have been conducted in public, I do not believe that divulging the nature of the discussion would represent a breach of ethics.

Kevin A. Seaman, Esq.
October 26, 2000
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



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12359

Committee Members

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October 26, 2000

Executive Director

Robert J. Freeman

Mr. Paul Stephen Beeber
New York State Coalition Opposed to Fluoridation, Inc.
P.O. Box 263
Old Bethpage, NY 11804-0263

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Beeber:

I have received your letter of September 7, as well as the correspondence attached to it. You have sought assistance in relation to your request made under the Freedom of Information Law for records relating to the National Center for Fluoridation Policy and Research (the "Center"), which is headed by Dr. Michael Easley. Dr. Easley is a member of the faculty at the School of Dental Medicine at the University of Buffalo.

Based upon a review of the materials, it appears to be your belief that the Center is part of or operates within the School of Dental Medicine. If that were so, I would agree that the kinds of records that you requested, insofar as they exist, fall within the coverage of the Freedom of Information Law. Nevertheless, having spoken with officials at the State University of New York, the Center is web based and is not physically located anywhere. Further, I was informed that it is not affiliated with the School of Dental Medicine, that it receives no money or support from the University of Buffalo and that the University has no records pertaining to the Center. That being so, it appears that the Freedom of Information Law would be inapplicable. In short, it is my understanding that the Center is essentially a private advocacy group that is in no way connected with the University of Buffalo.

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: Dennis R. Black
Madison Boyce
Robert Ruggeri



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AU-12360

Committee Members

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October 27, 2000

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 14 and the materials relating to it. You have sought an advisory opinion concerning a request made to the Metropolitan Transportation Authority (MTA).

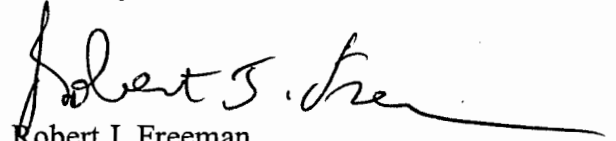
It is assumed that you have focused on two aspects of your request that were highlighted. One involves disciplinary records pertaining to two individuals. You were advised that the MTA does not maintain any such records. That being so, I do not believe that records were withheld in that instance. You were also given a printout from which items were deleted that pertained to matters that had not been finally determined. As you may recall, in an opinion addressed to you concerning disciplinary records in September of last year, it was advised that final determinations reflective of findings or admissions of misconduct on the part of public employees must be disclosed. However, conversely, if there is not yet or was no finding of misconduct in relation to a disciplinary matter, it has been held that the records relating to the matter may be withheld [see Herald Company v. School District of the City of Syracuse, 430 NYS2d 460 (1980)]. Therefore, the redactions appear to have been properly made.

With respect to the other highlighted aspect of your request, the Deputy Foil Officer, Ms. Gail Rogers, indicated that she had not yet received any records responsive to your request relating to EEO cases brought by Transit Authority employees. To avoid a delay in making available the records that had been found, she made them available but indicated that the remainder of the request would be addressed "at a later date." From my perspective, Ms. Rogers appears to have attempted to be considerate by transmitting the records already found without unnecessary delay. To fully have complied with law, I believe that she also should have included an approximation of when the remainder of your request might be granted or denied in a manner consistent with §89(3) of the Freedom of Information Law.

Mr. Robert Board
October 27, 2000
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: Gail Rogers



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12361

Committee Members

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Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Carole E. Stone
Alexander F. Treadwell

October 27, 2000

Executive Director

Robert J. Freeman

Mr. Edmund J. Wiatr, Jr.



The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Wiatr:

I have received your letter of September 16 in which you sought an advisory opinion relating to a request made by your daughter for records of the Utica City School District relating to her grievance. The request, which was made on August 4, had not been acknowledged as of the date of your letter to this office.

In this regard, I offer the following comments.

First, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

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 consideration of the nature of the records sought, it is clear in my view that minutes of meetings of the Board of Education must be disclosed. Similarly, the identities of those hired by the District would be available (see e.g., Freedom of Information Law, §87(3)(b)). With respect to the remaining records requested, it appears that only one of the grounds for denial, §87(2)(g), is pertinent to an analysis of right of access.

The cited provision states that an agency may withhold records that:

"are inter-agency or intra-agency materials which are not:

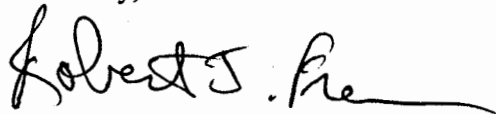
- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations; or
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

Mr. Edmund J. Wiatr, Jr.
October 27, 2000
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, horizontal flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: David Bruno



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12362

Committee Members

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October 27, 2000

Executive Director

Robert J. Freeman

Mr. Richard B. Meyer
Essex County Attorney
P.O. Box 217
Elizabethtown, NY 12932

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Meyer:

As you are aware, I have received your letter of September 11 in which you asked whether the addresses used in developing the County's E911 system are subject to disclosure under the Freedom of Information Law. You may recall that we discussed the matter, and I believe that we are generally in agreement.

From my perspective, there may be a variety of possible responses depending on the nature of requests. In this regard, in brief, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

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)]. As stated by the Court of Appeals:

"FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on government decision-making, its ambit is not confined to records actually used in the decision-making process. (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request" [Farbman v. New York City Health and Hospitals Corporation, 62 NY 2d 75, 80 (1984)].

Mr. Richard B. Meyer
October 27, 2000
Page - 2 -

Based on the foregoing, unless there is a basis for withholding records in accordance with the grounds for denial appearing in §87(2), the use of the records, including the potential for commercial use, is in my opinion irrelevant; when records are accessible, once they are disclosed, the recipient may do with the records as he or she sees fit.

The only exception to the principles described above involves the protection of personal privacy. By way of background, §87(2)(b) of the Freedom of Information Law permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." Further, §89(2)(b) of the Law provides a series of examples of unwarranted invasions of personal privacy, one of which pertains to:

"sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes" [§89(2)(b)(iii)].

The provision quoted above represents what might be viewed as an internal conflict in the law. As indicated earlier, the status of an applicant or the purposes for which a request is made are irrelevant to rights of access, and an agency cannot inquire as to the intended use of records. However, due to the language of §89(2)(b)(iii), rights of access to a list of names and addresses, or equivalent records, may be contingent upon the purpose for which a request is made [see Scott, Sardano & Pomeranz v. Records Access Officer of Syracuse, 65 NY 2d 294, 491 NYS 2d 289 (1985); Federation of New York State Rifle and Pistol Clubs, Inc. v. New York City Police Dept., 73 NY 2d 92 (1989); Goodstein v. Shaw, 463 NYS 2d 162 (1983)].

In the context of your inquiry, I believe that a request for a list of the names and addresses could be withheld, if the list would be used for a commercial or fund-raising purpose. In other circumstances, the list would be likely be accessible.

In some instances requests might be made for certain information contained within the list. For example, if a request is made for certain names or addresses, i.e., those involving calls relating to medical emergencies, because those referenced on the list would be associated with a medical problem or event, disclosure would, in my view, constitute an unwarranted invasion of personal privacy, irrespective of the intended use of the records. Further, assuming that the list includes phone numbers, some of which are unlisted, those portions of the database may in my view be withheld to protect personal privacy regardless of the purpose of the request. In other circumstances, depending on the nature of the request, perhaps names and phone numbers would be withheld, but the addresses would be available.

I hope that I have been of assistance. If you would like to discuss the matter further, please feel free to contact me.

Sincerely,


Robert J. Freeman
Executive Director

RJF:jm

FOIL-A0-12363

From: Janet Mercer
To: [REDACTED]
Subject: Re: Question

Dear Ms. Kopf:

I have received your letter of October 27 concerning the status of the National Center for Fluoridation Policy and Research under the Freedom of Information Law.

In this regard, having spoken with officials at the State University of New York , the Center is web based and is not physically located anywhere. Further, I was informed that it is not affiliated with the School of Dental Medicine, that it receives no money or support from the University of Buffalo and that the University has no records pertaining to the Center. That being so, it appears that the Freedom of Information Law would be inapplicable. In short, it is my understanding that the Center is essentially a private advocacy group that is in no way connected with the University of Buffalo.

I hope that the foregoing serves to clarify your understanding of the matter and that I have been of assistance.



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3220
FOIL-AO-12364

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October 30, 2000

Executive Director

Robert J. Freeman

Mr. Dennis V. Tobolski
Cattaraugus County Attorney
303 Court Street
Little Valley, NY 14755

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Tobolski:

I have received your letter of September 18 in which you sought guidance concerning a request by a member of the news media for certain records of the Cattaraugus County Tourist Promotion Agency, Inc. ("TPA"). She also asked that the meetings of the board of the TPA be open to the public and preceded by notice.

According to your letter and its by-laws, the governing body of the TPA is its Board of Directors, which consists of twelve members, three of whom are named by the County. Eight members are elected from the "active membership." An "active member" is "A dues paying individual, company or business, governmental body, agency or organization, or public or private organization or association directly or indirectly involved in the promotion of the County's tourism..." As such, there is no particular governmental representation among active members who elect the majority of the Board of Directors.

In consideration of the by-laws, I do not believe that the TPA is subject to either the Freedom of Information or Open Meetings Laws. The former 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."

Mr. Dennis V. Tobolski

October 30, 2000

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Based on the foregoing, an agency is generally a governmental entity, and the definition does not ordinarily include private or not-for-profit corporations. I note that it has been held that a not-for-profit corporation that is under the substantial control of a government agency is itself an agency subject to the Freedom of Information Law [see Buffalo News v. Buffalo Enterprise Development Corp., 84 NY2d 488 (1994)]. In that situation, the entity in question was created by and for the City of Buffalo, and its offices were located in City Hall. As I understand the matter at hand, the TPA, other than the membership of three representatives of the County, is independent of government. If that is so, it would not in my opinion constitute an "agency" for the purposes of the Freedom of Information Law.

The Open Meetings Law, like the Freedom of Information Law, pertains to entities that perform a governmental function. That statute applies to meetings of public bodies, and §102(2) defines "public body" to mean:

"...any entity for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

If the TPA does not perform a governmental function for the state or one or more municipalities, it would not constitute a public body subject to Open Meetings Law.

Notwithstanding the foregoing, I believe that the Freedom of Information Law is implicated due to the participation of representatives of the County. While the TPA is not subject to that statute, the County clearly is an "agency." Further, §86(4) defines the term "record" to include:

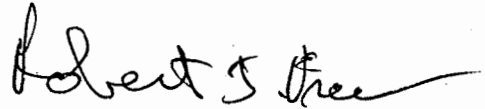
"any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Since those on the Board of Directors "named by the County" participate by virtue of their positions in County government, any records that they produce or receive in connection with their functions for the TPA would, in my view, based on the definition quoted above, constitute County records that fall within the coverage of the Freedom of Information Law.

Mr. Dennis V. Tobolski
October 30, 2000
Page - 3 -

I hope that I have been of assistance. If you would like to discuss the matter, please feel free to call me.

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



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3221
FOIL-AO-12365

Committee Members

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October 30, 2000

Executive Director

Robert J. Freeman

Ms. Susan V. Rice



The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Rice:

I have received your letter of September 13 in which you described a series of problems relating to the conduct of meetings and disclosure of records by the Potsdam Central School District Board of Education. You asked for suggestions concerning "recourse a citizen or group of citizens might take" and added that the "district could not possibly pay the court fees associated with taking action against them."

In this regard, aside from the issues associated with meetings and records, I believe that citizens expressing their views, collectively, in substantial numbers, can have a significant impact on the course of action taken by a government agency, and that by doing so, accountability is encouraged and enhanced.

With respect to the issues raised in relation to meetings and records, a review of the law and its judicial interpretation will be offered in the ensuing paragraphs. Although that commentary is not binding, it is our hope that an opinion rendered by this office is educational and persuasive, and that it serves to enable government officials to better understand and comply with law.

You referred to "the filing of a non-criminal claim" with the District's insurance company involving actions by District officials that allegedly resulted in "financial harm to [y]our district." In addition, a citizen has apparently initiated a suit concerning "the financial misrepresentations", and your request, a copy of which you enclosed, for a copy of the "insurance claim submitted 5/10/2000" was denied on the ground that it is "part of investigatory files."

It is noted at the outset that the phrase "part of investigatory files", which appears on the District's application for public access to records, was part of the Freedom of Information Law when that statute was initially enacted in 1974. However, it has not been in that statute since it was repealed and replaced with the current version, which became effective in 1978. The equivalent provision in the current law, §87(2)(e), pertains to the authority to withhold records that:

"are compiled for law enforcement purposes and which, if disclosed, would:

- i. interfere with law enforcement investigations or judicial proceedings;
- ii. deprive a person of a right to a fair trial or impartial adjudication;
- iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
- iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

It is questionable in my view whether a claim filed with an insurance company could be characterized as having been "compiled for law enforcement purposes." It is also questionable whether any of the harmful effects described in subparagraphs (i) through (iv) of §87(2)(e) would arise via disclosure. If §87(2)(e) does not apply, I do not believe that the insurance claim could be withheld.

You also referred in your letter to requests for "the information supporting the claim." While I am unfamiliar with the specific contents of the records at issue, it is noted that, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

I would conjecture that records "supporting the claim" may include books of account, ledgers, contracts, checks and similar documentation dealing with financial transactions. To characterize those kinds of 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. The Court of Appeals, the state's highest court, has held on several occasions that the exceptions to rights of access appearing in §87(2) "are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption 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, there is case law that illustrates why §87(2)(e) should be construed narrowly, and why a broad construction of that provision would give rise to an anomalous result. Specifically, in King v. Dillon (Supreme Court, Nassau County, December 19, 1984), the District Attorney was engaged in an investigation of the petitioner, who had served as a village clerk. In conjunction with the investigation, the District Attorney obtained minutes of meetings of the village board of trustees. Those minutes, which were prepared by the petitioner, were requested from the District Attorney.

In granting access to the minutes, the decision indicated that "the party resisting disclosure has the burden of proof in establishing entitlement to the exemption," and the judge wrote that he:

"must note in the first instance that the records sought were not compiled for law enforcement purposes (P.O.L. 87[2]e). Minutes of Village Board meetings serve a different function...These were public records, ostensibly prepared by the petitioner, so there can be little question of the disclosure of confidential material."

Often records prepared in the ordinary course of business, which might already have been disclosed under the Freedom of Information Law, become relevant to or used in a law enforcement investigation or perhaps in litigation. In my view, when that occurs, the records would not be transformed into records compiled for law enforcement purposes. If they would have been available prior to their use in a law enforcement or investigative context, I believe that they would remain available, notwithstanding their use in that context for a purpose inconsistent with the reason for which they were prepared.

The remaining issues to which you referred pertain to the Open Meetings Law. The first involves a "straw vote" relating to a vacancy on the Board. By way of background, the Open Meetings Law is based on a presumption of openness. Stated differently, meetings of public bodies must be conducted in public except to the extent that an executive session may appropriately be held. Paragraphs (a) through (h) of §105(1) of the Open Meetings Law specify and limit the subjects that may properly be considered during an executive session.

In my view, the only provision that might have justified the holding of an executive session is §105(1)(f) of the Open Meetings Law, which permits a public body to enter into an executive session to discuss:

"the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..."

Under the language quoted above, it would appear that a discussion focusing on the individual candidates could validly be considered in an executive session, for it would involve a matter leading to the appointment of a particular person. Nevertheless, in the only decision of which I am aware that dealt directly with the propriety of holding an executive to discuss filling a vacancy in an elective office, the court found that there was no basis for entry into executive session. In determining that an executive session could not properly have been held, the court stated that:

"...respondents' reliance on the portion of Section 105(1)(f) which states that a Board in executive session may discuss the 'appointment...of a particular person...' is misplaced. In this Court's opinion, given the liberality with which the law's requirements of openness are to be interpreted (Holden v. Board of Trustees of Cornell Univ., 80 AD2d 378) and given the obvious importance of

protecting the voter's franchise this section should be interpreted as applying only to employees of the municipality and not to appointments to fill the unexpired terms of elected officials. Certainly, the matter of replacing elected officials, should be subject to public input and scrutiny" (Gordon v. Village of Monticello, Supreme Court, Sullivan County, January 7, 1994), modified on other grounds, 207 AD 2d 55 (1994)].

Based on the foregoing, notwithstanding its language, the court in Gordon held that §105(1)(f) could not be asserted to conduct an executive session.

With respect to the "straw vote", in Previdi v. Hirsch [524 NYS 2d 643 (1988)], which involved a board of education, 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 intent 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).

Based on the foregoing, when the Board reaches a "consensus" that is reflective of its final determination of an issue, I believe that minutes must be prepared that indicate the manner in which each member voted. I recognize that public bodies often attempt to present themselves as being unanimous and that a ratification of a vote is often carried out in public. Nevertheless, if a unanimous ratification does not indicate how the members actually voted behind closed doors, the public may be aware of the members' views on a given issue. If indeed a consensus represents action upon which the Board relies in carrying out its duties, or when the Board, in effect, reaches agreement on a particular subject, I believe that the minutes should reflect the actual votes of the members.

In contrast, a "straw vote", or something like it, that is not binding and does not represent members' action that could be construed as final, could in my view be taken in executive session when it represents a means of ascertaining whether additional discussion is warranted or necessary. If a "straw vote" does not represent a final action or final determination of the Board, I do not believe that minutes including the votes of the members would be required to be prepared.

Lastly, you referred to "a work session, which was to be a goal setting meeting and a seminar on public relations with a state representative, [which] turned into a business meeting." You added that action was taken to hire an individual, but that "it was a meeting that only the board was

informed of." To put the matter in perspective, §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 of "meeting" has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

Inherent in the definition and its judicial interpretation is the notion of intent. If there is an intent that a majority of a public body will convene for the purpose of conducting public business, such a gathering would, in my opinion, constitute a meeting subject to the requirements of the Open Meetings Law.

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, Second Department, which includes Westchester County and whose determination was unanimously affirmed by the Court of Appeals, stated that:

"We believe that the Legislature intended to include more than the mere formal act of voting or the formal execution of an official document. Every step of the decision-making process, including the decision itself, is a necessary preliminary to formal action. Formal acts have always been matters of public record and the public has always been made aware of how its officials have voted on an issue. There would be no need for this law if this was all the Legislature intended. Obviously, every thought, as well as every affirmative act of a public official as it relates to and is within the scope of one's official duties is a matter of public concern. It is the entire decision-making process that the Legislature intended to affect by the enactment of this statute" (60 AD 2d 409, 415).

The court also dealt with the characterization of meetings as "informal," stating that:

"The word 'formal' is defined merely as 'following or according with established form, custom, or rule' (Webster's Third New Int. Dictionary). We believe that it was inserted to safeguard the rights of members of a public body to engage in ordinary social transactions, but not to permit the use of this safeguard as a vehicle by which it precludes the application of the law to gatherings which have as their true purpose the discussion of the business of a public body" (*id.*).

Based upon the direction given by the courts, when a majority of a public body gathers to discuss public business, in their capacities as members of the body, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law.

Ms. Susan V. Rice

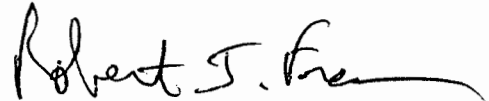
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If the sole intent of a gathering of the Board involves training or getting to know one another better, or if, for example, a gathering is social in nature, I do not believe that the Open Meetings Law would apply, for there would be no intent to conduct public business. However, "goal setting", as I understand that phrase, would constitute a matter of public business. If my understanding is accurate, the gathering was a "meeting" that should have been preceded by notice given in accordance with §104 of the Open Meetings Law and conducted open to the public to the extent required by law. If there was no intent to conduct public business and the gathering was not a meeting subject to the requirements of the Open Meetings Law, I believe that the Board should have waited to take action until convening a meeting in manner consistent with that statute. Further, if action was taken at a meeting essentially held in secret, without notice to the public, a court would have the authority to invalidate the action in the event of a lawsuit.

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.

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AU-12366

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October 30, 2000

Executive Director

Robert J. Freeman

Mr. Stephen J. Harrison
Associate Attorney
NYS Office of Real Property Services
16 Sheridan Avenue
Albany, NY 12210-2714

The staff of the Committee on Open 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 in which you sought an opinion concerning the application of the Freedom of Information Law relative to "a new agency endeavor which we refer to as a data warehouse."

By way of background, you wrote that the Office of Real Property Services ("ORPS") receives assessment data in electronic form from municipalities pursuant to §1590 of the Real Property Tax Law. The data has long been accessible to the public and is made available by municipalities and by ORPS on request. You wrote that:

"....staff proposes to copy this data into the data warehouse where it can be accessed by a new online web application. The application will allow the assessment community to access this information over the internet. Access will be restricted to assessors who will only be able to sign on if the agency has provided a valid usercode and password. The application will provide powerful features to run reports and select specific sets of data anywhere in the state. The original source of the data is still local governments, but we will be the primary owner of the application."

You have asked whether I concur with your view that the application is "a delivery system" and not a "record" subject to the Freedom of Information Law.

Mr. Stephen J. Harrison

October 30, 2000

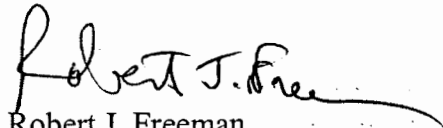
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In this regard, I agree with your conclusion. As I understand its function, the application is essentially a tool that enables assessors and others to use data; it is not data itself and, therefore, in my opinion, it could not be characterized as a "record" as that term is defined in §86(4) of the Freedom of Information Law. The application, like calculators or computers that provide individuals with the means to create or use data, but which are not themselves "records", would not in my opinion constitute a record for purposes of that statute.

Further, although agencies are increasingly making data available to the public via the Internet, I do not believe that there is any obligation to do so. That government officials, acting in the performance of their official duties, may have the capacity to acquire the data on the Internet through the use of usercodes and passwords does not in my view create a right of access on the part of the public generally. As you suggested, so long as ORPS gives effect to the Freedom of Information Law by making the data available on request in some sort of storage medium, whether it be paper, or computer tape or disk, for example, I believe that it 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 dark 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-AU-12367

Committee Members

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October 30, 2000

Executive Director

Robert J. Freeman

E-Mail

TO: Jeffrey Shankman <jeffreybi@justice.com>

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. Shankman:

I have received your letter of September 17 in which you sought assistance in relation to a delay in responding to your request for records of the Public Service Commission.

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.

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

Mr. Jeffrey Shankman
October 30, 2000
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receipt of a request because more than five business days may be needed to grant or deny a request, so long as it provides an approximate date indicating when the request will be granted or denied, and that date is reasonable in view of the attendant circumstances, I believe that the agency would be acting in compliance with law.

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Lastly, I note that you asked to inspect records in the New York City office of the Commission. If that agency's rules and regulations indicate that the office there is a location designated for the inspection of records, it appears that your request to inspect records there should be honored. However, if the rules and regulations designate Albany as the location for inspecting records, I do not believe that the Commission would be obliged to transfer its records to another site for your inspection (see 21 NYCRR §1401.3).

I hope that I have been of assistance.

RJF:jm

cc: Steven Blow



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3222
FOIL-AO-12368

Committee Members

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Executive Director

Robert J. Freeman

October 31, 2000

Mr. Arthur Norden



The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence, unless otherwise indicated.

Dear Mr. Norden:

I have received your letter of September 20, as well as the materials relating to it. You expressed concern that officials of the Sullivan West School District may have "deliberately misrepresented the budget to the voters and may have violated New York's Freedom of Information Law and Open Meetings Law in the process."

By way of background, you indicated that last year the Delaware Valley, Jeffersonville-Youngsville and Narrowsburg Central School Districts merged into what is now the Sullivan West Central School District. Following its election, the Board of Education "held several executive sessions about the budget which resulted in their approval and presentation to the voters..." Among the materials is a memorandum sent to the Board by Mr. Martin Handler of the Education Department that cites a "work document that was used to build the proposed budget", which you also enclosed. The memorandum makes reference to "the budget presented at the workshop...in the 3-part public document format as required by law" and states further that:

"To meet the legal requirements for the three-part document, some of the codes are split between the three components. In addition, we allocated the salary amounts across the appropriate salary codes and benefit codes. Our goal was to insure that the amount built into the budget for negotiation purposes was not readily available to the associations we will be bargaining with."

The memorandum states that "the additions representing adjustments to salaries [are] for the former Delaware Valley & Narrowsburg districts", specifies that the proposed figures are "for [the Board's] review and are open for discussion in executive session" and that "all this information is 'CONFIDENTIAL'" (emphasis in the memorandum) You added that "no negotiation [had been]

Mr. Arthur Norden
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scheduled as of the memo date." The "additions representing adjustments" total approximately \$537,000.

The "work document" containing that information, which you obtained "from an anonymous source", was requested and the portions of that record at issue were withheld by the District pursuant to §87(2)(c) of the Freedom of Information Law. You wrote that the documentation provided to voters by the District indicated that "the total combined salaries [would be] only \$8,657 more than the sum of the previous separate budgets" and that, therefore, the documentation presented to the voters included "deceptive information." It is your view that because "the salary additions were 'hidden' in the budget", those expenditures will diminish the District's ability to meet its operating costs in the future.

In consideration of the foregoing, you have sought an opinion concerning whether the Board "violated Open Meetings Laws by discussing and creating a budget in executive session, which accommodated \$536,000 in potential salary increases and without ever publicly acknowledging such action" and whether the denial of access to records indicating that amount "constitutes a violation of the Freedom of Information Laws."

In this regard, the courts have consistently interpreted the Freedom of Information Law in manner that fosters maximum access to government records. 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 state's highest court, the Court of Appeals, has expressed its view of the intent of the Freedom of Information Law on several occasions, and 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).

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

Mr. Arthur Norden

October 31, 2000

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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, I believe that only one of the grounds for denial, that cited in response to your request, would be pertinent in analyzing rights of access. Specifically, §87(2)(c) permits an agency to withhold records or portions thereof the disclosure of which "would impair present or imminent contract awards or collective bargaining negotiations. From my perspective, it is doubtful that a court would sustain the District's denial of access to the records at issue. If my understanding of the matter is accurate, the information withheld consisted of gross figures indicating moneys essentially set aside for salary increases for teachers without being earmarked as such. The information did not describe collective bargaining strategy; it did not deal with the numerous collective bargaining issues other than wages; it included no detail regarding any breakdown of possible payments or increases. In short, disclosure of those figures, without more, would not in my view have "impaired present or imminent...collective bargaining negotiations."

If denials of access to the kind of information at issue were found to be proper and sustainable, a school district's budget-related records, many of which are required by law to be disclosed, would be unavailable to the public, and the public's capacity to reach reasoned decisions prior to consideration of a budget would be minimized. As you may be aware, boards of education are required to prepare and disclose to the public detailed information concerning their proposed budgets. Subdivision (1) of §1716 of the Education Law, entitled "Estimated expenses for ensuing year", states in relevant part that:

"It shall be the duty of the board of education of each district to present at the annual budget hearing a detailed statement in writing of the amount of money which will be required for the ensuing year for school purposes, specifying the several purposes and the amount for each."

Subdivision (4) requires that the proposed budget "shall be presented in three components: a program component, a capital component and an administrative component which shall be separately delineated...." Relevant to the issue at hand, that provision states in part that:

"The program component shall include, but need not be limited to, all program expenditures of the school district, including the salaries and benefits of teachers and any school administrators or supervisors who spend a majority of their time performing teaching duties, and all transportation operating expenses. The capital component shall include, but need not be limited to, all transportation capital, debt service, and lease expenditures; costs resulting from judgements in tax certiorari proceedings or the payment of awards from court

Mr. Arthur Norden

October 31, 2000

Page - 4 -

judgments, administrative orders or settled or compromised claims; and all facilities costs of the school district, including facilities lease expenditures, the annual debt service and total debt for all facilities financed by bonds and notes of the school district, and the costs of construction, acquisition, reconstruction, rehabilitation or improvement of school buildings, provided that such budget shall include a rental, operations and maintenance section that includes base rent costs, total rent costs, operation and maintenance charges, cost per square foot for each facility leased by the school district, and any and all expenditures associated with custodial salaries and benefits, service contracts, supplies, utilities, and maintenance and repairs of school facilities.”

Arguably, the detail in the proposed budget that must be made available to the public might, if disclosed “impair present or imminent contract awards” in any number of contexts (i.e., leasing, or the purchase of goods and services. Nevertheless, in enacting §1716, the Legislature apparently determined that there would be no such impairment and that the public has the right to know, in reasonable detail, how tax dollars will be allocated. The same conclusion should be reached in relation to the kind of information that was withheld, which, as I understand the provision quoted above, must be included in the “program component” of a proposed budget that must indicate “the salaries and benefits of teachers.” Again, the figures that should appear would not detail a district’s negotiation strategy or identify particular elements pertinent in the collective bargaining process. Therefore, in my view, §87(2)(c) would not serve as a justifiable basis for withholding the information at issue.

With respect to the propriety of executive sessions, the Open Meetings Law, like the Freedom of Information Law, is based on a presumption of openness. Meetings of public bodies, such as boards of education, must be conducted open to the public, unless there is a basis for entry into executive session. Section 105(1) specifies and limits the grounds for entry into executive session.

Pertinent to the matter is paragraph (e) of §105(1), which permits a public body to conduct an executive session regarding “collective negotiations pursuant to article fourteen of the civil service law.” Article 14 is commonly known as the “Taylor Law”, and it deals with the relationship between public employers and public employee unions. As such, it is clear that a public body may conduct an executive session to discuss collective bargaining negotiations. The question, therefore, involves whether or the extent to which the Board conducted executive session to discuss the budget, as opposed to what clearly would be collective bargaining negotiations. In my view, insofar as discussions focused on the former, there would have been no basis for entry into executive session.

In an effort to enhance compliance with and understanding of the statutes cited in the preceding commentary, copies of this opinion will be sent to District officials.

Mr. Arthur Norden
October 31, 2000
Page - 5 -

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: Board of Education
Elizabeth McKean



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-10-12369

Committee Members

Mary O. Donohue
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November 3, 2000

Executive Director

Robert J. Freeman

Ms. Joan S. Giampoli

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Giampoli:

I have received your letter of September 22 and apologize for the delay in response.

You referred to a request for 1995 assessment records of the Town of Greenburgh, and you were informed that the records are kept in a storage facility "a few miles away." That being so, you wrote that you were informed by the clerk in the assessor's office that you "would have to pay between \$30 - \$38 to have the box containing the record transported and returned to the facility in addition to the cost of photocopying."

From my perspective, the only fee that could justifiably be charged by the Town would involve photocopying. 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 an administrative fee, 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, or as in this instance, transporting the records to Town Hall. In addition, it has been confirmed judicially that fees inconsistent with the Freedom of Information Law may be validly charged only when the authority to do so is conferred by a statute [see Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)].

Further, the specific language of the Freedom of Information Law and the regulations promulgated by the Committee on Open Government indicate that, absent statutory authority, an agency may charge fees only for the reproduction of records. Section 87(1)(b) of the Freedom of Information Law states:

"Each agency shall promulgate rules and regulations in conformance with this article...and pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the availability of records and procedures to be followed, including, but not limited to...

(iii) the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by statute."

The regulations promulgated by the Committee state in relevant part that:

"Except when a different fee is otherwise prescribed by statute:

(a) There shall be no fee charged for the following:

- (1) inspection of records;
- (2) search for records; or
- (3) any certification pursuant to this Part" (21 NYCRR 1401.8)."

Lastly, although compliance with the Freedom of Information Law involves the use of public employees' time and perhaps other costs, the Court of Appeals has found that the Law is not intended to be given effect "on a cost-accounting basis", but rather that "Meeting the public's legitimate right of access to information concerning government is fulfillment of a governmental obligation, not the gift of, or waste of, public funds" [Doolan v. BOCES, 48 NY 2d 341, 347 (1979)].

Ms. Joan S. Giampoli

November 3, 2000

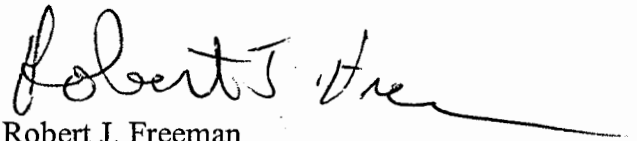
Page - 3 -

In short, the fee sought to be charged by the Town for transporting the records appears to be inconsistent with the Freedom of Information Law and its judicial interpretation.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this opinion will be forwarded to Town 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:jm

cc: Town Board
Town Clerk



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-190-12370

Committee Members

Mary O. Donohue
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November 3, 2000

Executive Director

Robert J. Freeman

Ronald P. Colefield, Ph.D.



The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Dr. Colefield:

I have received your letter of September 24 and the materials attached to it. You have sought assistance in obtaining certain information from the Greenburgh-Graham Union Free School District.

Although the District provided access to most of the records that you requested, you were unable to obtain "A detailed list of your [the Superintendent's] expenses from the discretionary account given to you for the 1999-2000 school year."

In this regard, as suggested in the response to your request, the Freedom of Information Law 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. Therefore, if the District maintains no "detailed list" of the Superintendent's expenses, there would be no obligation on the part of the District to create or prepare such a list on your behalf.

In the future, unless it is known that it exists, it is suggested that you should not seek a list, but rather that you seek existing records. For instance, you might request records reflective of expenses charged to the District by the Superintendent concerning a certain account covering a particular time period.

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: Betsey Hardeman

Ann Vaccaro-Teich



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMC-AO-3223
FOIL-AO-12371

Committee Members

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November 3, 2000

Executive Director

Robert J. Freeman

Mr. John D. Horst



The staff of the Committee 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. Horst:

I have received your letter of September 26 in which you raised the following questions:

“Can the Board of Education meet in executive session to discuss a FOIL denial since it is not listed as one of the eight items given as reasons for convening an executive session.

“When a board does meet in executive session and a quorum is present, does a simple majority vote on an issue before them, stand as if it were the entire board voting?

“Is factual data or information gathered by a consultant (hired by the district) and then used to expend public monies, through the creation of a new administrative post, foilable?”

In this regard, first, the Open Meetings Law is based on a presumption of openness. Meetings of public bodies, such as boards of education, must be conducted in public, except to the extent that an executive session may properly be held. Paragraphs (a) through (h) of §105(1) of that statute specify and limit the topics that may be considered in executive session.

According to materials sent to this office by the Patchogue-Medford School District, the record at issue was a report prepared by a consultant for the District. From my perspective, in consideration of the grounds for entry into executive session, it is doubtful in my view that an executive session could validly have been held to discuss your request. There may be other instances, however, in which an executive session might justifiably be held. For instance, if the issue involves records relating to a disciplinary matter, an executive session might appropriately be held [see Open Meetings Law, §105(1)(f)].

Second, any action taken by a public body requires an affirmative vote of a majority of its total membership, not a majority of those present. A board of education, like other governmental bodies, is subject to §41 of the General Construction Law which is entitled "Quorum and majority." That statute 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, gathered together in the presence of each other or through the use of videoconferencing, at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such board of body, or at any duly adjourned meeting of such meeting, or at any meeting duly held upon reasonable notice to all of them, shall constitute a quorum and not less than a majority of the whole number may perform and exercise such power, authority or duty. For the purpose of this provision the words 'whole number' shall be construed to mean the total number which the board, commission, body or other group of persons or officers would have were there no vacancies and were none of the persons or officers disqualified from acting."

Based upon the 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. Therefore, if a public body consists of five members, three affirmative votes would be need to approve a motion, even if only three members are present.

Lastly, I believe that "factual data" prepared by a consultant retained by an agency is accessible under the Freedom of Information law. In brief, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Pertinent is §87(2)(g), the provision to which the District alluded in its denial of your request. That provision permits an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

In a discussion of the issue of records prepared by consultants for agencies, the Court of Appeals, 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


Mr. John D. Horst
November 3, 2000
Page - 4 -

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,

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: Board of Education
Barbara Kane



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12372

Committee Members

Mary O. Donohue
Alan Jay Gerson
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Executive Director

Robert J. Freeman

November 3, 2000

Chief Donald W. Yost
Painted Post Police Department
P.O. Box 110
Painted Post, NY 14870

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Yost:

I have received your letter of September 20, as well as the correspondence attached to it. You have sought assistance in obtaining an investigative report from the Division of the State Police. The report was prepared in conjunction with a case that was dismissed, and the Division has indicated that the record is exempt from disclosure.

As I understand the matter, the denial of your request was consistent with 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.

Relevant under the circumstances is the first ground for denial, §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute. One such statute, §160.50 of the Criminal Procedure Law. As you are aware, that statute typically requires that a judge order that records be sealed when charges against an accused are dismissed in his or her favor. According to the response by the Division, the record of your interest has been ordered sealed. If that is so, I believe that the only means of obtaining the report would involve an attempt to obtain a judicial order to unseal the records and provide access to the report. At this juncture, however, the report, in my opinion, is exempt from disclosure and beyond rights of access conferred by the Freedom of Information Law.

Chief Donald W. Yost
November 3, 2000
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: William J. Callahan
Lt. Laurie M. Wagner

Enc.



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMC-140-3225
FOIL-140-12373

Committee Members

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November 3, 2000

Executive Director

Robert J. Freeman

Ms. F. Warren Kahn
Attorney at Law
M.P.O. Box 702
Niagara Falls, NY 14302-0702

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Kahn:

I have received your letter of September 20, as well as a portion of a transcript of an open meeting held by the Board of Education of the Lewiston-Porter Central School District.

In brief, you wrote that the District is involved in negotiations with the administrators' bargaining unit, and that the District's negotiator and the Superintendent reported on the negotiations in executive session. In an effort to avoid problems concerning the Board's involvement in the process, the Board was not given specific details regarding the negotiations. As I understand the situation, a member of the Board independently developed a questionnaire to the Superintendent concerning the negotiations. Based on the responses, that member considered the Superintendent's answers different from the answers to the same questions that he raised with the Board President.

"The issue", according to your letter, "is whether [the members] comments were appropriate in the setting just described." Having reviewed the comments as reflected in the transcript, I believe that the entirety of the discussion could have occurred during an executive session.

While the Freedom of Information and Open Meetings Laws are related and were likely enacted in an effort to achieve similar goals, their application in some instances may give rise to inconsistent results. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Similarly, the Open Meetings Law is based on a presumption of openness; meetings of public bodies must be conducted open to the public, except to the extent that they consider matters that may properly be discussed in executive session. As you are aware, paragraphs (a) through (h) of §105(1) of that statute specify and limit the grounds for entry into executive session.

Ms. F. Warren Kahn
November 3, 2000
Page - 2 -

As the Freedom of Information Law relates to the matter, the pertinent provision in my view is §87(2)(c), which authorizes an agency to withhold records to the extent that disclosure "would impair present or imminent contract awards or collective bargaining negotiations." The key word is "impair", and the question, therefore, under the Freedom of Information Law in the context of your inquiry involves whether or the extent to which the disclosure of records would adversely affect collective bargaining negotiations.

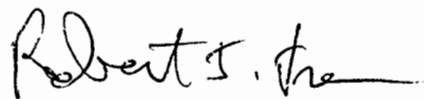
You and others during the discussion referred to records, such as the current contract and the budget, that are accessible to the public. Even though those records may be used in or relevant to a negotiation process, they must be disclosed, for disclosure of those records may be required by law (i.e., Education Law, §1716) and would not "impair" the collective bargaining process.

The analogous provision in the Open Meetings Law does not include language concerning the effects of disclosure or the harm that could potentially result through public discussion of an issue. Specifically, under §105(1)(e), the Board may discuss collective bargaining negotiations in executive session, irrespective of the impact of openness. That being so, I believe that the entirety of the discussion could have been conducted during an executive session.

With respect to your specific question, whether the member's comments "were appropriate" the answer may not be derived from the Open Meetings Law. That statute is permissive; a public body *may* conduct an executive session in accordance with one or more of the grounds for private discussion appearing in §105(1). Nevertheless, there is no obligation imposed by that statute to do so. While I am not an expert on the subject, it appears that the propriety of public discussion of the matter would involve the interpretation of the Taylor Law. Consequently, it is suggested that the Public Employment Relations Board may be better able to offer guidance concerning whether the member's comments were "appropriate."

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

7076-40-12374

Committee Members

Mary O. Donohue
Alan Jay Gerson
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November 3, 2000

Executive Director

Robert J. Freeman

Mr. Greg D. Lubow
Greene County Public Defender
County Court House
P.O. Box 413
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. Lubow:

I have received your letter of September 18, as well as the materials attached to it.

Your inquiry was precipitated by a situation in which your client, an inmate at Coxsackie Correctional Facility, was charged with promoting prison contraband when a razor blade was found to be in his possession. He contends, however, that he found the razor blade "on the floor in the assembly area as he and other inmates were being taken through the assembly area." Following his arraignment, the inmate expressed the belief that "a videotape existed of the assembly area which would show him finding the razor blade moments before it was found on him", and that the videotape could be considered exculpatory. Your letter describes a series of efforts to obtain the videotape and you questioned the Department's policy concerning the retention and recycling of videotapes. The videotape that you requested was apparently recycled seven days after its creation.

You have sought guidance with respect to a failure on the part of the facility to provide information in a timely manner and its unwillingness to disclose facility or department wide policies concerning the recycling of videotapes. You also asked whether "their policy of holding tapes seven days [is] a valid one."

In this regard, I offer the following comments.

First, regulations promulgated by the Committee on Open Government (21 NYCRR §1401.2) 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. According to the regulations of the Department of Correctional Services, requests for records kept at a correctional facility should be made to the facility superintendent or his designee. In my view, that person has the duty of responding directly or ensuring that Department personnel respond appropriately to requests. With respect to records kept at the Department's Albany offices, I believe that the records access officer is Mr. Mark Shepard.

Second, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)]. I believe that the person designated to determine appeals is Counsel to the Department, Mr. Anthony J. Annucci.

Third, any policies concerning the retention, disposal or recycling of videotapes would in my view be accessible, whether the policies are developed by a facility or are applicable to all Department facilities. In short, agencies' policies are generally available pursuant to subparagraph (iii) of §87(2)(g) of the Freedom of Information Law.

Lastly, while I am unaware of the validity of recycling videotapes after seven days, I point out that records cannot be disposed of or destroyed without having received the consent of the

Mr. Greg D. Lubow
November 3, 2000
Page - 3 -

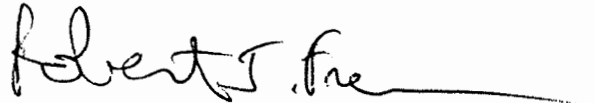
Commissioner of Education in accordance with §57.05 of the Arts and Cultural Affairs Law. That provision states that the Commissioner is empowered:

“(b) To authorize the disposal or destruction of state records including books, papers, maps, photographs, microphotographs or other documentary materials made, acquired or received by any agency. At least forty days prior to the proposed disposal or destruction of such records, the commissioner of education shall deliver a list of the records to be disposed of or destroyed to the attorney general, the comptroller and the state agency that transferred such records. No state records listed therein shall be destroyed if within thirty days after receipt of such list the attorney general, comptroller, or the agency that transferred such records shall notify the commissioner of education that in his opinion such state records should not be destroyed.”

Functions involving the management, retention and disposal of records are carried out by a unit of the State Education Department, the State Archives and Records Administration. That entity develops schedules indicating minimum periods that particular records must be retained, and it is suggested that you contact that office to obtain additional information on the subject.

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: Mark Shepard
Joseph F. David
H.D. Graham



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12375

Committee Members

Mary O. Donohue
Alan Jay Gerson
Walter W. Grunfeld
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November 6, 2000

Executive Director

Robert J. Freeman

Ms. Margaret C. Menzies

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Menzies:

I have received your letter of September 25 in which you wrote that you are "very confused about Freedom of Information requests to a private nonprofit organization."

Based on the information that you provided, the organization in question is not subject to the Freedom of Information Law. That statute is applicable to agencies, and §86(3) defines the term "agency" to mean:

"any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In view of the foregoing, the Freedom of Information Law generally applies to entities of state and local government. That being so, again, the organization in which you are interested is not required in my opinion to comply with the Freedom of Information Law or disclose its records to the public.

I hope that the foregoing serves to clarify your understanding of the Freedom of Information Law and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12376

Committee Members

Mary O. Donohue
Alan Jay Gerson
Walter W. Grunfeld
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November 6, 2000

Executive Director

Robert J. Freeman

Mr. Matthew Lee
Executive Director
Inner City Press/Community on the Move
& Inner City Public Interest Law Center
1919 Washington Avenue
Bronx, NY 10457

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence, unless otherwise indicated.

Dear Mr. Lee:

As you are aware, I have received your correspondence of September 30, as well as a variety of related materials. In addition, as required by law, the Banking Department has forwarded materials to this office.

In brief, the issue involves the propriety of a denial of access to certain records relating to the application transmitted to the Department by the Credit Suisse Group (CSG) to acquire other banking organizations. The most recent communication from the Department, a determination of your appeal by Sara A Kelsey, Deputy Superintendent and Counsel, indicates that much of the information sought has been disclosed. However, some aspects of the records were withheld. Specifically, Ms. Kelsey wrote that:

“CSG notes that certain portions of the Redacted Text remain qualified for the exemption from disclosure because they represent CSG’s counsel’s privileged and confidential legal characterization and assessment of (i) the nature of the particular claim, (ii) the positions taken and filings made by other parties, and (iii) in some cases the likely outcome of the claims. Specifically, CSG explains that the legal characterization and assessment of the nature of the claims were the product of attorney review of the cases and that the disclosure of such information would necessarily reveal CSG’s counsel’s opinion of the claims. Accordingly, CSG argues that since disclosing information of this sort could be potentially useful to CSG’s competitors, the harm that would result to CSG’s competitive position in doing so must prohibit the disclosure.

“Additionally, CSG describes that other portions of the Redacted Text contain information that is not publicly available from any other source, particularly descriptions of certain legal and regulatory proceedings. In this regard, for some cases, CSG indicates that redaction was necessary because the rules of the particular forum either preclude public disclosure of the substance of the proceedings, or do not otherwise make publicly available certain documents referred to. In other cases, CSG explains that redaction was made because certain forums do not publicly disclose decisions until the passage of specific time periods. CSG maintains that if disclosure of these types of non-public information was made, its competitors could obtain access to such information and use it to develop competitive strategies that would be harmful to CSG. More to the point because CSG would not have analogous information about its competitors, CSG reasons that it would be significantly hampered in developing responses.”

From my perspective, it appears that Ms. Kelsey’s determination is 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.

The materials prepared by CSG’s counsel appear to consist of communications subject to the attorney-client privilege that were required to be submitted to the Department in conjunction with its regulatory functions. The only situation of which I am aware in which the Freedom of Information Law involved records that would be subject to the attorney-client privilege but which were required to be submitted to an agency dealt with a decision concerning the Public Service Commission and a regulatory entity. In that case, North Star Contracting Corp. v. Department of Public Service (Supreme Court, Albany County, April 24, 1985), the petitioner requested records from the agency under the Freedom of Information Law that had been submitted to the agency by the Consolidated Edison Company "in response to an inquiry by the Department." Following an in camera review of the records and a finding that they consisted of material prepared for litigation and were, therefore, properly characterized as privileged, it was held that "the exemption accorded such privileged documents was not waived by Con Ed when it responded to the direction of the Public Service Commission that it should submit its comments and copies of any technical analysis...This is true particularly in light of the fact that Con Ed had specifically reserved its privilege when it submitted such documents pursuant to a directive of the Commission."

Critical in my view is CSG's effort to preserve the privilege. In an Appellate Division decision, it was held that: "Defendant waived any privilege that may have attached to its file when it turned over to plaintiff's criminal defense attorney and to the Grand Jury without specifically reserving its right to claim the privilege in subsequent proceedings..." [Ferraraccio v. Hartford

Insurance Company, 187 AD 2d 954, 955 (1992)]. In another New York State court decision, it was held that:

"Several Federal courts have held that the involuntary disclosure of privileged documents to a government agency does not waive the privilege. (See. e.g., *Osterneck v Barwick Inds.*, 82 FRD 81.83 Chase's production and disclosure, however, was voluntary, that is, it did not seek to prevent the production by asserting the privilege. Moreover, documents protected by the attorney-client privilege have been voluntarily produced to a governmental agency on the condition that the privilege will be maintained in subsequent proceedings, and in those cases courts have held that, under the circumstances, the privilege was not waived. (See. e.g., *Teachers Ins. & Annuity Assn. v Shamrock Broadcasting Co.*, 521 F Supp 638; *Schnell v Schnell*. 550 F Supp 650, 653. However, unless the right to assert the attorney-client privilege in subsequent proceedings is specifically reserved at the time disclosure is made to a governmental agency, that disclosure is held to be complete waiver of that privilege. (See *Teachers Ins. & Annuity Assn. v Shamrock Broadcasting Co.*, *supra*, at pp 644-645). Chase, by its own admission, made no reservation of the attorney-client privilege at the time it produced these documents, and thus it has waived that privilege with respect to the documents disclosed...a mere hope or expectation that the District Attorney was an ally and not an adversary does not convert the relationship into a 'community of interest'..." [People v. Calandra, 120 Misc. 2d 1059, 1060-1061 (1993).

Similarly, federal courts in the other contexts have found that "de facto compulsion" does not result in the waiver of a privilege that might otherwise be asserted [see e.g., Niagara Mohawk Power Corporation v. Stone & Webster Engineering Corporation, 125 F.R.D. 578 (1989); Transamerica Computer Company v. International Business Machines, 573 F.2d 646 (1978)].

In sum, insofar as CSG could properly claim privileges under the CPLR concerning its records, I believe that they would continue to be privileged and, therefore, exempted from disclosure under the Freedom of Information Law due to CSG's attempt to preserve the privilege.

The other ground for denial, which might properly be asserted due to their nature, regarding the materials discussed above and the remaining materials that were withheld is §87(2)(d). As you are aware, 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."

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.

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).

Mr. Matthew Lee
November 6, 2000
Page - 6 -

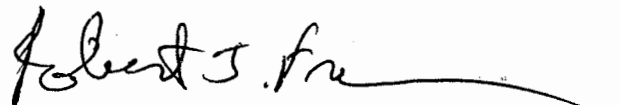
The Court also observed that the reasoning underlying these considerations is consistent with the policy behind §87(2)(d) to protect businesses from the deleterious consequences of disclosing confidential commercial information so as to further the state's economic development efforts and attract business 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 most circumstances, I would agree that records exchanged between parties or submitted to courts in legal proceedings should ordinarily be disclosed; in general, court records are public. In this instance, however, as I understand the matter, CSG, a Swiss company, is involved in proceedings outside of the United States. As indicated earlier, certain of the records submitted to the Banking Department would apparently be confidential, at least for a time, in other jurisdictions, and CSG has contended that disclosure could enable competitors to develop strategies to the detriment of CSG.

From my perspective, if CSG's claim is accurate, that the records would be unavailable elsewhere, and if disclosure would indeed cause substantial injury to its competitive position, the determination by Ms. Kelsey would be consistent with law.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Sara A. Kelsey
Ted McElroy



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12377

Committee Members

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Alan Jay Gerson
Walter W. Grunfeld
Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
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November 6, 2000

Executive Director

Robert J. Freeman

E-Mail

TO: Jerry Moore <Jerry@allthelaw.com>

FROM: Robert J. Freeman, Executive Director

RSF

The staff of the Committee on Open 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:

As you are aware, I have received your letter of September 28.

You asked whether the federal ID and bank account numbers of the Scotia-Glenville School District may be deleted prior to disclosure of the District's bank statements. In addition, you questioned whether the e-mail addresses of District faculty, staff and administrators may be withheld under the Freedom of Information Law.

In this regard, as you may be aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

From my perspective, the only ground for denial of potential significance is §87(2)(i), which authorizes an agency to withhold "computer access codes". Based on its legislative history, that provision is intended to permit agencies to withhold access codes which if disclosed would provide the recipient of a code with the ability to gain unauthorized access to information. Insofar as disclosure would enable a person with an access code to gain access to information without the authority to do so, or to shift, add, delete or alter information, i.e., to make electronic transfers, I believe that the bank account or ID 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. Jerry Moore
November 6, 2000
Page - 2 -

If indeed either of those items may properly be withheld, I do not believe that your inspection of the bank statements would necessarily have created or resulted in a right to obtain a copy [see McGraw-Edison v. Williams. 509 NYS2d 285 (1986)].

With respect to the e-mail addresses, while an e-mail address might not have been created to be used as a computer access code, it can be used in to gain unauthorized access to a computer or to transmit a virus or an "e-mail bomb", for example, to one or perhaps many more computers. Although there is no judicial decision of which I am aware that deals with the situation raised, the cited provision might justifiably be asserted to withhold e-mail addresses. However, if your statement is accurate, that hundreds of students or others not employed by the District have free access to the e-mail addresses, it would be unlikely in my opinion that the District could justify a denial of access to those items.

I hope that I have been of assistance.

RJF:jm

cc: Superintendent



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIA - 12378

Committee Members

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November 6, 2000

Executive Director

Robert J. Freeman

Mr. Mark Jackson

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Jackson:

I have received your letter of September 21 and the correspondence attached to it. You have sought guidance with respect to the delays that you and others have encountered when seeking records from the City of Long Beach.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

Based on the foregoing, an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date indicating when it can be anticipated that a request will be granted or denied. The acknowledgement by the records access officer did not make reference to such a date.

I note that there is no precise time period within which an agency must grant or deny access to records. The time needed to do so may be dependent upon the volume of a request, the possibility that other requests have been made, the necessity to conduct legal research, the search and retrieval techniques used to locate the records and the like. In short, when an agency acknowledges the

Mr. Mark Jackson
November 6, 2000
Page - 2 -

receipt of a request because more than five business days may be needed to grant or deny a request, so long as it provides an approximate date indicating when the request will be granted or denied, and that date is reasonable in view of the attendant circumstances, I believe that the agency would be acting in compliance with law. Notwithstanding the foregoing, in my view, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, if records are clearly available to the public under the Freedom of Information Law, and if they are readily retrievable, there may be no basis for a lengthy delay in disclosure.

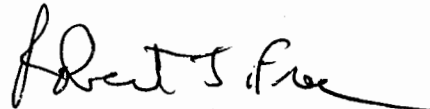
If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Bruce Nyman
Noreen B. Costello
Mary Cammarato



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3230
FOIL-AO-12379

Committee Members

Mary O. Donohue
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November 7, 2000

Executive Director

Robert J. Freeman

Mr. Donald Riviella

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Riviella:

I have received your letter in which you asked that this office "intervene" on your behalf in relation to your efforts in obtaining minutes of meetings of committees of community boards in the Bronx.

In this regard, it is noted at the outset that the Committee on Open Government is authorized to provide opinions concerning the Open Meetings and Freedom of Information Laws; it is not empowered to enforce those statutes. Nevertheless, in an effort to assist you, I offer the following comments.

First, 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 a community board, creates or designates its own members to serve as a committee or subcommittee, the committee or subcommittee would constitute a public body subject to the requirements of the Open Meetings Law. Therefore, committees of a community board consisting solely of its 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)].

Second, I believe that a committee of a community board would also have an obligation to prepare minutes in accordance with §106 of the Open Meetings Law. The cited provision states that:

"1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.

2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.

3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

Based upon the foregoing, it is clear that minutes must be prepared and made available within two weeks.

I note, too, that there is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. Nevertheless, as a matter of practice or policy, many public bodies approve minutes of their meetings. In the event that minutes have not been approved, to comply with the Open Meetings Law, it has consistently been advised that minutes be prepared and made available within two weeks, and that they may be marked "unapproved", "draft" or "non-final", for example. By so doing within the requisite time limitations, the public can generally know what transpired at a meeting; concurrently, the public is effectively notified that the minutes are subject to change.

Third, viewing the matter from a different perspective, minutes of meetings are subject to rights conferred by the Freedom of Information Law. In brief, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Minutes of open meetings must in my view be disclosed, for none of the grounds for denial would be applicable.

Mr. Donald Riviella
November 7, 2000
Page - 3 -

In an effort to enhance compliance with and understanding of the matter, copies of this opinion will be forwarded to the boards to which you referred. 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: Community Board 9
Community Board 10
Community Board 11



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AU-3231
FOIL-AU-12380

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Executive Director
Robert J. Freeman

November 7, 2000

Mr. Lee G. Austin

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Austin:

I have received your letter of September 15 and apologize for the delay in response. You have sought clarification concerning your right to look at minutes of meetings of the Town Board of the Town of Halcott. You wrote that the Town Clerk initially indicated that "to look at the minutes [you] would have purchase a copy for twenty-five cents." In addition, you questioned the propriety of an executive session held by the Town Board.

In this regard, first, the Freedom of Information Law, §87(2) states in relevant part that records must be made available for "inspection" and copying. Further, under §87(1)(b)(iii) of that statute and the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), an agency, such as a town, may charge only for copies. If a photocopy of an accessible record is requested, an agency may charge up to twenty-five cents. However, accessible records must be made available for inspection at no charge.

With respect to the executive session, the minutes attached to your letter indicate that the purpose "was to procure contractor or contractors" for a building project. Here I point out that the Open Meetings Law is based on a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public except to the extent that an executive session may properly be held. Paragraphs (a) through (h) of §105(1) specify and limit the topics that may be considered during an executive session.

It appears that one of the grounds for entry into executive session would have been pertinent. Paragraph (f) of §105(1) 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,

Mr. Lee G. Austin
November 7, 2000
Page - 2 -

employment, promotion, demotion, discipline, suspension, dismissal
or removal of a particular person or corporation..."

If the discussion involved a review of the strengths, weaknesses, experience, or financial status of a particular contractor or contractors, I believe that an executive session could properly have been held, for the matter would have focused on a "particular person or corporation." On the other hand, if, for instance, the discussion did not focus on any particular contractor, but perhaps when a legal notice should be given or the scope of the project generally, it is unlikely in my view that an executive session could properly have been held.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board
Hon. Ruth Kelder



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12381

Committee Members

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November 9, 2000

Executive Director

Robert J. Freeman

Mr. Michael F. Bergan
Harder Silber and Bergan
275 ½ 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, unless otherwise indicated.

Dear Mr. Bergan:

I have received your letter of October 3 in which you referred to a request made by Wallace S. Nolen to the BOCES that you represent for "a complete listing of the names, titles, salaries and public office address of every person employed by the BOCES." You have raised questions concerning whether the request involves a commercial purpose and, therefore, may be denied pursuant to §98(2)(b)(iii) of the Freedom of Information Law.

In this regard, I am familiar with Mr. Nolen's request, for it was made to dozens of agencies. Further, in view of the nature of the record sought and precedent relating to it, I do not believe that the use of the record is pertinent.

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.

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..."

Mr. Michael F. Bergan
November 9, 2000
Page - 2 -

However, a payroll list of employees is included among the records required to be kept pursuant to "subdivision three of section eighty-seven" of the Law. Specifically, that provision states in relevant part that:

"Each agency shall maintain...

(b) a record setting forth the name, public office address, title and salary of every officer or employee of the agency... "

As such, a payroll record that identifies all officers or employees by name, public office address, title and salary must be prepared to comply with the Freedom of Information Law. Moreover, I believe that the payroll record described above must be disclosed for the following reasons.

Relevant to an analysis is §87(2)(b), which permits an agency to withhold records or portions of records when disclosure would result in "an unwarranted invasion of personal privacy." However, payroll information has been found by the courts to be available [see e.g., Miller v. Village of Freeport, 379 NYS 2d 517, 51 AD 2d 765, (1976); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NYS 2d 954 (1978)]. Miller dealt specifically with a request by a newspaper for the names and salaries of public employees, and in Gannett, the Court of Appeals held that the identities of former employees laid off due to budget cuts, as well as current employees, should be made available. In addition, this Committee has advised and the courts have upheld the notion that records that are relevant to the performance of the official duties of public employees are generally available, for disclosure in such instances would result in a permissible as opposed to an unwarranted invasion of personal privacy [Gannett, supra; Capital Newspapers v. Burns, 109 AD 2d 292, aff'd 67 NY 2d 562 (1986); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980; Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); and Montes v. State, 406 NYS 664 (Court of Claims 1978)]. As stated prior to the enactment of the Freedom of Information Law, payroll records:

"...represent important fiscal as well as operation information. The identity of the employees and their salaries are vital statistics kept in the proper recordation of departmental functioning and are the primary sources of protection against employment 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.

Second, in general, the reasons for which a request is made or an applicant's potential use of records are irrelevant, and it has been held that if records are accessible, they should be made equally available to any person, without regard to status or interest [see e.g., M. Farbman & Sons v. New York City, 642 NY 2d 75 (1984) and Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. However, section 89(2)(iii) of the Freedom of Information Law permits an agency to withhold "lists of names and addresses if such lists would be used for commercial or fund-

Mr. Michael F. Bergan
November 9, 2000
Page - 3 -

raising purposes" on the ground that disclosure would constitute an unwarranted invasion of personal privacy. Due to the language of that provision, the intended use of a list of names and addresses is relevant, and case law indicates that an agency can ask why a list of names and addresses has been requested [see Goldbert v. Suffolk County Department of Consumer Affairs, Sup. Ct., Suffolk Cty., (September 5, 1980)].

Nevertheless, §89(6) of the Freedom of Information Law states that:

"Nothing in this article shall be construed to limit or abridge any otherwise available right of access at law or in equity to any party to records."

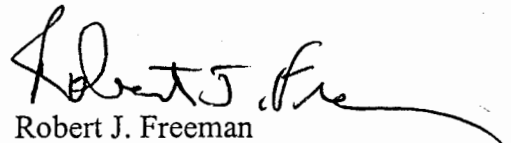
As such, if records are available as of right under a different provision of law or by means of judicial determination, nothing in the Freedom of Information Law can serve to diminish rights of access. In this instance, since payroll information in question was found to be available prior to the enactment of the Freedom of Information Law, I believe that it must be disclosed, regardless of the intended use of the records. Consequently, in my view, the payroll record required to be maintained should be disclosed to any person, irrespective of its intended use.

When §89(2)(b)(iii) is relevant and there is a question concerning the use of a list, it has been suggested that an agency require the applicant to certify in writing that he or she will not use the list for a commercial or fund-raising purpose. Based on the Golbert decision cited above, if the applicant is unwilling to do so, the agency may assume that the request has been made for a commercial purpose.

Finally, due to the variety of issues raised by Mr. Nolen's request, I have enclosed for your consideration an opinion that sought to address them.

I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:jm

Enc.



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12382

Committee Members

Mary O. Donohue
Alan Jay Gerson
Walter W. Grunfeld
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November 10, 2000

Ms. Kathleen 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 facts presented in your correspondence, unless otherwise indicated.

Dear Ms. Allen:

I have received your letter of October 3, as well as the materials attached to it. You referred to requests for records of the Town of North Greenbush and alleged that the Town has "made no effort to comply..."

In order to learn more of the matter, I contacted the Town Clerk. She informed me that she had been ill and could not perform her duties for a time, and that she offered to make available the entirety of a payroll record containing the information sought. Based on your acceptance of the offer, various deletions would be made to protect the privacy of those identified in the record. From her perspective, her response was not a denial of your request; on the contrary, she was awaiting your answer to her offer of the record.

For future reference, I note that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges

Ms. Kathleen Allen
November 10, 2000
Page - 2 -

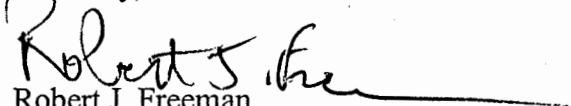
that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...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

cc: Hon. Kathryn A. Connolly

FOIL-AU - 12383

From: Robert Freeman
To: "acjnews@RCN.COM".GWIA.DOS1
Subject: Re: NYS MVA records

Dear Caplyn:

I called DMV again regarding the request by Mr. Schuler. As you are likely aware, the Freedom of Information Law pertains to existing records and states that an agency is not required to create a record in response to a request. I was told that DMV cannot generate a list of omnibus-livery owners or licensees via its computer programs; it would have to develop a new program to do so. It has been held that when an agency would have to develop a new program to generate data, it would be involved in creating a new record, and that it is not required to do so.

I hope that this serves to clarify your understanding of the matter and that I have been of assistance. If you would like to discuss the situation, please feel free to call.

DMV RECORD
OPEN GOVERNMENT



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12384

Committee Members

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November 13, 2000

Executive Director

Robert J. Freeman

E-Mail

TO:

[REDACTED]

FROM:

Robert J. Freeman, Executive Director *RSF*

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Dorothy:

I have received your letter regarding access to records relating to grand jury proceedings. In general, those records are exempt from disclosure to the public. Section 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, any disclosure of grand jury related records would be based upon a court order.

I hope that the foregoing serves to enhance your understanding of the matter and that I have been of assistance.

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12385

Committee Members

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November 14, 2000

Executive Director

Robert J. Freeman

Mr. William S. Hecht

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Hecht:

As you are aware, I have received your letter of October 6 in which you raised a series of questions concerning the ability of units of state and local government in New York to copyright records they produce. You referred to a statement by Counsel to the American Society of Newspaper Editors, Mr. Kevin M. Goldberg, in which it was suggested that "state and local government can claim copyright in official documents", with certain "minor exceptions."

In this regard, I am not an expert on the subject of copyright, and I cannot offer specific information in response to many of your questions. It appears, however, that your inquiry was precipitated by a claim by Cayuga County that its tax maps were copyrighted. Based on the only judicial decision of which I am aware, the tax maps are not subject to a copyright claim. In that case, County of Suffolk v. Experian Information Solutions, Inc., it was initially determined that the County could properly claim copyright protection for the tax maps that it prepared (U.S. District Court, SDNY, 99 Civ.8735, May 15, 2000). On reargument, the Court reversed its prior holding and found that such a claim could not be made (U.S. District Court, SDNY, NYLJ, August 1, 2000).

That latter decision was based largely on an advisory opinion that I prepared on March 14, without knowledge of the Suffolk County litigation, concerning tax maps prepared by the State Department of Transportation ("DOT") and made available under the Freedom of Information Law that were copyrighted by the Department. The Court quoted from that opinion extensively as follows:

"I note that every state has enacted a statute dealing with public access to records of state and local government. However, I know of no judicial decision

to limit, restrict or condition the use of records acquired as of right pursuant to a statute that requires the agency to disclose and copy its records. Further, federal agencies cannot copyright their works, and there is no precedent dealing with copyright by the federal government. DOT contends that by making copies of records available, it is in no way infringing rights conferred by the [FOIL]. The restriction, which is based on a copyright, merely deals with 'a situation involving a separate set of rights to the ownership and possession of property which the State enjoys under a separate set of federal laws.'

"The stance taken by DOT, in view of the Copyright Act (17 U.S.C. §101), arguably is correct. However, due to the inherent purpose of the [FOIL] and a review of the constitutional and statutory underpinnings of copyright protection, I respectfully disagree. In enacting the Freedom of Information Law, the State Legislature declared that:

'The more open a government is with its citizenry, the greater the understanding and participation of public in government.

'As state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible.

'[The above] in my view evidences an intent that the public good is best served when records available under that statute are disclosed as widely as possible and without impediment...[I]n construing the [FOIL], the courts have held that the status or interest of a person seeking records are irrelevant; the only question...is whether there is a basis for a denial of access pursuant §87(2). 'Interest' in my opinion relates to the intended use of records. That a record may not be used for a purpose relating to the accountability of government is of no moment...and in general, I do not believe that it is the government's business to know or even to inquire as to the intended use of records. Once the records have been found to

be available, the applicant should be able to do with them as he or she sees fit...

'[M]ost state statutes, like the federal FOIA, do not allow for interest balancing or assessing the reason for access. The mere fact that an individual or entity may obtain income from an activity that serves a public purpose does not negate the public nature of the activity. When a commercial publisher disseminates public information, it is serving a public purpose - the very purpose that is central justification for FOIAs" [Perritt, Should Local Governments Sell Local Spatial Databases Through State Monopolies? 35 Jurimetrics Journal 449, 45, Summer, 1995).

'[T]he commentary quoted above is consistent with and supports the notion that an access statute, like the [FOIL], is intended to remove barriers to the dissemination of government records and encourage the widest possible distribution of those records.

'In relating the foregoing to copyright, it is important, in my opinion, to review the history and intent of copyright protection. The basis of copyright is Article I, §8 of the United States Constitution, which indicates the framer's intent: 'To promote the Progress of Science and Useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.' In construing the 'copyright clause', the United States Supreme Court has stated that its purpose is as follows: 'The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts'' [Mazer v. Stein, 347 U.S. 201, 219 (1954)].

'At heart (sic) of copyright protection, therefore, is 'personal gain', an economic incentive, and several decisions support that principle.

'Unlike authors and creators, DOT needs no similar incentives. On the contrary, it is that agency's

'Unlike authors and creators, DOT needs no similar incentives. On the contrary, it is that agency's statutory duty to prepare and preserve the kinds of records that you are seeking...Such incentives are unnecessary for public agencies, since these entities have a statutory duty to collect, organize and disseminate information...(Perritt, supra, 460)...

"The March 14 Advisory opinion then compares the FOIL to the federal Freedom of Information Act, again concluding that the DOT 'does not prepare the records for economic gain; it has no 'commercial interest' in so doing; on the contrary, the records are prepared because it is the agency's statutory obligation to do so. In short, it is questionable in my view whether DOT can claim copyright protection at all.' See id. at 8.

"The March 14 Advisory Opinion also included arguments that the assertion of copyright protection in this context is contrary to public policy and may violate the First Amendment. See id. at 9-10. The Committee's March 14 opinion ultimately concluded that 'the assertion of copyright claims in the context of your inquiry is, in my opinion, contrary to the intent of both the [FOIL] and the Copyright Act.' See id. at 10."

The Court concluded that my opinion was "neither irrational nor unreasonable", and that Suffolk County:

"...similar to the DOT, does not prepare the maps in question for economic gain and has no commercial interest in preparing the maps. Rather, Plaintiff prepares the tax maps because it is Plaintiff's statutory obligation to prepare them. As a result, this ruling will not create a disincentive for counties to create these tax maps...

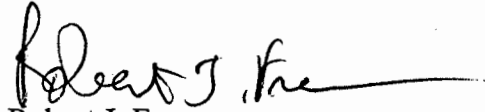
"The Court concludes that, under the FOIL, First American may freely copy and distribute Plaintiff's tax maps and that Plaintiff may not prevent First American from disseminating the tax maps on the basis of Plaintiff's copyrights in those maps."

In sum, based on the foregoing, it appears that records, like the tax maps, that a government agency is required to produce, is not subject to copyright protection. I emphasize that the County of Suffolk decision has been appealed.

Mr. William S. Hecht
November 14, 2000
Page - 5 -

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: Alan P. Koslowski
Kevin M. Goldberg



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO - 3234
FOIL-AO - 12386

Committee Members

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November 17, 2000

Executive Director
Robert J. Freeman

Mr. Theodore A. Trespasz, Jr.
Trespasz & Marquardt, LLP
251 West Fayette Street
Syracuse, NY 13202

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence, unless otherwise indicated.

Dear Mr. Trespasz:

I have received your letter of October 2, as well as related materials. You indicated that you represent the Canandaigua Recreation Development Corporation ("the Corporation"), which was the subject of an advisory opinion prepared on August 8 at the request of Mr. Harold Oliver. In brief, based on the information provided by Mr. Oliver, it was advised that the Corporation is subject to both the Freedom of Information and Open Meetings Laws. At that time, the information that I had indicated that the Board of the Directors consisted of *ex officio* City of Canandaigua officials and others designated by the City Council that would comprise a majority of the Board. For that reason, it was advised that the City had substantial control over the Corporation.

Since then, I have learned that the composition of the Board of Directors has been changed. As you aware, in its original certificate of incorporation, Article V stated that the Board of Directors must consist initially of eleven members, six of whom would be the City officials to whom reference was made above. I note that Article 7 entitled "Amendments" states that certain articles, including Article V, "shall not be subject to amendment." Notwithstanding the foregoing, less than a year after the approval of the certificate of incorporation, Article 5 was amended to provide that five members of the Board would be City officials. As such, it would appear that less than a majority of Board consists of City officials. I point out that City officials, based on the certificate of incorporation, could become a majority on the Board, for Article V provides that the Board's initial membership shall be eleven, but that it may be reduced to nine. In that event, five of the nine members would be City officials.

Not being an expert in the Not-for-Profit Corporation Law, I cannot gauge the legality or propriety of amending the terms of Article V in view of its original prohibition regarding a change in the composition of the Board. I would conjecture, however, that such an amendment would be

Mr. Theodore A. Trespasz, Jr.

November 17, 2000

Page - 2 -

unusual, and that it is equally unusual to create a corporation whose board of directors may shift from being somewhat independent of government to being under substantial governmental control. Despite the amendment to the certificate and the reduction of City officials on its Board, I believe that many of the Corporation's records would remain subject to the Freedom of Information Law even if the Corporation is not itself subject to that statute. Further, meetings of the Board arguably are subject to the Open Meetings Law.

Specific reference is found in §1411 of the Not-for-Profit Corporation Law to local development corporations, such as the entity in question. 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."

Due to its status as a not-for-profit corporation, it is not clear in every instance that a local development corporation is a governmental entity; however, it is clear that such a corporation performs a governmental function.

With respect to its status under the Open Meetings Law, that statute applies 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."

By breaking the definition into its components, I believe that each condition necessary to a finding that the board of a local development corporation 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, I believe that it conducts public business and performs a governmental function for a public corporation, in this instance, the City of Canandaigua.

With respect to access to records under the Freedom of Information Law, even if it may be contended that the Corporation is not an "agency" subject to that statute, it is clear that several of the members of its Board serve due to their status as City officials, and I believe that any records that they prepare or receive in conjunction with their activities involving the Corporation would 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:

Mr. Theodore A. Trespasz, Jr.

November 17, 2000

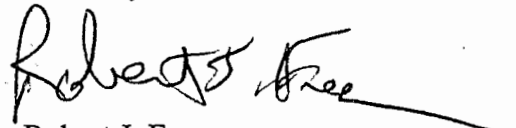
Page - 3 -

"any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, documentation prepared or received by City officials in conjunction with the performance of their duties with the Corporation would be kept or produced by or for an agency, the City of Canandaigua. Therefore, again, even if the Corporation is not directly subject to the Freedom of Information Law, and I am not suggesting that it is not subject to that statute, due to the participation of City officials and designees, many, if not all of its records would in my view fall within the coverage of the statute.

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: Harold Oliver
City Council



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-A0-12387

Committee Members

Mary O. Donohue
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November 27, 2000

Executive Director

Robert J. Freeman

Mr. John D. Horst



The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Horst:

I have received your letter of October 5, which reached this office on October 12. Please accept my apologies for the delay in response. You have raised questions concerning the functions of the Committee on Open Government and rights of access to records.

First, the Committee is authorized to provide advice and opinions concerning the Freedom of Information and Open Meetings Laws. The Committee is not empowered to compel an entity of government to comply with those statutes or to grant or deny access to 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 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 grounds for denial that follow. The phrase quoted in the preceding sentence indicates that a single record may be both accessible or deniable in whole or in part, and that an agency is required to review requested records in their entirety to determine which portions, if any, may justifiably be withheld. In short, in response to your question, there may be instances in which records may be made available pursuant to an appeal following deletions made in accordance with the grounds for denial.

Next, you asked whether "an unsatisfactory Report Card or analysis of a public school's administration, compiled by an outside analyst hired by the district [would] be considered an invasion of privacy." In this regard, I believe that report cards pertaining to school districts are issued by the State Education Department and are available to the public. With respect to a report prepared by a consultant retained by a school district, §87(2)(g) is likely of particular relevance. While that provision potentially authorizes an agency to withhold records, as suggested above, due to its structure, it often requires substantial disclosure. Specifically, §87(2)(g) permits an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations; or
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted [i.e., §87(2)(b) concerning unwarranted invasions of personal privacy]. Concurrently, those 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, has held that:

"Opinions and recommendations prepared by agency personnel may be exempt from disclosure under FOIL as 'predecisional materials, prepared to assist an agency decision maker***in arriving at his decision' (McAulay v. Board of Educ., 61 AD 2d 1048, aff'd 48 NY 2d 659). Such material is exempt 'to protect the deliberative process of government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers (Matter of Sea Crest Const. Corp. v. Stubing, 82 AD 2d 546, 549).

"In connection with their deliberative process, agencies may at times require opinions and recommendations from outside consultants. It would make little sense to protect the deliberative process when such reports are prepared by agency employees yet deny this protection when reports are prepared for the same purpose by outside consultants retained by agencies. Accordingly, we hold that records may be considered 'intra-agency material' even though prepared by an outside consultant at the behest of an agency as part of the agency's deliberative process (see, Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD 2d 546, 549, supra; Matter of 124 Ferry St. Realty Corp. v. Hennessy, 82 AD 2d 981, 983)" [Xerox Corporation v. Town of Webster, 65 NY 2d 131, 132-133 (1985)].

Based upon the foregoing, records prepared by a consultant for an agency may be withheld or must be disclosed based upon the same standards as in cases in which records are prepared by the

staff of an agency. It is emphasized that the Court in Xerox specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

"While the reports in principle may be exempt from disclosure, on this record - which contains only the barest description of them - we cannot determine whether the documents in fact fall wholly within the scope of FOIL's exemption for 'intra-agency materials,' as claimed by respondents. To the extent the reports contain 'statistical or factual tabulations or data' (Public Officers Law section 87[2][g][i], or other material subject to production, they should be redacted and made available to the appellant" (id. at 133).

Therefore, a record prepared by a consultant for an agency would be accessible or deniable, in whole or in part, depending on its contents.

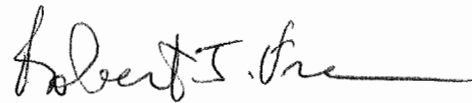
Lastly, without knowledge of the content of the kind of report in which you are interested, I cannot offer specific guidance concerning the ability to deny access on the ground that disclosure would result in "an unwarranted invasion of personal privacy." I point out, however, that although the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public employees. It is clear that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. Further, the courts have found that, as a general rule, records that are relevant to the performance of a public employee's official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

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)].

Mr. John D. Horst
November 27, 2000
Page - 4 -

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", followed by a horizontal line extending to the right.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMC-AO-3223
FOIL-AO-12371

Committee Members

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November 3, 2000

Executive Director

Robert J. Freeman

Mr. John D. Horst



The staff of the Committee 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. Horst:

I have received your letter of September 26 in which you raised the following questions:

“Can the Board of Education meet in executive session to discuss a FOIL denial since it is not listed as one of the eight items given as reasons for convening an executive session.

“When a board does meet in executive session and a quorum is present, does a simple majority vote on an issue before them, stand as if it were the entire board voting?

“Is factual data or information gathered by a consultant (hired by the district) and then used to expend public monies, through the creation of a new administrative post, foilable?”

In this regard, first, the Open Meetings Law is based on a presumption of openness. Meetings of public bodies, such as boards of education, must be conducted in public, except to the extent that an executive session may properly be held. Paragraphs (a) through (h) of §105(1) of that statute specify and limit the topics that may be considered in executive session.

According to materials sent to this office by the Patchogue-Medford School District, the record at issue was a report prepared by a consultant for the District. From my perspective, in consideration of the grounds for entry into executive session, it is doubtful in my view that an executive session could validly have been held to discuss your request. There may be other instances, however, in which an executive session might justifiably be held. For instance, if the issue involves records relating to a disciplinary matter, an executive session might appropriately be held [see Open Meetings Law, §105(1)(f)].

Second, any action taken by a public body requires an affirmative vote of a majority of its total membership, not a majority of those present. A board of education, like other governmental bodies, is subject to §41 of the General Construction Law which is entitled "Quorum and majority." That statute 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, gathered together in the presence of each other or through the use of videoconferencing, at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such board of body, or at any duly adjourned meeting of such meeting, or at any meeting duly held upon reasonable notice to all of them, shall constitute a quorum and not less than a majority of the whole number may perform and exercise such power, authority or duty. For the purpose of this provision the words 'whole number' shall be construed to mean the total number which the board, commission, body or other group of persons or officers would have were there no vacancies and were none of the persons or officers disqualified from acting."

Based upon the 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. Therefore, if a public body consists of five members, three affirmative votes would be need to approve a motion, even if only three members are present.

Lastly, I believe that "factual data" prepared by a consultant retained by an agency is accessible under the Freedom of Information law. In brief, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Pertinent is §87(2)(g), the provision to which the District alluded in its denial of your request. That provision permits an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

In a discussion of the issue of records prepared by consultants for agencies, the Court of Appeals, 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

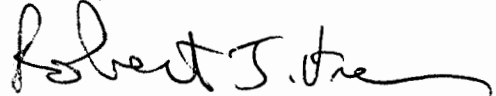
Mr. John D. Horst
November 3, 2000
Page - 4 -

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,

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: Board of Education
Barbara Kane



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12372

Committee Members

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Executive Director

Robert J. Freeman

November 3, 2000

Chief Donald W. Yost
Painted Post Police Department
P.O. Box 110
Painted Post, NY 14870

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Yost:

I have received your letter of September 20, as well as the correspondence attached to it. You have sought assistance in obtaining an investigative report from the Division of the State Police. The report was prepared in conjunction with a case that was dismissed, and the Division has indicated that the record is exempt from disclosure.

As I understand the matter, the denial of your request was consistent with 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.

Relevant under the circumstances is the first ground for denial, §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute. One such statute, §160.50 of the Criminal Procedure Law. As you are aware, that statute typically requires that a judge order that records be sealed when charges against an accused are dismissed in his or her favor. According to the response by the Division, the record of your interest has been ordered sealed. If that is so, I believe that the only means of obtaining the report would involve an attempt to obtain a judicial order to unseal the records and provide access to the report. At this juncture, however, the report, in my opinion, is exempt from disclosure and beyond rights of access conferred by the Freedom of Information Law.

Chief Donald W. Yost
November 3, 2000
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". The signature is written in a cursive style with a long horizontal flourish at the end.

Robert J. Freeman
Executive Director

RJF:tt

cc: William J. Callahan
Lt. Laurie M. Wagner

Enc.



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMC-140-3225
FOIL-140-12373

Committee Members

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November 3, 2000

Executive Director

Robert J. Freeman

Ms. F. Warren Kahn
Attorney at Law
M.P.O. Box 702
Niagara Falls, NY 14302-0702

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Kahn:

I have received your letter of September 20, as well as a portion of a transcript of an open meeting held by the Board of Education of the Lewiston-Porter Central School District.

In brief, you wrote that the District is involved in negotiations with the administrators' bargaining unit, and that the District's negotiator and the Superintendent reported on the negotiations in executive session. In an effort to avoid problems concerning the Board's involvement in the process, the Board was not given specific details regarding the negotiations. As I understand the situation, a member of the Board independently developed a questionnaire to the Superintendent concerning the negotiations. Based on the responses, that member considered the Superintendent's answers different from the answers to the same questions that he raised with the Board President.

"The issue", according to your letter, "is whether [the members] comments were appropriate in the setting just described." Having reviewed the comments as reflected in the transcript, I believe that the entirety of the discussion could have occurred during an executive session.

While the Freedom of Information and Open Meetings Laws are related and were likely enacted in an effort to achieve similar goals, their application in some instances may give rise to inconsistent results. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Similarly, the Open Meetings Law is based on a presumption of openness; meetings of public bodies must be conducted open to the public, except to the extent that they consider matters that may properly be discussed in executive session. As you are aware, paragraphs (a) through (h) of §105(1) of that statute specify and limit the grounds for entry into executive session.

Ms. F. Warren Kahn
November 3, 2000
Page - 2 -

As the Freedom of Information Law relates to the matter, the pertinent provision in my view is §87(2)(c), which authorizes an agency to withhold records to the extent that disclosure "would impair present or imminent contract awards or collective bargaining negotiations." The key word is "impair", and the question, therefore, under the Freedom of Information Law in the context of your inquiry involves whether or the extent to which the disclosure of records would adversely affect collective bargaining negotiations.

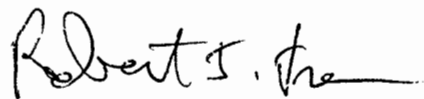
You and others during the discussion referred to records, such as the current contract and the budget, that are accessible to the public. Even though those records may be used in or relevant to a negotiation process, they must be disclosed, for disclosure of those records may be required by law (i.e., Education Law, §1716) and would not "impair" the collective bargaining process.

The analogous provision in the Open Meetings Law does not include language concerning the effects of disclosure or the harm that could potentially result through public discussion of an issue. Specifically, under §105(1)(e), the Board may discuss collective bargaining negotiations in executive session, irrespective of the impact of openness. That being so, I believe that the entirety of the discussion could have been conducted during an executive session.

With respect to your specific question, whether the member's comments "were appropriate" the answer may not be derived from the Open Meetings Law. That statute is permissive; a public body *may* conduct an executive session in accordance with one or more of the grounds for private discussion appearing in §105(1). Nevertheless, there is no obligation imposed by that statute to do so. While I am not an expert on the subject, it appears that the propriety of public discussion of the matter would involve the interpretation of the Taylor Law. Consequently, it is suggested that the Public Employment Relations Board may be better able to offer guidance concerning whether the member's comments were "appropriate."

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

7076-40-12374

Committee Members

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November 3, 2000

Executive Director

Robert J. Freeman

Mr. Greg D. Lubow
Greene County Public Defender
County Court House
P.O. Box 413
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. Lubow:

I have received your letter of September 18, as well as the materials attached to it.

Your inquiry was precipitated by a situation in which your client, an inmate at Coxsackie Correctional Facility, was charged with promoting prison contraband when a razor blade was found to be in his possession. He contends, however, that he found the razor blade "on the floor in the assembly area as he and other inmates were being taken through the assembly area." Following his arraignment, the inmate expressed the belief that "a videotape existed of the assembly area which would show him finding the razor blade moments before it was found on him", and that the videotape could be considered exculpatory. Your letter describes a series of efforts to obtain the videotape and you questioned the Department's policy concerning the retention and recycling of videotapes. The videotape that you requested was apparently recycled seven days after its creation.

You have sought guidance with respect to a failure on the part of the facility to provide information in a timely manner and its unwillingness to disclose facility or department wide policies concerning the recycling of videotapes. You also asked whether "their policy of holding tapes seven days [is] a valid one."

In this regard, I offer the following comments.

First, regulations promulgated by the Committee on Open Government (21 NYCRR §1401.2) 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. According to the regulations of the Department of Correctional Services, requests for records kept at a correctional facility should be made to the facility superintendent or his designee. In my view, that person has the duty of responding directly or ensuring that Department personnel respond appropriately to requests. With respect to records kept at the Department's Albany offices, I believe that the records access officer is Mr. Mark Shepard.

Second, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)]. I believe that the person designated to determine appeals is Counsel to the Department, Mr. Anthony J. Annucci.

Third, any policies concerning the retention, disposal or recycling of videotapes would in my view be accessible, whether the policies are developed by a facility or are applicable to all Department facilities. In short, agencies' policies are generally available pursuant to subparagraph (iii) of §87(2)(g) of the Freedom of Information Law.

Lastly, while I am unaware of the validity of recycling videotapes after seven days, I point out that records cannot be disposed of or destroyed without having received the consent of the

Mr. Greg D. Lubow
November 3, 2000
Page - 3 -

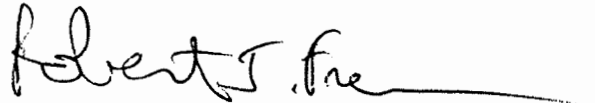
Commissioner of Education in accordance with §57.05 of the Arts and Cultural Affairs Law. That provision states that the Commissioner is empowered:

“(b) To authorize the disposal or destruction of state records including books, papers, maps, photographs, microphotographs or other documentary materials made, acquired or received by any agency. At least forty days prior to the proposed disposal or destruction of such records, the commissioner of education shall deliver a list of the records to be disposed of or destroyed to the attorney general, the comptroller and the state agency that transferred such records. No state records listed therein shall be destroyed if within thirty days after receipt of such list the attorney general, comptroller, or the agency that transferred such records shall notify the commissioner of education that in his opinion such state records should not be destroyed.”

Functions involving the management, retention and disposal of records are carried out by a unit of the State Education Department, the State Archives and Records Administration. That entity develops schedules indicating minimum periods that particular records must be retained, and it is suggested that you contact that office to obtain additional information on the subject.

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: Mark Shepard
Joseph F. David
H.D. Graham



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12375

Committee Members

Mary O. Donohue
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November 6, 2000

Executive Director

Robert J. Freeman

Ms. Margaret C. Menzies

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Menzies:

I have received your letter of September 25 in which you wrote that you are "very confused about Freedom of Information requests to a private nonprofit organization."

Based on the information that you provided, the organization in question is not subject to the Freedom of Information Law. That statute is applicable to agencies, and §86(3) defines the term "agency" to mean:

"any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In view of the foregoing, the Freedom of Information Law generally applies to entities of state and local government. That being so, again, the organization in which you are interested is not required in my opinion to comply with the Freedom of Information Law or disclose its records to the public.

I hope that the foregoing serves to clarify your understanding of the Freedom of Information Law and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12376

Committee Members

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Walter W. Grunfeld
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November 6, 2000

Executive Director

Robert J. Freeman

Mr. Matthew Lee
Executive Director
Inner City Press/Community on the Move
& Inner City Public Interest Law Center
1919 Washington Avenue
Bronx, NY 10457

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence, unless otherwise indicated.

Dear Mr. Lee:

As you are aware, I have received your correspondence of September 30, as well as a variety of related materials. In addition, as required by law, the Banking Department has forwarded materials to this office.

In brief, the issue involves the propriety of a denial of access to certain records relating to the application transmitted to the Department by the Credit Suisse Group (CSG) to acquire other banking organizations. The most recent communication from the Department, a determination of your appeal by Sara A Kelsey, Deputy Superintendent and Counsel, indicates that much of the information sought has been disclosed. However, some aspects of the records were withheld. Specifically, Ms. Kelsey wrote that:

“CSG notes that certain portions of the Redacted Text remain qualified for the exemption from disclosure because they represent CSG’s counsel’s privileged and confidential legal characterization and assessment of (i) the nature of the particular claim, (ii) the positions taken and filings made by other parties, and (iii) in some cases the likely outcome of the claims. Specifically, CSG explains that the legal characterization and assessment of the nature of the claims were the product of attorney review of the cases and that the disclosure of such information would necessarily reveal CSG’s counsel’s opinion of the claims. Accordingly, CSG argues that since disclosing information of this sort could be potentially useful to CSG’s competitors, the harm that would result to CSG’s competitive position in doing so must prohibit the disclosure.

“Additionally, CSG describes that other portions of the Redacted Text contain information that is not publicly available from any other source, particularly descriptions of certain legal and regulatory proceedings. In this regard, for some cases, CSG indicates that redaction was necessary because the rules of the particular forum either preclude public disclosure of the substance of the proceedings, or do not otherwise make publicly available certain documents referred to. In other cases, CSG explains that redaction was made because certain forums do not publicly disclose decisions until the passage of specific time periods. CSG maintains that if disclosure of these types of non-public information was made, its competitors could obtain access to such information and use it to develop competitive strategies that would be harmful to CSG. More to the point because CSG would not have analogous information about its competitors, CSG reasons that it would be significantly hampered in developing responses.”

From my perspective, it appears that Ms. Kelsey’s determination is 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.

The materials prepared by CSG’s counsel appear to consist of communications subject to the attorney-client privilege that were required to be submitted to the Department in conjunction with its regulatory functions. The only situation of which I am aware in which the Freedom of Information Law involved records that would be subject to the attorney-client privilege but which were required to be submitted to an agency dealt with a decision concerning the Public Service Commission and a regulatory entity. In that case, North Star Contracting Corp. v. Department of Public Service (Supreme Court, Albany County, April 24, 1985), the petitioner requested records from the agency under the Freedom of Information Law that had been submitted to the agency by the Consolidated Edison Company "in response to an inquiry by the Department." Following an in camera review of the records and a finding that they consisted of material prepared for litigation and were, therefore, properly characterized as privileged, it was held that "the exemption accorded such privileged documents was not waived by Con Ed when it responded to the direction of the Public Service Commission that it should submit its comments and copies of any technical analysis...This is true particularly in light of the fact that Con Ed had specifically reserved its privilege when it submitted such documents pursuant to a directive of the Commission."

Critical in my view is CSG's effort to preserve the privilege. In an Appellate Division decision, it was held that: "Defendant waived any privilege that may have attached to its file when it turned over to plaintiff's criminal defense attorney and to the Grand Jury without specifically reserving its right to claim the privilege in subsequent proceedings..." [Ferraraccio v. Hartford

Insurance Company, 187 AD 2d 954, 955 (1992)]. In another New York State court decision, it was held that:

"Several Federal courts have held that the involuntary disclosure of privileged documents to a government agency does not waive the privilege. (See. e.g., *Osterneck v Barwick Inds.*, 82 FRD 81.83 Chase's production and disclosure, however, was voluntary, that is, it did not seek to prevent the production by asserting the privilege. Moreover, documents protected by the attorney-client privilege have been voluntarily produced to a governmental agency on the condition that the privilege will be maintained in subsequent proceedings, and in those cases courts have held that, under the circumstances, the privilege was not waived. (See. e.g., *Teachers Ins. & Annuity Assn. v Shamrock Broadcasting Co.*, 521 F Supp 638; *Schnell v Schnell*. 550 F Supp 650, 653. However, unless the right to assert the attorney-client privilege in subsequent proceedings is specifically reserved at the time disclosure is made to a governmental agency, that disclosure is held to be complete waiver of that privilege. (See *Teachers Ins. & Annuity Assn. v Shamrock Broadcasting Co.*, *supra*, at pp 644-645). Chase, by its own admission, made no reservation of the attorney-client privilege at the time it produced these documents, and thus it has waived that privilege with respect to the documents disclosed...a mere hope or expectation that the District Attorney was an ally and not an adversary does not convert the relationship into a 'community of interest'..." [People v. Calandra, 120 Misc. 2d 1059, 1060-1061 (1993).

Similarly, federal courts in the other contexts have found that "de facto compulsion" does not result in the waiver of a privilege that might otherwise be asserted [see e.g., Niagara Mohawk Power Corporation v. Stone & Webster Engineering Corporation, 125 F.R.D. 578 (1989); Transamerica Computer Company v. International Business Machines, 573 F.2d 646 (1978)].

In sum, insofar as CSG could properly claim privileges under the CPLR concerning its records, I believe that they would continue to be privileged and, therefore, exempted from disclosure under the Freedom of Information Law due to CSG's attempt to preserve the privilege.

The other ground for denial, which might properly be asserted due to their nature, regarding the materials discussed above and the remaining materials that were withheld is §87(2)(d). As you are aware, 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."

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.

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).

Mr. Matthew Lee
November 6, 2000
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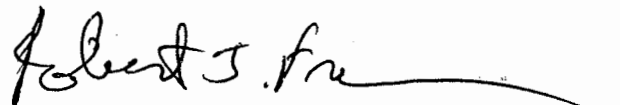
The Court also observed that the reasoning underlying these considerations is consistent with the policy behind §87(2)(d) to protect businesses from the deleterious consequences of disclosing confidential commercial information so as to further the state's economic development efforts and attract business 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 most circumstances, I would agree that records exchanged between parties or submitted to courts in legal proceedings should ordinarily be disclosed; in general, court records are public. In this instance, however, as I understand the matter, CSG, a Swiss company, is involved in proceedings outside of the United States. As indicated earlier, certain of the records submitted to the Banking Department would apparently be confidential, at least for a time, in other jurisdictions, and CSG has contended that disclosure could enable competitors to develop strategies to the detriment of CSG.

From my perspective, if CSG's claim is accurate, that the records would be unavailable elsewhere, and if disclosure would indeed cause substantial injury to its competitive position, the determination by Ms. Kelsey would be consistent with law.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Sara A. Kelsey
Ted McElroy



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12377

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November 6, 2000

Executive Director

Robert J. Freeman

E-Mail

TO: Jerry Moore <Jerry@allthelaw.com>

FROM: Robert J. Freeman, Executive Director

RSF

The staff of the Committee on Open 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:

As you are aware, I have received your letter of September 28.

You asked whether the federal ID and bank account numbers of the Scotia-Glenville School District may be deleted prior to disclosure of the District's bank statements. In addition, you questioned whether the e-mail addresses of District faculty, staff and administrators may be withheld under the Freedom of Information Law.

In this regard, as you may be aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

From my perspective, the only ground for denial of potential significance is §87(2)(i), which authorizes an agency to withhold "computer access codes". Based on its legislative history, that provision is intended to permit agencies to withhold access codes which if disclosed would provide the recipient of a code with the ability to gain unauthorized access to information. Insofar as disclosure would enable a person with an access code to gain access to information without the authority to do so, or to shift, add, delete or alter information, i.e., to make electronic transfers, I believe that the bank account or ID 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. Jerry Moore
November 6, 2000
Page - 2 -

If indeed either of those items may properly be withheld, I do not believe that your inspection of the bank statements would necessarily have created or resulted in a right to obtain a copy [see McGraw-Edison v. Williams. 509 NYS2d 285 (1986)].

With respect to the e-mail addresses, while an e-mail address might not have been created to be used as a computer access code, it can be used in to gain unauthorized access to a computer or to transmit a virus or an "e-mail bomb", for example, to one or perhaps many more computers. Although there is no judicial decision of which I am aware that deals with the situation raised, the cited provision might justifiably be asserted to withhold e-mail addresses. However, if your statement is accurate, that hundreds of students or others not employed by the District have free access to the e-mail addresses, it would be unlikely in my opinion that the District could justify a denial of access to those items.

I hope that I have been of assistance.

RJF:jm

cc: Superintendent



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIA - 12378

Committee Members

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November 6, 2000

Executive Director

Robert J. Freeman

Mr. Mark Jackson

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Jackson:

I have received your letter of September 21 and the correspondence attached to it. You have sought guidance with respect to the delays that you and others have encountered when seeking records from the City of Long Beach.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

Based on the foregoing, an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date indicating when it can be anticipated that a request will be granted or denied. The acknowledgement by the records access officer did not make reference to such a date.

I note that there is no precise time period within which an agency must grant or deny access to records. The time needed to do so may be dependent upon the volume of a request, the possibility that other requests have been made, the necessity to conduct legal research, the search and retrieval techniques used to locate the records and the like. In short, when an agency acknowledges the

Mr. Mark Jackson
November 6, 2000
Page - 2 -

receipt of a request because more than five business days may be needed to grant or deny a request, so long as it provides an approximate date indicating when the request will be granted or denied, and that date is reasonable in view of the attendant circumstances, I believe that the agency would be acting in compliance with law. Notwithstanding the foregoing, in my view, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, if records are clearly available to the public under the Freedom of Information Law, and if they are readily retrievable, there may be no basis for a lengthy delay in disclosure.

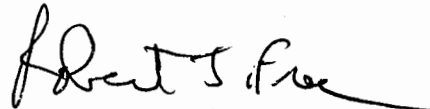
If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Bruce Nyman
Noreen B. Costello
Mary Cammarato



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3230
FOIL-AO-12379

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November 7, 2000

Executive Director

Robert J. Freeman

Mr. Donald Riviella

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Riviella:

I have received your letter in which you asked that this office "intervene" on your behalf in relation to your efforts in obtaining minutes of meetings of committees of community boards in the Bronx.

In this regard, it is noted at the outset that the Committee on Open Government is authorized to provide opinions concerning the Open Meetings and Freedom of Information Laws; it is not empowered to enforce those statutes. Nevertheless, in an effort to assist you, I offer the following comments.

First, 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 a community board, creates or designates its own members to serve as a committee or subcommittee, the committee or subcommittee would constitute a public body subject to the requirements of the Open Meetings Law. Therefore, committees of a community board consisting solely of its 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)].

Second, I believe that a committee of a community board would also have an obligation to prepare minutes in accordance with §106 of the Open Meetings Law. The cited provision states that:

"1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.

2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.

3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

Based upon the foregoing, it is clear that minutes must be prepared and made available within two weeks.

I note, too, that there is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. Nevertheless, as a matter of practice or policy, many public bodies approve minutes of their meetings. In the event that minutes have not been approved, to comply with the Open Meetings Law, it has consistently been advised that minutes be prepared and made available within two weeks, and that they may be marked "unapproved", "draft" or "non-final", for example. By so doing within the requisite time limitations, the public can generally know what transpired at a meeting; concurrently, the public is effectively notified that the minutes are subject to change.

Third, viewing the matter from a different perspective, minutes of meetings are subject to rights conferred by the Freedom of Information Law. In brief, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Minutes of open meetings must in my view be disclosed, for none of the grounds for denial would be applicable.

Mr. Donald Riviella
November 7, 2000
Page - 3 -

In an effort to enhance compliance with and understanding of the matter, copies of this opinion will be forwarded to the boards to which you referred. 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: Community Board 9
Community Board 10
Community Board 11



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AU-3231
FOIL-AU-12380

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Executive Director
Robert J. Freeman

November 7, 2000

Mr. Lee G. Austin

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Austin:

I have received your letter of September 15 and apologize for the delay in response. You have sought clarification concerning your right to look at minutes of meetings of the Town Board of the Town of Halcott. You wrote that the Town Clerk initially indicated that "to look at the minutes [you] would have purchase a copy for twenty-five cents." In addition, you questioned the propriety of an executive session held by the Town Board.

In this regard, first, the Freedom of Information Law, §87(2) states in relevant part that records must be made available for "inspection" and copying. Further, under §87(1)(b)(iii) of that statute and the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), an agency, such as a town, may charge only for copies. If a photocopy of an accessible record is requested, an agency may charge up to twenty-five cents. However, accessible records must be made available for inspection at no charge.

With respect to the executive session, the minutes attached to your letter indicate that the purpose "was to procure contractor or contractors" for a building project. Here I point out that the Open Meetings Law is based on a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public except to the extent that an executive session may properly be held. Paragraphs (a) through (h) of §105(1) specify and limit the topics that may be considered during an executive session.

It appears that one of the grounds for entry into executive session would have been pertinent. Paragraph (f) of §105(1) 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,

Mr. Lee G. Austin
November 7, 2000
Page - 2 -

employment, promotion, demotion, discipline, suspension, dismissal
or removal of a particular person or corporation..."

If the discussion involved a review of the strengths, weaknesses, experience, or financial status of a particular contractor or contractors, I believe that an executive session could properly have been held, for the matter would have focused on a "particular person or corporation." On the other hand, if, for instance, the discussion did not focus on any particular contractor, but perhaps when a legal notice should be given or the scope of the project generally, it is unlikely in my view that an executive session could properly have been held.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board
Hon. Ruth Kelder



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12381

Committee Members

Mary O. Donohue
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November 9, 2000

Executive Director

Robert J. Freeman

Mr. Michael F. Bergan
Harder Silber and Bergan
275 ½ 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, unless otherwise indicated.

Dear Mr. Bergan:

I have received your letter of October 3 in which you referred to a request made by Wallace S. Nolen to the BOCES that you represent for "a complete listing of the names, titles, salaries and public office address of every person employed by the BOCES." You have raised questions concerning whether the request involves a commercial purpose and, therefore, may be denied pursuant to §98(2)(b)(iii) of the Freedom of Information Law.

In this regard, I am familiar with Mr. Nolen's request, for it was made to dozens of agencies. Further, in view of the nature of the record sought and precedent relating to it, I do not believe that the use of the record is pertinent.

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.

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..."

Mr. Michael F. Bergan
November 9, 2000
Page - 2 -

However, a payroll list of employees is included among the records required to be kept pursuant to "subdivision three of section eighty-seven" of the Law. Specifically, that provision states in relevant part that:

"Each agency shall maintain...

(b) a record setting forth the name, public office address, title and salary of every officer or employee of the agency... "

As such, a payroll record that identifies all officers or employees by name, public office address, title and salary must be prepared to comply with the Freedom of Information Law. Moreover, I believe that the payroll record described above must be disclosed for the following reasons.

Relevant to an analysis is §87(2)(b), which permits an agency to withhold records or portions of records when disclosure would result in "an unwarranted invasion of personal privacy." However, payroll information has been found by the courts to be available [see e.g., Miller v. Village of Freeport, 379 NYS 2d 517, 51 AD 2d 765, (1976); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NYS 2d 954 (1978)]. Miller dealt specifically with a request by a newspaper for the names and salaries of public employees, and in Gannett, the Court of Appeals held that the identities of former employees laid off due to budget cuts, as well as current employees, should be made available. In addition, this Committee has advised and the courts have upheld the notion that records that are relevant to the performance of the official duties of public employees are generally available, for disclosure in such instances would result in a permissible as opposed to an unwarranted invasion of personal privacy [Gannett, supra; Capital Newspapers v. Burns, 109 AD 2d 292, aff'd 67 NY 2d 562 (1986); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980; Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); and Montes v. State, 406 NYS 664 (Court of Claims 1978)]. As stated prior to the enactment of the Freedom of Information Law, payroll records:

"...represent important fiscal as well as operation information. The identity of the employees and their salaries are vital statistics kept in the proper recordation of departmental functioning and are the primary sources of protection against employment 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.

Second, in general, the reasons for which a request is made or an applicant's potential use of records are irrelevant, and it has been held that if records are accessible, they should be made equally available to any person, without regard to status or interest [see e.g., M. Farbman & Sons v. New York City, 642 NY 2d 75 (1984) and Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. However, section 89(2)(iii) of the Freedom of Information Law permits an agency to withhold "lists of names and addresses if such lists would be used for commercial or fund-

Mr. Michael F. Bergan
November 9, 2000
Page - 3 -

raising purposes" on the ground that disclosure would constitute an unwarranted invasion of personal privacy. Due to the language of that provision, the intended use of a list of names and addresses is relevant, and case law indicates that an agency can ask why a list of names and addresses has been requested [see Goldbert v. Suffolk County Department of Consumer Affairs, Sup. Ct., Suffolk Cty., (September 5, 1980)].

Nevertheless, §89(6) of the Freedom of Information Law states that:

"Nothing in this article shall be construed to limit or abridge any otherwise available right of access at law or in equity to any party to records."

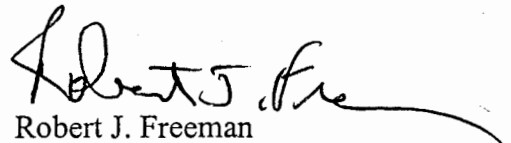
As such, if records are available as of right under a different provision of law or by means of judicial determination, nothing in the Freedom of Information Law can serve to diminish rights of access. In this instance, since payroll information in question was found to be available prior to the enactment of the Freedom of Information Law, I believe that it must be disclosed, regardless of the intended use of the records. Consequently, in my view, the payroll record required to be maintained should be disclosed to any person, irrespective of its intended use.

When §89(2)(b)(iii) is relevant and there is a question concerning the use of a list, it has been suggested that an agency require the applicant to certify in writing that he or she will not use the list for a commercial or fund-raising purpose. Based on the Golbert decision cited above, if the applicant is unwilling to do so, the agency may assume that the request has been made for a commercial purpose.

Finally, due to the variety of issues raised by Mr. Nolen's request, I have enclosed for your consideration an opinion that sought to address them.

I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:jm

Enc.



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12382

Committee Members

Mary O. Donohue
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November 10, 2000

Ms. Kathleen 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 facts presented in your correspondence, unless otherwise indicated.

Dear Ms. Allen:

I have received your letter of October 3, as well as the materials attached to it. You referred to requests for records of the Town of North Greenbush and alleged that the Town has "made no effort to comply..."

In order to learn more of the matter, I contacted the Town Clerk. She informed me that she had been ill and could not perform her duties for a time, and that she offered to make available the entirety of a payroll record containing the information sought. Based on your acceptance of the offer, various deletions would be made to protect the privacy of those identified in the record. From her perspective, her response was not a denial of your request; on the contrary, she was awaiting your answer to her offer of the record.

For future reference, I note that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges

Ms. Kathleen Allen
November 10, 2000
Page - 2 -

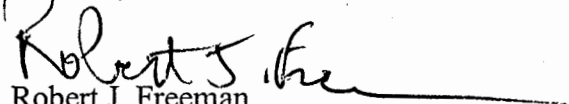
that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...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

cc: Hon. Kathryn A. Connolly

FOIL-AU - 12383

From: Robert Freeman
To: "acjnews@RCN.COM".GWIA.DOS1
Subject: Re: NYS MVA records

Dear Caplyn:

I called DMV again regarding the request by Mr. Schuler. As you are likely aware, the Freedom of Information Law pertains to existing records and states that an agency is not required to create a record in response to a request. I was told that DMV cannot generate a list of omnibus-livery owners or licensees via its computer programs; it would have to develop a new program to do so. It has been held that when an agency would have to develop a new program to generate data, it would be involved in creating a new record, and that it is not required to do so.

I hope that this serves to clarify your understanding of the matter and that I have been of assistance. If you would like to discuss the situation, please feel free to call.

DMV RECORD
OPEN GOVERNMENT



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12384

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November 13, 2000

Executive Director

Robert J. Freeman

E-Mail

TO: [REDACTED]

FROM: Robert J. Freeman, Executive Director *RSF*

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Dorothy:

I have received your letter regarding access to records relating to grand jury proceedings. In general, those records are exempt from disclosure to the public. Section 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, any disclosure of grand jury related records would be based upon a court order.

I hope that the foregoing serves to enhance your understanding of the matter and that I have been of assistance.

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12385

Committee Members

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November 14, 2000

Executive Director

Robert J. Freeman

Mr. William S. Hecht

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Hecht:

As you are aware, I have received your letter of October 6 in which you raised a series of questions concerning the ability of units of state and local government in New York to copyright records they produce. You referred to a statement by Counsel to the American Society of Newspaper Editors, Mr. Kevin M. Goldberg, in which it was suggested that "state and local government can claim copyright in official documents", with certain "minor exceptions."

In this regard, I am not an expert on the subject of copyright, and I cannot offer specific information in response to many of your questions. It appears, however, that your inquiry was precipitated by a claim by Cayuga County that its tax maps were copyrighted. Based on the only judicial decision of which I am aware, the tax maps are not subject to a copyright claim. In that case, County of Suffolk v. Experian Information Solutions, Inc., it was initially determined that the County could properly claim copyright protection for the tax maps that it prepared (U.S. District Court, SDNY, 99 Civ. 8735, May 15, 2000). On reargument, the Court reversed its prior holding and found that such a claim could not be made (U.S. District Court, SDNY, NYLJ, August 1, 2000).

That latter decision was based largely on an advisory opinion that I prepared on March 14, without knowledge of the Suffolk County litigation, concerning tax maps prepared by the State Department of Transportation ("DOT") and made available under the Freedom of Information Law that were copyrighted by the Department. The Court quoted from that opinion extensively as follows:

"I note that every state has enacted a statute dealing with public access to records of state and local government. However, I know of no judicial decision

to limit, restrict or condition the use of records acquired as of right pursuant to a statute that requires the agency to disclose and copy its records. Further, federal agencies cannot copyright their works, and there is no precedent dealing with copyright by the federal government. DOT contends that by making copies of records available, it is in no way infringing rights conferred by the [FOIL]. The restriction, which is based on a copyright, merely deals with 'a situation involving a separate set of rights to the ownership and possession of property which the State enjoys under a separate set of federal laws.'

"The stance taken by DOT, in view of the Copyright Act (17 U.S.C. §101), arguably is correct. However, due to the inherent purpose of the [FOIL] and a review of the constitutional and statutory underpinnings of copyright protection, I respectfully disagree. In enacting the Freedom of Information Law, the State Legislature declared that:

'The more open a government is with its citizenry, the greater the understanding and participation of public in government.

'As state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible.

'[The above] in my view evidences an intent that the public good is best served when records available under that statute are disclosed as widely as possible and without impediment...[I]n construing the [FOIL], the courts have held that the status or interest of a person seeking records are irrelevant; the only question...is whether there is a basis for a denial of access pursuant §87(2). 'Interest' in my opinion relates to the intended use of records. That a record may not be used for a purpose relating to the accountability of government is of no moment...and in general, I do not believe that it is the government's business to know or even to inquire as to the intended use of records. Once the records have been found to

be available, the applicant should be able to do with them as he or she sees fit...

'[M]ost state statutes, like the federal FOIA, do not allow for interest balancing or assessing the reason for access. The mere fact that an individual or entity may obtain income from an activity that serves a public purpose does not negate the public nature of the activity. When a commercial publisher disseminates public information, it is serving a public purpose - the very purpose that is central justification for FOIAs" [Perritt, Should Local Governments Sell Local Spatial Databases Through State Monopolies? 35 Jurimetrics Journal 449, 45, Summer, 1995).

'[T]he commentary quoted above is consistent with and supports the notion that an access statute, like the [FOIL], is intended to remove barriers to the dissemination of government records and encourage the widest possible distribution of those records.

'In relating the foregoing to copyright, it is important, in my opinion, to review the history and intent of copyright protection. The basis of copyright is Article I, §8 of the United States Constitution, which indicates the framer's intent: 'To promote the Progress of Science and Useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.' In construing the 'copyright clause', the United States Supreme Court has stated that its purpose is as follows: 'The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts'' [Mazer v. Stein, 347 U.S. 201, 219 (1954)].

'At heart (sic) of copyright protection, therefore, is 'personal gain', an economic incentive, and several decisions support that principle.

'Unlike authors and creators, DOT needs no similar incentives. On the contrary, it is that agency's

'Unlike authors and creators, DOT needs no similar incentives. On the contrary, it is that agency's statutory duty to prepare and preserve the kinds of records that you are seeking...Such incentives are unnecessary for public agencies, since these entities have a statutory duty to collect, organize and disseminate information...(Perritt, supra, 460)...

"The March 14 Advisory opinion then compares the FOIL to the federal Freedom of Information Act, again concluding that the DOT 'does not prepare the records for economic gain; it has no 'commercial interest' in so doing; on the contrary, the records are prepared because it is the agency's statutory obligation to do so. In short, it is questionable in my view whether DOT can claim copyright protection at all.' See id. at 8.

"The March 14 Advisory Opinion also included arguments that the assertion of copyright protection in this context is contrary to public policy and may violate the First Amendment. See id. at 9-10. The Committee's March 14 opinion ultimately concluded that 'the assertion of copyright claims in the context of your inquiry is, in my opinion, contrary to the intent of both the [FOIL] and the Copyright Act.' See id. at 10."

The Court concluded that my opinion was "neither irrational nor unreasonable", and that Suffolk County:

"...similar to the DOT, does not prepare the maps in question for economic gain and has no commercial interest in preparing the maps. Rather, Plaintiff prepares the tax maps because it is Plaintiff's statutory obligation to prepare them. As a result, this ruling will not create a disincentive for counties to create these tax maps...

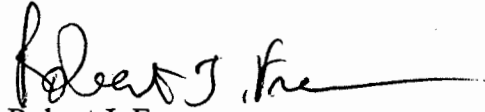
"The Court concludes that, under the FOIL, First American may freely copy and distribute Plaintiff's tax maps and that Plaintiff may not prevent First American from disseminating the tax maps on the basis of Plaintiff's copyrights in those maps."

In sum, based on the foregoing, it appears that records, like the tax maps, that a government agency is required to produce, is not subject to copyright protection. I emphasize that the County of Suffolk decision has been appealed.

Mr. William S. Hecht
November 14, 2000
Page - 5 -

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: Alan P. Koslowski
Kevin M. Goldberg



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO - 3234
FOIL-AO - 12386

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November 17, 2000

Executive Director

Robert J. Freeman

Mr. Theodore A. Trespasz, Jr.
Trespasz & Marquardt, LLP
251 West Fayette Street
Syracuse, NY 13202

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence, unless otherwise indicated.

Dear Mr. Trespasz:

I have received your letter of October 2, as well as related materials. You indicated that you represent the Canandaigua Recreation Development Corporation ("the Corporation"), which was the subject of an advisory opinion prepared on August 8 at the request of Mr. Harold Oliver. In brief, based on the information provided by Mr. Oliver, it was advised that the Corporation is subject to both the Freedom of Information and Open Meetings Laws. At that time, the information that I had indicated that the Board of the Directors consisted of *ex officio* City of Canandaigua officials and others designated by the City Council that would comprise a majority of the Board. For that reason, it was advised that the City had substantial control over the Corporation.

Since then, I have learned that the composition of the Board of Directors has been changed. As you aware, in its original certificate of incorporation, Article V stated that the Board of Directors must consist initially of eleven members, six of whom would be the City officials to whom reference was made above. I note that Article 7 entitled "Amendments" states that certain articles, including Article V, "shall not be subject to amendment." Notwithstanding the foregoing, less than a year after the approval of the certificate of incorporation, Article 5 was amended to provide that five members of the Board would be City officials. As such, it would appear that less than a majority of Board consists of City officials. I point out that City officials, based on the certificate of incorporation, could become a majority on the Board, for Article V provides that the Board's initial membership shall be eleven, but that it may be reduced to nine. In that event, five of the nine members would be City officials.

Not being an expert in the Not-for-Profit Corporation Law, I cannot gauge the legality or propriety of amending the terms of Article V in view of its original prohibition regarding a change in the composition of the Board. I would conjecture, however, that such an amendment would be

Mr. Theodore A. Trespasz, Jr.

November 17, 2000

Page - 2 -

unusual, and that it is equally unusual to create a corporation whose board of directors may shift from being somewhat independent of government to being under substantial governmental control. Despite the amendment to the certificate and the reduction of City officials on its Board, I believe that many of the Corporation's records would remain subject to the Freedom of Information Law even if the Corporation is not itself subject to that statute. Further, meetings of the Board arguably are subject to the Open Meetings Law.

Specific reference is found in §1411 of the Not-for-Profit Corporation Law to local development corporations, such as the entity in question. 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."

Due to its status as a not-for-profit corporation, it is not clear in every instance that a local development corporation is a governmental entity; however, it is clear that such a corporation performs a governmental function.

With respect to its status under the Open Meetings Law, that statute applies 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."

By breaking the definition into its components, I believe that each condition necessary to a finding that the board of a local development corporation 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, I believe that it conducts public business and performs a governmental function for a public corporation, in this instance, the City of Canandaigua.

With respect to access to records under the Freedom of Information Law, even if it may be contended that the Corporation is not an "agency" subject to that statute, it is clear that several of the members of its Board serve due to their status as City officials, and I believe that any records that they prepare or receive in conjunction with their activities involving the Corporation would 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:

Mr. Theodore A. Trespasz, Jr.

November 17, 2000

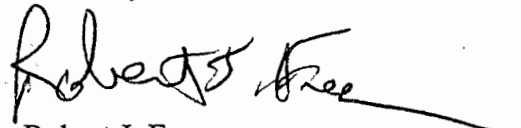
Page - 3 -

"any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, documentation prepared or received by City officials in conjunction with the performance of their duties with the Corporation would be kept or produced by or for an agency, the City of Canandaigua. Therefore, again, even if the Corporation is not directly subject to the Freedom of Information Law, and I am not suggesting that it is not subject to that statute, due to the participation of City officials and designees, many, if not all of its records would in my view fall within the coverage of the 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 flourish extending to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Harold Oliver
City Council



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-A0-12387

Committee Members

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November 27, 2000

Executive Director

Robert J. Freeman

Mr. John D. Horst



The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Horst:

I have received your letter of October 5, which reached this office on October 12. Please accept my apologies for the delay in response. You have raised questions concerning the functions of the Committee on Open Government and rights of access to records.

First, the Committee is authorized to provide advice and opinions concerning the Freedom of Information and Open Meetings Laws. The Committee is not empowered to compel an entity of government to comply with those statutes or to grant or deny access to 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 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 grounds for denial that follow. The phrase quoted in the preceding sentence indicates that a single record may be both accessible or deniable in whole or in part, and that an agency is required to review requested records in their entirety to determine which portions, if any, may justifiably be withheld. In short, in response to your question, there may be instances in which records may be made available pursuant to an appeal following deletions made in accordance with the grounds for denial.

Next, you asked whether "an unsatisfactory Report Card or analysis of a public school's administration, compiled by an outside analyst hired by the district [would] be considered an invasion of privacy." In this regard, I believe that report cards pertaining to school districts are issued by the State Education Department and are available to the public. With respect to a report prepared by a consultant retained by a school district, §87(2)(g) is likely of particular relevance. While that provision potentially authorizes an agency to withhold records, as suggested above, due to its structure, it often requires substantial disclosure. Specifically, §87(2)(g) permits an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations; or
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted [i.e., §87(2)(b) concerning unwarranted invasions of personal privacy]. Concurrently, those 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, has held that:

"Opinions and recommendations prepared by agency personnel may be exempt from disclosure under FOIL as 'predecisional materials, prepared to assist an agency decision maker***in arriving at his decision' (McAulay v. Board of Educ., 61 AD 2d 1048, aff'd 48 NY 2d 659). Such material is exempt 'to protect the deliberative process of government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers (Matter of Sea Crest Const. Corp. v. Stubing, 82 AD 2d 546, 549).

"In connection with their deliberative process, agencies may at times require opinions and recommendations from outside consultants. It would make little sense to protect the deliberative process when such reports are prepared by agency employees yet deny this protection when reports are prepared for the same purpose by outside consultants retained by agencies. Accordingly, we hold that records may be considered 'intra-agency material' even though prepared by an outside consultant at the behest of an agency as part of the agency's deliberative process (see, Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD 2d 546, 549, supra; Matter of 124 Ferry St. Realty Corp. v. Hennessy, 82 AD 2d 981, 983)" [Xerox Corporation v. Town of Webster, 65 NY 2d 131, 132-133 (1985)].

Based upon the foregoing, records prepared by a consultant for an agency may be withheld or must be disclosed based upon the same standards as in cases in which records are prepared by the

staff of an agency. It is emphasized that the Court in Xerox specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

"While the reports in principle may be exempt from disclosure, on this record - which contains only the barest description of them - we cannot determine whether the documents in fact fall wholly within the scope of FOIL's exemption for 'intra-agency materials,' as claimed by respondents. To the extent the reports contain 'statistical or factual tabulations or data' (Public Officers Law section 87[2][g][i], or other material subject to production, they should be redacted and made available to the appellant" (id. at 133).

Therefore, a record prepared by a consultant for an agency would be accessible or deniable, in whole or in part, depending on its contents.

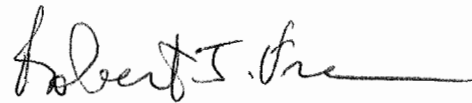
Lastly, without knowledge of the content of the kind of report in which you are interested, I cannot offer specific guidance concerning the ability to deny access on the ground that disclosure would result in "an unwarranted invasion of personal privacy." I point out, however, that although the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public employees. It is clear that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. Further, the courts have found that, as a general rule, records that are relevant to the performance of a public employee's official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

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)].

Mr. John D. Horst
November 27, 2000
Page - 4 -

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", 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

FOIL-A0-12388

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November 27, 2000

Executive Director

Robert J. Freeman

Mr. Gregory J. Giammalvo
Town Attorney
Town of Oyster Bay
Town Hall
Oyster Bay, NY 11771

Dear Mr. Giammalvo:

I appreciate having received your determination of October 4 of an appeal made under the Freedom of Information Law by Mr. Gregory Yatzyshyn. It is my understanding the Mr. Yatzyshyn's request for a draft environmental impact statement (DEIS) was denied because it has not yet been "accepted" by the Town's Environmental Quality Review Commission "as complete." From my perspective, if the record sought is in possession of the Town, irrespective of whether it has been accepted or is complete, it must be disclosed. In this regard, I offer the following comments.

First, as you may be aware, the Freedom of Information Law pertains to all agency records, and §86(4) of that statute defines the term "record" to mean:

"any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, once a record is submitted to or in possession of a Town office or officer, even if it is incomplete or has not been "accepted", it constitutes a "record" subject to rights of access.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, none of the grounds for denial could properly be asserted to withhold the record in question.

Mr. Gregory J. Giammalvo

November 27, 2000

Page - 2 -

Although one of the grounds for denial may frequently be cited to withhold records or portions of records characterized as "draft" or "preliminary", for example, that provision would not be applicable in the situation in question. Specifically, §87(2)(g) deals with "inter-agency and intra-agency materials." Section 86(3) of the Freedom of Information Law defines the term "agency" to mean:

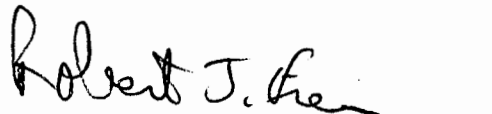
"any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, the exception pertains to communications between or among state or local government officials at two or more agencies ("inter-agency materials"), or communications between or among officials at one agency ("intra-agency materials"). If the record sought consists of documentation sent to the Town by a developer, it would not constitute inter-agency or intra-agency materials. In short, the developer would not be an agency, and its communications with the Town would be neither inter-agency nor intra-agency materials.

The remaining exceptions to rights of access would not, in my view, be applicable or pertinent. If that is so, none of the grounds for denial would serve to enable the Town to withhold the record sought.

I hope that the foregoing enhances your understanding of the Freedom of Information Law and that I have been of assistance. If you would like to discuss the matter, please feel free to contact me.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Gregory Yatzyshyn



STATE OF NEW YORK
DEPARTMENT OF STATE
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FOIL-A - 12389

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November 28, 2000

Executive Director

Robert J. Freeman

Ronald P. Colefield, Ph.D.

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Dr. Colefield:

I have received your letter of October 9, as well as the documentation attached to it. As I understand the matter, you have complained with respect to a response to your request directed to the Greenburgh-Graham Union Free School District for various items, including a "formal copy" of the Superintendent's contract "with \$ amounts indicated which are directly related."

In this regard, having reviewed the materials, 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 new record in response to a request.

Among the attachments to your letter are copies of the contract between the Superintendent and the District and a letter that separately indicates her salary, reimbursements and other expenses incurred. The contract itself, which was signed in June of 1999, does not include amounts for those items but states that "Hardeman will be paid for her services for the first year of this Agreement a salary in an amount to be determined by the Board no later than August 15, 1999..." Similarly, the contract includes provisions relating to the payment by the District for membership in professional organizations, travel to conferences, health insurance and the like; no specific costs are mentioned. Again, the cost of those items appears to be reflected in the letter referenced earlier.

In short, if there is no record, i.e., no contract that includes dollar amounts indicating the Superintendent's salary, reimbursements and similar costs, the District would not be required, in my view, to create or prepare a new document that includes the information sought in the format of your choice. Further, although the specific information sought is not included in the contract, it appears that the District provided that information in substance through the disclosure of other materials.

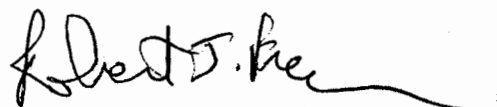
Ronald P. Colefield, Ph.D.

November 28, 2000

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

cc: Betsey Hardeman



STATE OF NEW YORK
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FOIL-AO-12390

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November 28, 2000

Executive Director

Robert J. Freeman

Mr. Thomas W. Stetz

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Stetz:

I have received your letter of October 7 and the materials attached to it. As in the case of previous correspondence, the matter involves your efforts in gaining access to a copy of a title search from the Town of Allegany.

Having reviewed the opinion addressed to you on July 20, I do not believe that I can add to it in any significant way. In short, if the documentation in question is maintained by the Town or by or for any Town official, I believe that it would constitute a "record" that falls within the coverage of the Freedom of Information Law. Conversely, if it is not maintained at any Town facility or by or for any Town official, that statute, in my view, would not apply.

It is noted that when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

I point out that in Key v. Hynes [613 NYS 2d 926, 205 AD 2d 779 (1994)], it was found that a court could not validly accept conclusory allegations as a substitute for proof that an agency could not locate a record after having made a "diligent search". However, in another decision, such an allegation was found to be sufficient when "the employee who conducted the actual search for the documents in question submitted an affidavit which provided an adequate basis upon which to conclude that a 'diligent search' for the documents had been made" [Thomas v. Records Access Officer, 613 NYS 2d 929, 205 AD 2d 786 (1994)].

Mr. Thomas W. Stetz
November 28, 2000
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: Hon. Mary Peck
Wendy Tuttle



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AJ-12391

Committee Members

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November 28, 2000

Executive Director

Robert J. Freeman

Ms. Cecelia Ferrara



The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Ferrara:

I have received your letter October 9. You have sought assistance on behalf of your son, who was convicted of second degree murder in 1982. The victim was his wife, and you wrote that "domestic violence is an issue" that may be raised at an upcoming parole hearing. You added that the deceased "had a history of assaults and suicide attempts" that were reported to the 50th precinct in the Bronx, and that your son requested records of his wife's "contact with any New York State Criminal Justice Authority" that are stored by the New York City Police Department's Criminal Records Section. As of the date of your letter to this office, the Department had apparently not responded.

In this regard, I offer the following comments.

First, it is emphasized that the Freedom of Information Law pertains to existing records. The events to which you referred may have occurred more than twenty years ago, and it is possible or perhaps likely that the records relating to those events have been destroyed. Insofar as records no longer exist, the Freedom of Information Law would not apply.

Second, pursuant to regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), each agency is required to designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests for records, and requests should ordinarily be made to that person. While I believe that the person in receipt of your son's request should have responded directly or forwarded the request to the proper person, it is suggested that a new request be made to the records access officer at One Police Plaza.

Third, §89(3) of the Freedom of Information Law requires that an applicant must "reasonably describe" the records sought. Therefore, when seeking records, an applicant must include sufficient

detail to enable agency staff to locate and identify the records. I point out that whether a request reasonably describes the records is often dependent on the manner in which records are kept or filed. If, for example, records are filed by name, alphabetically, it may be relatively easy to locate records pertaining to a particular individual. On the other hand, if they are kept chronologically, a request using the name of that individual would not likely reasonably describe the records; in that instance, a request based on the dates of events would be necessary to locate records.

Next, assuming that the records of your interest exist and can be located, 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. Since the subject of the records is long deceased, it is unlikely in my view that records identifiable to her could be withheld. However, if others, such as witnesses or neighbors are named, it is possible that identifying details pertaining to those persons could be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" in accordance with §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:

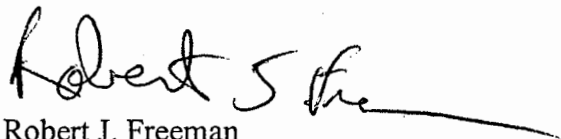
"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, 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)].

Ms.Cecelia Ferrara
November 28, 2000
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

FOI-100-12392

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November 29, 2000

Executive Director

Robert J. Freeman

Michael C. Shaw, P.E.



The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Shaw:

I have received your letter of October 11 in which you described a series of events relating to your efforts in obtaining records under the Freedom of Information Law from the Ulster County Health Department.

Based on your commentary, I offer the following remarks.

First, pursuant to the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), each agency, such a county, must designate one or more persons as "records access officer." The records access officer has the duty of coordinating the agency's response to requests for records, and requests should ordinarily be made to that person. While I believe that the person in receipt of your request should have responded directly in a manner consistent with the Freedom of Information Law or forwarded the request to the proper person, it is suggested that you renew your request and transmit it to the records access officer. To ascertain the identity of that person, it is suggested that you contact the County Attorney or the Clerk of the County Legislature.

Second, I do not believe that an agency can require that a request be made on a prescribed form. The Freedom of Information Law, §89(3), as well as the regulations promulgated by the Committee (§1401.5), require that an agency respond to a request that reasonably describes the record sought within five business days of the receipt of a request. Further, the regulations indicate that "an agency may require that a request be made in writing or may make records available upon oral request" [§1401.5(a)]. As such, neither the Law nor the regulations refer to, require or authorize the use of standard forms. Accordingly, it has consistently been advised that any written request that reasonably describes the records sought should suffice.

It has also been advised that a failure to complete a form prescribed by an agency cannot serve to delay a response or deny a request for records. A delay due to a failure to use a prescribed form might result in an inconsistency with the time limitations imposed by the Freedom of Information Law. For example, assume that an individual requests a record in writing from an agency and that the agency responds by directing that a standard form must be submitted. By the time the individual submits the form, and the agency processes and responds to the request, it is probable that more than five business days would have elapsed, particularly if a form is sent by mail and returned to the agency by mail. Therefore, to the extent that an agency's response granting, denying or acknowledging the receipt of a request is given more than five business days following the initial receipt of the written request, the agency, in my opinion, would have failed to comply with the provisions of the Freedom of Information Law.

While the Law does not preclude an agency from developing a standard form, as suggested earlier, I do not believe that a failure to use such a form can be used to delay a response to a written request for records reasonably described beyond the statutory period. However, a standard form may, in my opinion, be utilized so long as it does not prolong the time limitations discussed above. For instance, a standard form could be completed by a requester while his or her written request is timely processed by the agency. In addition, an individual who appears at a government office and makes an oral request for records could be asked to complete the standard form as his or her written request.

In sum, it is my opinion that the use of standard forms is inappropriate to the extent that it unnecessarily serves to delay a response to or deny a request for records.

Lastly, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully

Michael C. Shaw, P.E.
November 29, 2000
Page - 3 -

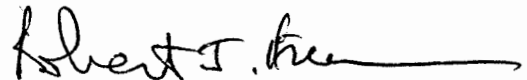
explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

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)].

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this opinion will be forwarded to County officials.

I hope that I have been of assistance.

Sincerely,

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: Dean Palen
Robert Hagopian
Frank Murray



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-10-12393

Committee Members

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November 30, 2000

Executive Director

Robert J. Freeman

Mr. Wayne Jackson



The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Jackson:

I have received your letter of October 6 in which you raised a series of questions concerning the Freedom of Information Law. In consideration of those questions, 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 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.

Further, the only fee that may be assessed under the Freedom of Information Law involves the reproduction of records. Pursuant to §87(1)(b)(iii), an agency may charge up to twenty-five cents per photocopy, or in the case of records that cannot be photocopied, the actual cost of reproduction; no fee may be charged for search or administrative costs.

If a request is made to inspect records and the records are available in their entirety, again, no fee may be charged. However, if photocopies are requested, it has been held that an agency may require payment in advance (Sambucci v. McGuire, Supreme Court, New York County, November 4, 1982).

Second, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural aspects of the Law (see 21 NYCRR Part 1401). In turn, §87(1)(a) of the Law states that:

Mr. Wayne Jackson
November 30, 2000
Page - 2 -

"the governing body of each public corporation shall promulgate uniform rules and regulations for all agencies in such public corporation pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the administration of this article."

The initial responsibility to deal with requests is borne by an agency's records access officer, and the Committee's regulations provide direction concerning the designation and duties of a records access officer. Specifically, §1401.2 of the regulations provides in relevant part that:

"(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so."

When a request is denied, it may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Further, the regulations promulgated by the Committee state that:

"(a) The governing body of a public corporation or the head, chief executive or governing body of other agencies shall hear appeals or shall designate a person or body to hear appeals regarding denial of access to records under the Freedom of Information Law.

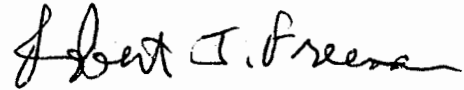
(b) Denial of access shall be in writing stating the reason therefor and advising the person denied access of his or her right to appeal to the person or body established to hear appeals, and that person or body shall be identified by name, title, business address and business telephone number. The records access officer shall not be the appeals officer" (§1401.7).

Mr. Wayne Jackson
November 30, 2000
Page - 3 -

In sum, there are no specific criteria or qualifications that must be met to be a records access or appeals officer. However, as indicated in the regulations, the records access officer and the appeals officer cannot be the same person.

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 large, stylized initial "R".

Robert J. Freeman
Executive Director

RJF:jm

cc: Director, Albany Housing Authority



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

10711-140-12394

Committee Members

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November 30, 2000

Executive Director
Robert J. Freeman

Mr. Nelson Pendergast

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Pendergast:

I have received your letter of October 16, as well as the correspondence attached to it. As I understand the situation, you are seeking assistance in relation to your request that the Attorney General investigate a certain incident. In that regard, you have sought a response from his office citing the law that states that the Department of Law does not engage in such investigations. In addition, you are attempting to obtain the records that you supplied in the hope of his initiation of an investigation.

From my perspective, the first issue does not likely involve the Freedom of Information Law. That statute pertains to existing records, and §89(3) states in part that an agency is not required to create a record in response to a request. It is common for laws to indicate an agency's powers, duties and investigative authority. It is unlikely, however, that a statute specifies the areas in which an agency cannot conduct investigations. If that is so in this instance, there would be no record or law indicating that the Attorney General does not investigate, and the Freedom of Information Law would not apply.

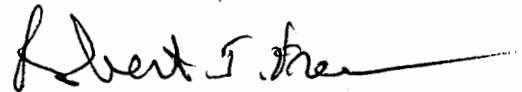
Similarly, a request for a law that may applicable might not be viewed as a request for a record, but rather an interpretation of law that requires a judgment. Depending on the nature of the matter, any number of provisions might be applicable, and a disclosure of some of them, based on one's knowledge, 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 made, for example, for subdivision 8 of §63 of the Executive Law, no interpretation or judgment is needed, for the request 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. Nelson Pendergast
November 30, 2000
Page - 2 -

With respect to the ability to obtain the records that you supplied, in my view, once the records came into the possession of the Department of Law, they became the Department's property. Nevertheless, since you supplied the records, I believe that you would have the right to obtain copies under 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: Terryl Brown



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12395

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December 1, 2000

Mr. James B. Cantwell
Assistant Commissioner and Chief Counsel
Office of Legal Affairs
State of New York
Department of Transportation
Bldg. 5, State Campus
Albany, NY 12232

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Cantwell:

I appreciate receipt of your determination of November 2 concerning an appeal made under the Freedom of Information Law by Michael Hurewitz, a reporter for the *Albany Times Union*. According to your determination, Mr. Hurewitz sought "certain NYSDOT records involving listings of safety deficient locations (SDLs) and priority investigation locations (PILs) for roadways in the Capital District..." You denied the appeal, stating that:

"[r]ecords of highway safety studies performed by NYSDOT engineers in connection with the federal Highway Safety Improvement Program (HSIP) under 23 USCA Section 152 are exempt from disclosure under 23 USCA Section 409, a copy of which is enclosed for your information. Since these records are exempted from disclosure by a federal statute, 23 USCA §409, they are also exempted by Public Officers Law §87 (2)(a) from disclosure under FOIL."

Assuming that Mr. Hurewitz can demonstrate that he does not intend to use the records in litigation, I respectfully disagree with your determination. 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.

Mr. James B. Cantwell
December 1, 2000
Page - 2 -

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, due to its language, 23 USC §409 precludes the *use* of certain records in a litigation context; it does not, however, exempt records from disclosure in every instance. That statute states that:

“Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying[,] evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130,144 and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.”

In my view, if the statute quoted above indicated that the records at issue are exempt from disclosure or confidential, I would agree with your conclusion. Nevertheless, the language refers to the use of the records in an action for damages arising from an incident that occurred at a location mentioned or addressed in the records. Again, the statute provides that the records “shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages....”

I am mindful that language analogous to that found in 23 USC 409 might be construed to exempt records from public disclosure, irrespective of the intended use of the records [see e.g., John P. v. Whalen, 54 NY2d 89 (1981)]. Further, there is no federal court decision of which I am aware that deals directly with the interpretation of that statute in a situation in which the records might not be used in litigation. However, there is one state court decision that dealt with the issue, and it was rendered in New York. In Light v. State, the Court of Claims cited cases in other jurisdictions that focused on the rules of discovery in which it was found that §409 “does not declare the documents privileged or require that they be kept confidential” [560 NYS2d 962, 964 (1990)] and reached following conclusion:

“In our view, the purpose of the statutory protection was merely to keep the record-keeping required by Federal funding provisions from providing an additional, virtually no-work tool for direct use in private litigation. The statute expressly makes the ‘reports, surveys, schedules, lists, or data compiled’ inadmissible as evidence; it does not, expressly or by implication, make the information contained in such reports confidential” (id., 965).

Based on the decision rendered in Light, the records in question may not be subject to discovery or use in litigation, but they may be available for other purposes. If that is so, and if it can be demonstrated that the applicants does not seek the records for any use precluded by §409, I believe that the records maintained by or for the Department of Transportation would be subject to rights conferred by the Freedom of Information Law.

It would appear that the ground for denial of greatest significance would be §87(2)(g), which deals with "inter-agency and intra-agency materials." In my view, that exception would be applicable to communications between or among officers or employees of the Department of Transportation and other state agencies or units of local government in New York.

Insofar as the records prepared by the NYSDOT or involve communications within the Department or with other entities of state or local government in New York, §87(2)(g) would enable the Department to withhold records that:

"are inter-agency or intra-agency materials which are not:

- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations; or
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

One of the contentions offered by the New York City Police Department in a case determined 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)]). 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

Mr. James B. Cantwell

December 1, 2000

Page - 4 -

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" [Gould v. New York City Police Department, 89 NY2d, 267, 276 (1996)].

In short, that a record is reflective of the "deliberative process" 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.

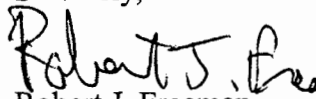
The Court also dealt with the issue of what constitutes "factual data" that must be disclosed under §87(2)(g)(i). In its consideration of the matter, the Court found that:

"...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 sum, if Mr. Hurewitz can demonstrate that the records at issue would not be used for a purpose prohibited by federal law, I believe rights of access would be determined by the Freedom of Information Law, and particularly §87(2)(g).

I hope that I have been of assistance. If you would like to discuss the matter, please feel free to contact me.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Michael Hurewitz



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DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

7011-AO-12396

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December 7, 2000

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 October 25 in which you questioned whether or the extent to which the performance evaluation of a public employee should be disclosed under the Freedom of Information Law.

Although numerous opinions have been prepared at your request relating to the matter at issue, I offer the following comments.

First, as you are aware, there is nothing in the Freedom of Information Law that deals specifically with personnel records or personnel files. The nature and content of so-called personnel files may differ from one agency to another and from one employee to another. Neither the characterization of documents as personnel records nor their placement in personnel files would necessarily render those documents confidential or deniable under the Freedom of Information Law (see Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980). On the contrary, the contents of those documents are the factors used in determining the extent to which they are available or deniable under the Freedom of Information Law.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Two of the grounds for denial are relevant to an analysis of rights of access to the records in question.

Section 87(2)(g) enables an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations; or
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

Also significant is §87(2)(b), which permits an agency to withhold records when disclosure would constitute "an unwarranted invasion of personal privacy." Although the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public employees. It is clear based upon judicial decisions that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. Further, with regard to records pertaining to public employees, the courts have found in a variety of contexts that records that are relevant to the performance of a public employee's official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

While the contents of performance evaluations may differ, I believe that a typical evaluation contains three components.

One 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

Mr. Harvey M. Elentuck

December 7, 2000

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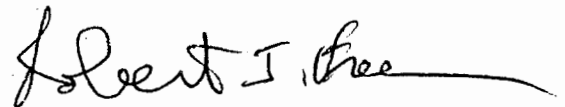
person who holds that position. As such, I believe that disclosure would result in a permissible rather than an unwarranted invasion of personal privacy. In terms of §87(2)(g), a duties description or statement of goals would be reflective of the policy of an agency regarding the performance standards inherent in a position and, therefore, in my view, would be available under §87(2)(g)(iii). It might also be considered factual information available under §87(2)(g)(i).

The second component involves the reviewer's subjective analysis or opinion of how well or poorly the standards or duties have been carried out or the goals have been achieved. In my opinion, that aspect of an evaluation could be withheld, both as an unwarranted invasion of personal privacy and under §87(2)(g), on the ground that it constitutes an opinion concerning performance.

A third possible component, as in this instance, is often a final rating, i.e., "good", "excellent", "average", etc. Any such final rating would in my opinion be available, assuming that any appeals have been exhausted, for it would constitute a final agency determination available under §87(2)(g)(iii), particularly if a monetary award is based upon a rating. Moreover, a final rating concerning a public employee's performance is relevant to that person's official duties and therefore would not in my view result in an unwarranted invasion of personal privacy if disclosed.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Ron LeDonni
Celeste Segure
Chad Vignola
Anne Marie Iannizzi



STATE OF NEW YORK
DEPARTMENT OF STATE
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7071-20-12397

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Executive Director
Robert J. Freeman

December 7, 2000

Mr. Marshall Ballard



The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Ballard:

I have received your letter of October 26, which reached this office on November 8.

Having requested databases from the New York City Fire Department and the Nassau County Fire Commission concerning petroleum bulk storage facilities, both denied access on the basis of §89 (2)(b)(iii) of the Freedom of Information Law.

From my perspective, reliance on that provision reflects a misinterpretation of 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. One of the grounds for denial, §87 (2)(b), authorizes an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy", and §89 (2)(b)(iii) states that an unwarranted invasion of personal privacy includes the "sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes."

In my opinion, and in view of judicial interpretations, §87(2)(b) is intended to pertain to natural persons, not to 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

Mr. Marshall Ballard
December 7, 2000
Page - 2 -

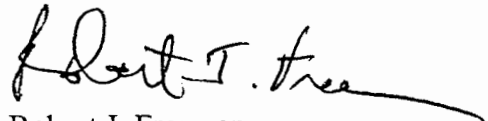
a person's business address may also be the address of his or her residence" [American Society for the Prevention of Cruelty to Animals v. New York State Department of Agriculture and Markets, Supreme Court, Albany County, May 10, 1989). Similarly, in a case concerning records pertaining to the performance 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 largely to the location of petroleum storage tanks, not people, I do not believe that any of the grounds for denial would be applicable.

In an effort to enhance compliance with and understanding of the Freedom of Information, copies of this opinion will be sent to the agencies from which the records were requested. Further, you use or do with opinions rendered by this office as you see fit.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Elena Ferrera
Richard Velez
Thomas E. Tilley



STATE OF NEW YORK
DEPARTMENT OF STATE
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FOI L No 12398

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Executive Director
Robert J. Freeman

December 7, 2000

Mr. John W. Kane



The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Kane:

I have received your letter of November 2 and 13. You have sought an opinion "on the refusal of the Fulton County Industrial [Development] Agency ('FCIDA') to answer [your] Freedom of Information Law Appeals request."

In consideration of the correspondence, I offer the following comments.

First, it is emphasized that the Freedom of Information Law pertains to records maintained by or for an agency and that §89 (3) provides in part that an agency need not create or acquire a record on behalf of an applicant. Therefore, if the record of your interest is not maintained by or for FCIDA, the Freedom of Information Law would not apply.

Second, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89 (3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

I point out that in Key v. Hynes [613 NYS 2d 926, 205 AD 2d 779 (1994)], it was found that a court could not validly accept conclusory allegations as a substitute for proof that an agency could not locate a record after having made a "diligent search." However, in another decision, such an allegation was found to be sufficient when "the employee who conducted the actual search for 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)].

Mr. John W. Kane
December 7, 2000
Page - 2 -

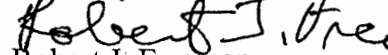
Third, when a request for a record kept by or for an agency is denied, the applicant has the right to appeal the denial pursuant to §89 (4)(a) of the Freedom of Information Law. That provision states in relevant part that:

“any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought.”

If an appeal is not determined within ten business days, the person denied access may consider the appeal to have been constructively denied and may initiate a proceeding under Article 78 of the Civil Practice Law and Rules to seek judicial review of the denial [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: Richard Smith



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

7011-40-12399

Committee Members

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Executive Director
Robert J. Freeman

December 7, 2000

Mr. Mark Jackson

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Jackson:

I have received your letter of October 30 in which you sought assistance in obtaining certain records from the City of Long Beach Housing Authority.

Specifically, you sought records involving "Federal H.U.D. Section 8. Monthly payments to the owner (landlord) 13 Riverside Blvd. For rent subsidies on behalf of the tenant in the above premises from December 1998 to the present date." In response, the Executive Director of the Authority wrote that "According to New York State Public Housing Law, that constitutes Chapter 44-a of the Consolidated Laws, the Long Beach Housing Authority cannot disclose the information you requested."

In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

The initial ground for denial is frequently relevant with respect to records relating to public housing. That provision, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." The only provision of which I am aware in the Public Housing Law that requires confidentiality, §159, provides guidance concerning the disclosure of information furnished by applicants for and tenants of dwellings in projects maintained by public housing authorities. That statute states in part that:

"[I]nformation acquired by an authority or municipality or by an officer or employee thereof from applicants for dwellings in projects of an authority or municipality or from tenants of dwellings thereof or from members of the family of any such applicant or tenant or from employers of such persons or from any third person, whether voluntarily or by compulsory examination as provided in this chapter, shall be for the exclusive use and information of the authority or municipality in the discharge of its duties under this chapter and shall not be open to the public nor be used in any court in any action or proceeding pending therein unless the authority, municipality or successor in interest thereof is a party or complaining witness to such action or proceeding."

Based on the language quoted above, a public housing authority or municipality can not disclose information identifiable to tenants.

Second, since the matter involves Section 8 housing, particularly pertinent in my view is the determination rendered in Tri-State Publishing, Co. v. City of Port Jervis (Supreme Court, Orange County, March 4, 1992) serves as precedent or that decision includes excerpts from an advisory opinion that I prepared in 1991, and I believe that the court essentially agreed with the thrust of that opinion. Because tenants in section 8 housing must meet an income qualification, it has been consistently advised that insofar as disclosure of records would identify tenants, they may be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)], even if the dwellings are not public housing units or under the jurisdiction of a housing authority. Conversely, following the deletion of identifying details pertaining to tenants, the remainder of the records, i.e., those portions indicating identities of landlords, contractors and the amounts that are paid, must be disclosed.

The court referred to concern with respect to what it characterized as a "hybrid situation" in which "a landlord owns one or more multiple dwellings where less than all units in each building are Section 8 units." The court determined that in that kind of situation, "it may reasonably be said that a subsidized tenant's identity would not be readily ascertainable." Based upon that finding, the court determined that the names of landlords and the addresses of multiple dwellings, as well as related information must be disclosed. I note that the court added that:

"While certain of the information ordered disclosed could indirectly permit as astute and industrious individual to research the identity of Section 8 recipients, the speculative likelihood and remoteness of this occurrence especially in light of the statement of Petitioner that it is not interested in the names of the recipients, must be balanced against the presumption in favor of disclosure."

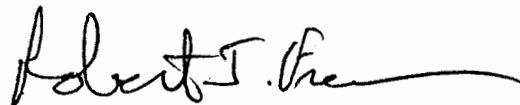
As I interpret the passage quoted above, disclosure in accordance with the court's order would not preclude an individual or firm from learning of the identities of section 8 tenants if such persons or entities demonstrated significant effort in attempt to gain such information. At the same time, the court recognized that the names of tenants were not requested by or of interest to the applicant, a newspaper.

Mr. Mark Jackson
December 7, 2000
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From my perspective, in view of the court's recognition of the absence of any intent on the part of the applicant to ascertain the names of section 8 tenants, the Authority may withhold portions of records that identify tenants. Nevertheless, in my opinion, the identity of a landlord must be disclosed, for payments are made by governmental entities to the landlord, irrespective of the landlord's income and financial standing. Other details, however, which if disclosed would make a tenant's identity ascertainable, 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:tt



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI DO-12400

Committee Members

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Executive Director

Robert J. Freeman

December 7, 2000

Mr. Richard Mackay

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Mackay:

I have received your letter of October 18, in which you requested an advisory opinion concerning the Freedom of Information Law.

According to your letter:

“Each year, between December and March, the different department heads submit to the Board of Education, their budgets for review. Sometimes the departments might be asked to see if they can cut anything else before their budget comes up for final review. After all is said and done, the Board of Education will adopt the Proposed Budget.”

You have asked whether “all this paperwork that they call preliminary and is presented to the Board of Education in open session [is] Public Information.”

From my perspective, the characterization of the materials as “preliminary” is not determinative of rights of access, and it is likely that some portions of the records may be withheld, but that others must be disclosed. In this regard, I offer the following comments.

First, insofar as records that have been presented or disclosed at open meetings, I believe that they would be available, for the District would have effectively waived its authority to deny access to them.

Second, the Freedom of Information Law pertains to agency records, and §86(4) of the Law defines the term “record” expansively to mean:

"any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, when information is maintained by an agency in some physical form (i.e., drafts, worksheets, computer disks, etc.), I believe that it would constitute a "record" subject to rights of access, notwithstanding its status as preliminary.

Third, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my opinion, two of the grounds for denial would be relevant to an analysis of rights of access to the records in question.

Section 87(2)(g) of the Freedom of Information Law permits an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations; or
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

In a case involving "budget worksheets", it was held that numerical figures, including estimates and projections of proposed expenditures, are accessible, even though they may have been advisory and subject to change. In that case, I believe that the records at issue contained three columns of numbers related to certain areas of expenditures. One column consisted of a breakdown of expenditures for the current fiscal year; the second consisted of a breakdown of proposed expenditures recommended by a state agency; the third consisted of a breakdown of proposed expenditures recommended by a budget examiner for the Division of the Budget. Although the latter two columns were merely estimates and subject to modification, they were found to be "statistical

tabulations" accessible under the Freedom of Information Law as originally enacted [see Dunlea v. Goldmark, 380 NYS 2d 496, aff'd 54 AD 2d 446, aff'd 43 NY 2d 754 (1977)]. At that time, the Freedom of Information Law granted access to "statistical or factual tabulations" [see original Law, §88(1)(d)]. Currently, §87(2)(g)(i) requires the disclosure of "statistical or factual tabulations or data". As stated by the Appellate Division in Dunlea:

"[I]t is readily apparent that the language statistical or factual tabulation was meant to be something other than an expression of opinion or naked argument for or against a certain position. The present record contains the form used for work sheets and it apparently was designed to accomplish a statistical or factual presentation of data primarily in tabulation form. In view of the broad policy of public access expressed in §85 the work sheets have been shown by the appellants as being not a record made available in §88" (54 Ad 2d 446, 448)."

The Court was also aware of the fact that the records were used in the deliberative process, stating that:

"The mere fact that the document is a part of the deliberative process is irrelevant in New York State because §88 clearly makes the back-up factual or statistical information to a final decision available to the public. This necessarily means that the deliberative process is to be a subject of examination although limited to tabulations. In particular, there is no statutory requirement that such data be limited to 'objective' information and there no apparent necessity for such a limitation" (id. at 449).

Based upon the language of the determination quoted above, which was affirmed by the state's highest court, it is my view that the records in question, to the extent that they consist of "statistical or factual tabulations or data", are accessible, unless a provision other than §87(2)(g) could be asserted as a basis for denial.

Further, another decision highlighted that the contents of materials falling within the scope of section 87(2)(g) represent the factors in determining the extent to which inter-agency or intra-agency materials must be disclosed or may be withheld. For example, in Ingram v. Axelrod, the Appellate Division held that:

"Respondent, while admitting that the report contains factual data, contends that such data is so intertwined with subject analysis and opinion as to make the entire report exempt. After reviewing the report in camera and applying to it the above statutory and regulatory criteria, we find that Special Term correctly held pages 3-5 ('Chronology of Events' and 'Analysis of the Records') to be disclosable. These pages are clearly a 'collection of statements of objective information logically arranged and reflecting objective

Mr. Richard Mackay

December 7, 2000

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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 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 are intertwined in it; we have held that '[t]he mere fact that some of the data might be an estimate or a recommendation does not convert it into an expression of opinion' (Matter of Polansky v Regan, 81 AD2d 102, 104; emphasis added). Regardless, in the instant situation, we find these pages to be strictly factual and thus clearly disclosable" [90 AD 2d 568, 569 (1982)].

Similarly, the Court of Appeals has specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

"While the reports in principle may be exempt from disclosure, on this record - which contains only the barest description of them - we cannot determine whether the documents in fact fall wholly within the scope of FOIL's exemption for 'intra-agency materials,' as claimed by respondents. To the extent the reports contain 'statistical or factual tabulations or data' (Public Officers Law section 87[2][g][i], or other material subject to production, they should be redacted and made available to the appellant" (id. at 133).

In short, even though statistical or factual information may be "intertwined" with opinions, the statistical or factual portions, if any, as well as any policy or determinations, would be available, unless a different ground for denial could properly be asserted.

The remaining provision of possible significance, §87(2)(c), states that an agency may withhold records to the extent that disclosure "would impair present or imminent contract awards or collective bargaining negotiations. If a proposed expenditure refers to services that must be negotiated with contractors or that are subject to bidding requirements, disclosure of those figures might enable contractors to tailor their bids accordingly, to the potential detriment of the District and its taxpayers. To the extent that disclosure would "impair" the process of awarding contracts or collective bargaining negotiations, it would appear that those portions of the records could be withheld.

Lastly, §84 of the Freedom of Information Law contains that statute's statement of intent. That provision states in part that:

"As state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible.

Mr. Richard Mackay

December 7, 2000

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"The people's right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality."

I hope that I have been of some assistance.

Sincerely,

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:tt



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

File A012901

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December 7, 2000

Executive Director

Robert J. Freeman

Mr. Roy Mallette



The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Mallette:

I have received your letter of October 26, as well as a variety of materials relating to it. In brief, having requested records from the Cicero Local Development Corporation ("CLDC") under the Freedom of Information Law, you were informed that it is not subject to that statute because it was formed as a not-for-profit corporation.

From my perspective, although the Freedom of Information Law generally applies to governmental entities, judicial decisions indicate that a not-for-profit corporation may be subject to the Freedom of Information Law if the corporation is under substantial government control.

In this regard, the Freedom of Information Law pertains to agencies, and §86(3) of that statute defines the term "agency" to mean:

"any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office of other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature" [§86(3)].

Specific reference is found in §1411 of the Not-for-Profit Corporation Law to local development corporations. The cited provision describes the purpose of those corporations and states in part that:

"it is hereby found, determined and declared that in carrying out said purposes and in exercising the powers conferred by paragraph (b) such corporations will be performing an essential governmental function."

Therefore, due to its status as a not-for-profit corporation, it is not clear in every instance that a local development corporation is a governmental entity; however, it is clear that such a corporation performs a governmental function.

Relevant to your inquiry is a decision rendered by the Court of Appeals, the state's highest court, in which it was held that a particular not-for-profit corporation, or also a local development corporation, is an "agency" required to comply with the Freedom of Information Law [Buffalo News v. Buffalo Enterprise Development Corporation, 84 NY 2d 488 (1994)]. In so holding, the Court found that:

"The BEDC seeks to squeeze itself out of that broad multipurposed definition by relying principally on Federal precedents interpreting FOIL's counterpart, the Freedom of Information Act (5 U.S.C. §552). The BEDC principally pegs its argument for nondisclosure on the feature that an entity qualifies as an 'agency' only if there is substantial governmental control over its daily operations...The Buffalo News counters by arguing that the City of Buffalo is 'inextricably involved in the core planning and execution of the agency's [BEDC] program'; thus the BEDC is a 'governmental entity' performing a governmental function of the City of Buffalo, within the statutory definition.

"The BEDC's purpose is undeniably governmental. It was created exclusively by and for the City of Buffalo to attract investment and stimulate growth in Buffalo's downtown and neighborhoods. As a city development agency, it is required to publicly disclose its annual budget. The budget is subject to a public hearing and is submitted with its annual audited financial statements to the City of Buffalo for review. Moreover, the BEDC describes itself in its financial reports and public brochure as an 'agent' of the City of Buffalo. In sum, the constricted construction urged by appellant BEDC would contradict the expansive public policy dictates underpinning FOIL. Thus, we reject appellant's arguments" (id., 492-493).

Based on the foregoing, if the relationship between the CLDC and the Town of Cicero is analogous to that of the BEDC and the City of Buffalo, the LDC would constitute an "agency" required to comply with the Freedom of Information Law. Stated differently, if there is significant government control, i.e., if a majority of the CLDC's board of directors consists of or is designated by government, the CLDC, based on a decision by the state's highest court, would be required to comply with the Freedom of Information Law, notwithstanding its status as a not-for-profit corporation.

Even if the CLDC is not subject to the Freedom of Information Law, the membership on the board of directors of a municipal official in his or her capacity as a municipal official would bring

Mr. Roy Mallette
December 7, 2000
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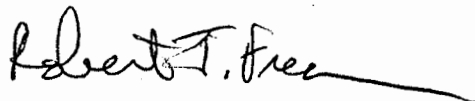
records within the coverage of the Freedom of Information Law. That statute pertains to agency records, and §86(4) defines the term "record" expansively to include:

"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."

In view of the foregoing, if a Town of Cicero official acting in his or her capacity as a Town official serves on the CLDC Board, records that he or she produces or receives in that capacity would be Town records 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

cc: Peter Kip, Jr.
Town Board



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI 100-12402

Committee Members

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December 7, 2000

Executive Director

Robert J. Freeman

Mr. Don Hassig
St. Lawrence Environmental Action
531, CR 28
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, unless otherwise indicated.

Dear Mr. Hassig:

I have received your letter of October 26 in which you sought an advisory opinion concerning the propriety of a denial of your request for certain data by the NYS Department of Health. As required by §89(4)(a) of the Freedom of Information Law, the Department has forwarded its determination of your appeal to this office.

Your request involves the New York State Cancer Registry records of cancer site specific diagnoses and deaths from the period 1976-1997 for St. Lawrence County. You added in your request that:

“If, due to confidentiality concerns, it is necessary to blank out names and addresses, please leave the zip code unblanked out. In cases where two or less cancer site specific records exist for a year and zip code, you may decline to release such records.”

Your request was denied based on statutes that exempt records from disclosure, as well as provisions in the Freedom of Information Law, §§87(2)(b) and 89(2)(b), that authorize agencies to withhold records to the extent that disclosure would constitute “an unwarranted invasion of personal privacy.” Further, even if names and addresses are withheld, the Department’s Appeals Officer contended that the data:

“...could be linked to other publicly available databases which could lead to identification of an individual. Additionally, having personal knowledge concerning individuals in a community combined with the information you seek could lead to disclosure of specific attributes about a cancer patient such as type of cancer, stage at diagnosis and type of treatment.”

Mr. Don Hassig
December 7, 2000
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In this regard, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

The first ground for denial, §87(2)(a), pertains to records that “are specifically exempted from disclosure by state or federal statute.” One such statute that was cited in response to you, §2402 of the Public Health Law, states that:

“The reports of cancer cases made pursuant to the provisions of this article shall not be divulged or made public so as to disclose the identity of any person to whom they relate, by any person, except in so far as may be authorized by sanitary code.”

If indeed the records that you requested include personally identifiable information, I would agree that they would be exempted from disclosure. Nevertheless, based on a judicial decision involving a similar request, it would be unlikely in my view that a court would determine that the information sought may justifiably be withheld.

In New York Times Company v. New York State Department of Health, 674 NYS2d 826, 243 AD2d 157 (1998), the issue involved a request for health care data and the ability to withhold certain items on the ground that disclosure would constitute “an unwarranted invasion of personal privacy” pursuant to §87(2)(b) of the Freedom of Information Law. Stated differently, to the extent that the data would be personally identifiable to patients, the Department would have the ability to deny access. Pursuant to its regulations, the Department granted access to a variety of items, but withheld data pertaining to treating physicians, hospitals and insurers. Following the initiation of a proceeding challenging the denial of access to those items, the Department agreed to release the names of hospitals and insurers. Nevertheless, it continued to withhold the names of physicians. The Supreme Court in its review of the denial “expressly rejected [the Department’s] argument that the disclosure of:

“...physician identifiers, even when such information was used in combination with other disclosable data, would lead to the identification of patients and, hence, would constitute an unwarranted invasion of personal privacy” (*id.*, 828).

The Appellate Division later unanimously affirmed the applicant’s right to the physician identifiers. In this regard, in brief, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. That being so, the Court determined that:

“It is well settled that all records of a public agency are presumptively available for public inspection and copying, unless the documents in question fall within one of the enumerated exemptions set forth in Public Officers Law § 87(2) (*see, Matter of Capital Newspapers Div.*

of Hearst Corp. v. Burns, 67 N.Y.2d 562, 566, 505 N.Y.S.2d 576, 496 N.E.2d 665). To that end, 'FOIL is to be liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government' (*Matter of Capital Newspapers, Div. of Hearst Corp. v. Whalen*, 69 N.Y.2d 246, 252, 513 N.Y.S.2d 367, 505 N.E.2d 932). In this regard, the agency seeking to prevent disclosure bears the burden of demonstrating that the requested material falls squarely within the particular exemption claimed 'by articulating a particularized and specific justification for denying access' (*Matter of Capital Newspapers Div. of Hearst Corp. v. Burns, supra*, at 566, 505 N.Y.S.2d 576, 496 N.E.2d 665; see, *Matter of Ruberti, Girvin & Ferlazzo v. New York State Div. of State Police*, 218 A.D.2d 494, 496-497, 641 N.Y.S.2d 411; *Matter of Legal Aid Socy. of Northeastern N.Y. v. New York State Dept. of Social Servs.*, 195 A.D.2d 150, 153, 605 N.Y.S.2d 785). This respondent has failed to do."

In finding that the Department could not demonstrate that disclosure would enable the public to identify patients, the Court stated that the Department:

"...would have the court believe...that...providing the identity of the patient's physician is the one additional factor that 'could readily permit a third party to deduce logically the identity of a given patient, resulting in a breach of medical confidentiality'. In our view, such speculation falls far short of 'articulating a particularized and specific justification for denying access'" (*id.*).

The Court emphasized that other data is routinely disclosed including:

"...the patient's gender, race and ethnicity; the month and year of the patient's admission, the month and year of the patient's discharge; the patient's length of stay; the patient's number of preoperative days; the patient's number of postoperative days; the class of payor; the census tract location of the patient; the age of the patient or one-year intervals for patients one year old or older; the age of the patient at one-week intervals for patients less than one year old; the physician specialty; the number of attending physicians; the presence or absence of an accident; and the facility reimbursement peer group..." (*id.*).

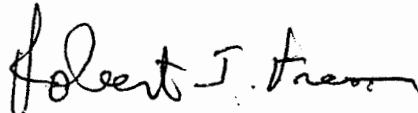
Since the Court determined in New York Times that the items enumerated, including the names of physicians and zip code of residence would not, if disclosed, constitute an unwarranted invasion of personal privacy because that combination of data did not consist of personally identifiable information, I do not believe that the data you seek could, under the terms of §2402 of the Public Health Law, "disclose the identity of any person." Anyone anywhere could interview persons residing in a particular locale and question them about the incidence of certain diseases. Any

Mr. Don Hassig
December 7, 2000
Page - 4 -

such disclosures, which would not be required by law, would in my view be irrelevant to the authority to withhold records pursuant to the provisions cited by 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 dark ink and is positioned above the printed name and title.

Robert J. Freeman
Executive Director

RJF:jm

cc: John F. Signor



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 12403

Committee Members

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December 7, 2000

Executive Director

Robert J. Freeman

Mr. Donald G. Hobel



The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Hobel:

I have received your letter of October 20 in which you sought advice concerning an inquiry made to the Empire State Development Corporation. I note that you raised questions, i.e., whether a certain contract exists and, if so what the "date and title" might be should [you] desire to file a FOIL request for such data." The receipt of your inquiry was acknowledged, and it appears that it was treated as a request under the Freedom of Information Law.

In this regard, first, in a technical sense, the Freedom of Information Law involves requests for records; it does not require that agency staff provide answers to questions. Nevertheless, in view of your questions, I believe that it was appropriate for the Corporation's records access officer to treat your inquiry as a request made under the Freedom of Information Law.

Second, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

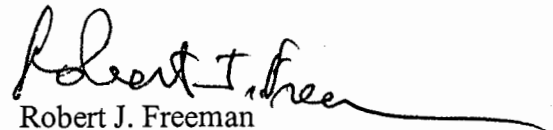
While an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days, when such acknowledgement is given, there is no precise time period within which an agency must grant or deny access to records. The time needed to do so may be dependent upon the volume of a request, the possibility that other requests have been made, the

Mr. Donald G. Hobel
December 7, 2000
Page - 2 -

be dependent upon the volume of a request, the possibility that other requests have been made, the necessity to conduct legal research, the search and retrieval techniques used to locate the records and the like. In short, when an agency acknowledges the receipt of a request because more than five business days may be needed to grant or deny a request, so long as it provides an approximate date indicating when the request will be granted or denied, and that date is reasonable in view of the attendant circumstances, I believe that the agency would be acting in compliance with law.

I hope that the foregoing serves to clarify your understanding of the Freedom of Information Law and that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:jm

cc: Lawrence M. Gerson



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL - AO - 12404

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Executive Director

Robert J. Freeman

December 7, 2000

Mr. Frank V. Schwarz
Town of Lumberland Historian
P.O. Box #1
Glen Spey, NY 12737

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Schwarz:

I have received your letter of October 17. In your capacity as historian for the Town of Lumberland, you wrote of a problem in the Town's museum room. Specifically, you indicated that:

"A person is persistent about wanting copies of more than six pictures of a private estate I will name as 'P'. These copies were given for display within our Historian's office which doubles as the Town of Lumberland Museum Room. The 'P' family has made it clear that they do not want their pictures copied and or leaving the museum room. These are c 1880 prints of the 'P' estate building, some mansion and boathouse prints."

You have sought guidance concerning the matter, and in this regard, I offer the following comments.

First, it is questionable in my view whether the Freedom of Information Law applies. I note that the statute is expansive in its coverage, for it encompasses all agency records and 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."

Mr. Frank V. Schwarz
December 7, 2000
Page - 2 -

You referred to the items at issue as "pictures" and "prints." Although photographs generally constitute "records" subject to inspection and copying, the items in this instance might more reasonably be characterized as artifacts or perhaps works of art. If that is so, the Freedom of Information Law would not apply, for the items sought would not constitute "records." Since they are being displayed in a museum, it is advised that you not consider them as agency records subject to the Freedom of Information Law.

Second, even if they are considered "records", I believe that you and other Town officials have a duty to preserve and protect them. Subdivision (1) of §57.25 of the Arts and Cultural Affairs Law states in relevant part that:

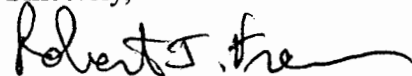
"It shall be the responsibility of every local officer to maintain records to adequately document the transaction of public business and the services and programs for which such officer is responsible; to retain and have custody of such records for so long as the records are needed for the conduct of the business of the office; to adequately protect such records; to cooperate with the local government's records management officer on programs for the orderly and efficient management of records including identification and management of inactive records and identification and preservation of records of enduring value; to dispose of records in accordance with legal requirements; and to pass on to his successor records needed for the continuing conduct of business of the office..."

In my opinion, although an agency ordinarily would be required to photocopy a paper record on request, under the circumstances that you described in which copying or photocopying could destroy the record, you would have the authority to restrict the ability to copy.

Further, I do not believe that the Town would be required to relinquish custody or possession of the prints to person seeking access to them.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMC. 140 - 3245
1071-A0 - 12405

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December 7, 2000

Executive Director

Robert J. Freeman

Ms. Sue Ellen Gerchman
Biology Department Bldg. 463
Brookhaven National Laboratory
Upton, NY 11973

The staff of the Committee 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. Gerchman:

As you are aware, I have received your letters of October 27 and November 15.

Several areas of your inquiry involve your ability as a member of the Board of Education of the Shoreham Wading River Central School District Board of Education to disclose information or express your views. For instance, during an open meeting in which the Board discussed its policy concerning videotaping of meetings, you "revealed what [you] felt were the feelings that had been expressed by [y]our attorney." You also asked whether "all discussions which occur in executive session [are] privileged" and questioned the "confidentiality of material received by the Board of Education in [y]our weekly packets." Similarly, you asked whether "a board member [is] allowed to discuss class sizes or fund balances, [or] any information which could be gotten through a FOIL request." A Board member also questioned the propriety of your transmission of an e-mail communication to a number of people relating to certain programs that are carried out in the District.

From my perspective, unless a statute, an act of the Congress or the State Legislature, forbids a member of the Board or others from disclosing specific information or records, the Board member may choose to disclose.

In this regard, it is emphasized that the two statutes of primary significance in relation to your questions, the Freedom of Information Law and the Open Meetings 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

Ms. Sue Ellen Gerchman

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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)].

I am unaware of any statute that would prohibit a Board member from disclosing the kinds of information at issue. Further, even when information might have been obtained during an executive session properly held or from records marked "confidential", I note that the term "confidential" in my view has a narrow and precise technical meaning. For records or information to be validly characterized as confidential, I believe that such a claim must be based upon a statute that specifically confers or requires confidentiality.

For example, if a discussion by a board of education concerns a record pertaining to a particular student (i.e., in the case of consideration of disciplinary action, an educational program, an award, etc.), the discussion would have to occur in private and the record would have to be withheld insofar as public discussion or disclosure would identify the student. As you may be aware, the Family Educational Rights and Privacy Act (20 USC §1232g) generally prohibits an 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).

Since you referred to disclosure of information obtained from the District's attorney, although I returned the videotape containing the exchange in question, my recollection is that several Board members made reference to the attorney's advice and that his opinion was part of the discussion. That being so, I believe that the Board, the client, effectively waived the ability to claim that your comments were made in contravention of the attorney-client privilege.

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

Ms. Sue Ellen Gerchman

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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.

In the context of the situations that you described, I do not believe that your disclosure of comments were in any way inappropriate. On the contrary, you and the others on the Board were elected to express points of view and represent your community. 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; rather, in my view, they should represent disparate points of view which, when conveyed as members of the community and part of a deliberative process, lead to fair and representative decision making.

With specific reference to the propriety of your discussion of class sizes or fund balances, I believe that you were elected to discuss those issues and that a failure to do so would deprive the public of the ability to communicate with an elected official and to know of that official's views on matters within the scope of his or her official duties. With respect to e-mail, I ask how you, as a Board member, could have a lesser right to communicate or offer an opinion than any other member of the public. In short, I disagree with the suggestion that your e-mail communication was in some way improper; on the contrary, you were elected to be an opinion leader and communicate on issues of public concern within your community, and doing so is in my opinion not only proper but precisely what you were elected to do.

Next, with respect to the materials distributed to Board members, I point out that an assertion or claim of confidentiality, unless it is based upon a statute, is likely meaningless. As suggested earlier, when confidentiality is conferred by a statute, records fall outside the scope of rights of access pursuant to §87(2)(a) of the Freedom of Information Law, which, again, states that an agency may withhold records that "are specifically exempted from disclosure by state or federal statute". If there is no statute upon which an agency can rely to characterize records as "confidential" or "exempted from disclosure", the records are subject to whatever rights of access exist under the Freedom of Information Law [see Doolan v. BOCES, 48 NY 2d 341 (1979); Washington Post v. Insurance Department, 61 NY 2d 557 (1984); Gannett News Service, Inc. v. State Office of Alcoholism and Substance Abuse, 415 NYS 2d 780 (1979)]. As such, an assertion of confidentiality without more, would not in my view serve to enable an agency to withhold a record.

The contents of the records in question serve as the factors relevant to an analysis of the extent to which they may be withheld or must be disclosed. In my view, several of the grounds for denial may be pertinent to such an analysis.

Records prepared by District staff and forwarded to members of the Board would constitute intra-agency materials that fall within the coverage of §87(2)(g) of the Freedom of Information Law. That provision states that an agency may withhold records that:

"are inter-agency or intra-agency materials which are not:

- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations; or
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

It is emphasized that the Court of Appeals has specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

"While the reports in principle may be exempt from disclosure, on this record - which contains only the barest description of them - we cannot determine whether the documents in fact fall wholly within the scope of FOIL's exemption for 'intra-agency materials,' as claimed by respondents. To the extent the reports contain 'statistical or factual tabulations or data' (Public Officers Law section 87[2][g][i], or other material subject to production, they should be redacted and made available to the appellant" [Xerox Corp. v. Town of Webster, 65 NY 2d 131, 133 (1985)].

Therefore, as indicated earlier, intra-agency materials may be accessible or deniable in whole or in part, depending upon their specific contents.

Also relevant may be §87(2)(b), which enables an agency to withhold records or portions thereof which if disclosed would result in an unwarranted invasion of privacy. That provision might be applied with respect to a variety of matters relating to hiring, evaluation or discipline of teachers or other staff, for example.

Section 87(2)(c) of the Freedom of Information Law permits an agency to withhold records to the extent that disclosure "would impair present or imminent contract awards or collective bargaining negotiations". When the District is engaged in collective bargaining negotiations, information provided to the Board might in some instances fall within that exception.

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As discussed previously, §87(2)(a) pertains to records that are exempted from disclosure by state or federal statute. One such statute is the Family Educational Rights and Privacy Act (20 U.S.C. §1232g). In brief, that statute generally forbids a school district from disclosing personally identifiable information concerning students, unless the parents of students consent to disclosure.

In sum, a blanket denial of access to the records in question would likely be inconsistent with the Freedom of Information Law. However, it is also likely that one or more grounds for denial could appropriately be cited withhold portions of those records.

It is noted, too, that the grounds for withholding records appearing in the Freedom of Information Law and the grounds for entry into executive session appearing in §105(1) of the Open Meetings Law are not necessarily consistent. For instance, a recommendation to modify policy or to change the date of a board meeting would constitute intra-agency material that could be withheld pursuant to §87(2)(g) of the Freedom of Information Law. However, when those issues are raised at a Board meeting, there would be no valid basis for conducting an executive session. Therefore, even though records might be withheld in accordance with law, it does not necessarily follow that a meeting pertaining to those records may properly be closed or that it is reasonable to withhold them.

Lastly, with regard to the confidentiality of meetings of subcommittees of the Board, when a committee or subcommittee consists solely of members of a public body, such as the Board, I believe that the Open Meetings Law is applicable.

By way of background, when the Open Meetings Law went into effect in 1977, questions consistently arose with respect to the status of committees, subcommittees and similar bodies that had no capacity to take final action, but rather merely the authority to advise. Those questions arose due to the definition of "public body" as it appeared in the Open Meetings Law as it was originally enacted. Perhaps the leading case on the subject also involved a situation in which a governing body, a school board, designated committees consisting of less than a majority of the total membership of the board. In Daily Gazette Co., Inc. v. North Colonie Board of Education [67 AD 2d 803 (1978)], it was held that those advisory committees, which had no capacity to take final action, fell outside the scope of the definition of "public body".

Nevertheless, prior to its passage, the bill that became the Open Meetings Law was debated on the floor of the Assembly. During that debate, questions were raised regarding the status of "committees, subcommittees and other subgroups." In response to those questions, the sponsor stated that it was his intent that such entities be included within the scope of the definition of "public body" (see Transcript of Assembly proceedings, May 20, 1976, pp. 6268-6270).

Due to the determination rendered in Daily Gazette, *supra*, which was in apparent conflict with the stated intent of the sponsor of the legislation, a series of amendments to the Open Meetings Law was enacted in 1979 and became effective on October 1 of that year. Among the changes was a redefinition of the term "public body". "Public body" is now defined in §102(2) to include:

Ms. Sue Ellen Gerchman

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"...any entity for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

Although the original definition made reference to entities that "transact" public business, the current definition makes reference to entities that "conduct" public business. Moreover, the definition makes specific reference to "committees, subcommittees and similar bodies" of a public body.

In view of the amendments to the definition of "public body", I believe that any entity consisting of two or more members of a public body, such as a committee or subcommittee consisting of members of the Agency, would fall within the requirements of the Open Meetings Law, assuming that a committee discusses or conducts public business collectively as a body [see Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984 (1981)]. Further, as a general matter, I believe that a quorum consists of a majority of the total membership of a body (see e.g., General Construction Law, §41). Therefore, if, for example, the Board consists of seven, its quorum would be four; in the case of a committee consisting of three, a quorum would be two.

When a committee is subject to the Open Meetings Law, I believe that it has the same obligations regarding notice and openness, for example, as well as the same authority to conduct executive sessions, as a governing body [see Glens Falls Newspapers, Inc. v. Solid Waste and Recycling Committee of the Warren County Board of Supervisors, 195 AD 2d 898 (1993)].

In sum, assuming that committees or subcommittees consist of two or more members of the Board, I believe that they would constitute public bodies subject to the Open Meetings Law, and that a quorum of those bodies would be a majority of their membership.

Further, as you are aware, a copy of an opinion was sent to the Board recently in which it was advised that any person may tape or video record an open meeting of a public body, so long as the use of the recording device is not disruptive or obtrusive.

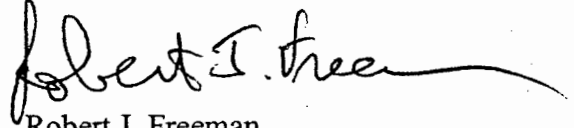
Ms. Sue Ellen Gerchman

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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 that reads "Robert J. Freeman". The signature is written in a cursive style with 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-12406

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December 11, 2000

Executive Director

Robert J. Freeman

Ms. Mary Ules

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Ules:

I have received your letter of October 29, as well as the materials attached to it. You have sought an opinion "on whether the state codes enforcement agency has to keep records or complaints made about City of Utica codes enforcement officials, and whether [you are] entitled to copies of those records from state officials."

In this regard, first, it is emphasized that the Freedom of Information Law pertains to agency records and that §89(3) states in part that an agency is not required to prepare or acquire records on behalf of an applicant. Therefore, if, for example, a state agency does not have possession of the records of your interest, it would not be required to obtain them from the City of Utica. However, when two or more agencies have copies of the same records, each would have the same obligation to comply with the Freedom of Information Law. Consequently, if both the City and Department of State have copies of records prepared by a City official, both would have the duty to respond to a request made under the Freedom of Information Law.

I note that complaints about local code enforcement officials may be made to the Department of State, but that there is no requirement that a unit of local government transmit complaints about its employees to the Department. Further, as I interpret the correspondence, the Department does not maintain the records of your interest.

Second, with respect to the access to complaints concerning public employees, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Relevant to your inquiry is §87(2)(b), which enables an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." It has been held that unproven or unsubstantiated charges or allegations made against a public employee may be withheld as an unwarranted invasion of personal privacy. However, if there is a final determination indicating that a public employee has engaged in or admitted misconduct, the courts have found that such a determination must be disclosed [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Cty., Wayne Cty., March 25, 1981; Powhida v. City of Albany, 147 AD2d 236 (1989); Sinicropi v. County of Nassau, 76 AD2d 838 (1980)].

Further, when a complaint is made by a member of the public, I believe that those portions of the complaint that identify that person may be withheld to protect his or her privacy. It has generally been advised that the substance of a complaint is available, but that those portions of the complaint which identify complainants may be deleted on the ground that disclosure would result in an unwarranted invasion of personal privacy. I point out that §89(2)(b) states that an "agency may delete identifying details when it makes records available." Further, the same provision contains five examples of unwarranted invasions of personal privacy, the last two of which include:

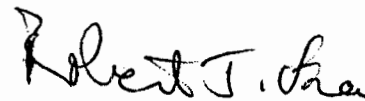
"iv. disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it; or

v. disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency."

In my view, what is relevant to the work of the agency is the substance of the complaint, i.e., whether or not the complaint has merit. The identity of the person who made the complaint is often irrelevant to the work of the agency, and in such circumstances, I believe that identifying details may be deleted.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Tom Romanowski
Charles N. Brown



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 12407

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December 12, 2000

Executive Director

Robert J. Freeman

Mr. David F. Bruno
Clerk of the Board
Utica City School District
115 Mohawk 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. Bruno:

I have received your thoughtful letter of November 7 in which you raised questions relating to the Freedom of Information Law.

First, you asked whether a request that you “[i]dentify what section of Education Law allows appointments...” or identify budget codes for purchases....fall[s] under FOIL.” In this regard, the Freedom of Information Law deals with requests for records, and I do not believe that the kind of request to which you referred is envisioned by that statute.

From my perspective, a request for a law that may applicable might not be viewed as a request for a record, but rather an interpretation of law that requires a judgment. Depending on the nature of the matter, 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 made, for example, for “section 1709 of the Education 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 or codes that might be applicable is not, in my view, a request for a record as envisioned by the Freedom of Information Law.

Second, in a situation in which a person has received copies of records but has not paid the requisite fees, you asked whether you are “allowed to embargo any future requests until [you] are paid in full.” 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 fee, the agency can refuse to honor further requests until the fee is paid.

Mr. David F. Bruno

December 12, 2000

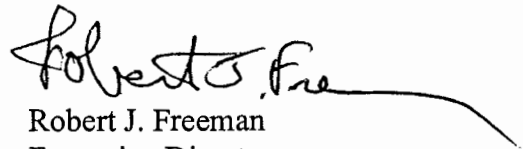
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There is no judicial decision of which I am aware that is pertinent to the matter. However, when a request for copies of records is served upon an agency, both the agency and the applicant bear a responsibility. The agency is responsible for compliance with the Freedom of Information Law by retrieving the records sought and disclosing them to the extent required by law. The agency is also required to produce copies of records "[u]pon payment of, or offer to pay, the fee prescribed therefor" [see Freedom of Information Law, §89(3)]. Concurrently, if the applicant requests copies, I believe that he or she bears the responsibility of paying the appropriate fee.

If an agency has prepared copies of records in good faith and the applicant fails or refuses to pay the fee, I do not believe that the agency would be required to make available those copies that have been prepared. In my view, it follows that an agency should not be required to honor ensuing requests until the applicant has fulfilled his or her responsibility by tendering the fee for copies previously made.

I hope that I 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-12408

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December 12, 2000

Executive Director

Robert J. Freeman

Mr. Alfonso Rizzuto
00-A-2600
Elmira Correctional Facility
P.O. Box 500
Elmira, NY 14902-0500

Dear Mr. Rizzuto:

I have received your letter, which you characterized as an "appeal" following the deletion of the home addresses from records identifying your visitors.

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 determine appeals. As I understand your comments, the denial of access to the addresses was rendered following your appeal to Counsel to the Department of Correctional Services. If that is so, the only remaining official means of review would involve the initiation of a proceeding under Article 78 of the Civil Practice Law and Rules.

Second, in my view, the deletion of visitors' home addresses appears to have been proper. Although the Freedom of Information Law provides broad rights of access, §87(2)(b) authorizes an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." In most circumstances, including the matter at hand, I believe that individuals' home addresses may be withheld based on the cited provision.

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: Anthony J. Annucci



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12409

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December 12, 2000

Executive Director

Robert J. Freeman

Ms. Susan Dandrow

The staff of the Committee on Open 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 letter of November 1, which reached this office on November 9. You have sought clarification concerning the fees that may be charged under the Freedom of Information Law, particularly those involving copies of accident reports.

In this regard, I offer the following comments.

First, the attachment to your letter refers to the "FOIA", which is the federal Freedom of Information Act (5 USC §552) and which applies only to federal agencies. Each state has enacted its own version of a law dealing with public access to government records, and in New York, the Freedom of Information Law pertains to records maintained by state and local government agencies. I note that §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."

Second, from my perspective, unless a statute, an act of the State Legislature, authorizes an agency to charge a different fee, an agency can charge no more than twenty-five cents per photocopy up to nine by fourteen inches, nor can it charge a fee for search or administrative costs.

By way of background, §87(1)(b)(iii) of the Freedom of Information Law stated until October 15, 1982, that an agency could charge up to twenty-five cents per photocopy unless a different fee was prescribed by "law". Chapter 73 of the Laws of 1982 replaced the word "law" with the term "statute". As described in the Committee's fourth annual report to the Governor and the Legislature

of the Freedom of Information Law, which was submitted in December of 1981 and which recommended the amendment that is now law:

"The problem is that the term 'law' may include regulations, local laws, or ordinances, for example. As such, state agencies by means of regulation or municipalities by means of local law may and in some instances have established fees in excess of twenty-five cents per photocopy, thereby resulting in constructive denials of access. To remove this problem, the word 'law' should be replaced by 'statute', thereby enabling an agency to charge more than twenty-five cents only in situations in which an act of the State Legislature, a statute, so specifies."

As such, prior to October 15, 1982, a local law, an ordinance, or a regulation for instance, establishing a search fee or a fee in excess of twenty-five cents per photocopy or higher than the actual cost of reproduction was valid. However, under the amendment, only an act of the State Legislature, a statute, would in my view permit the assessment of a fee higher than twenty-five cents per photocopy, a fee that exceeds the actual cost of reproducing records that cannot be photocopied, or any other fee, such as a fee for search. In addition, it was confirmed judicially that fees inconsistent with the Freedom of Information Law may be validly charged only when the authority to do so is conferred by a statute. In addition, in a case in which you were involved, Sheehan v. City of Syracuse [521 NYS 2d 207 (1987)], a fee in excess of twenty-five cents per photocopy for certain records was established by an ordinance, and the court found the ordinance to be invalid. More recently, a provision of a county code authorizing a fee of twenty dollars for an accident report was struck down, and it was determined that the agency could charge no more than twenty-five cents per photocopy [Gordon Schotsky & Rappaport v. Suffolk County, 221 AD 2d 339 (1996)].

Further, the specific language of the Freedom of Information Law and the regulations promulgated by the Committee on Open Government indicate that, absent statutory authority, an agency may charge fees only for the reproduction of records. Section 87(1)(b) of the Freedom of Information Law states:

"Each agency shall promulgate rules and regulations in conformance with this article...and pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the availability of records and procedures to be followed, including, but not limited to...

(iii) the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by statute."

The regulations promulgated by the Committee states in relevant part that:

"Except when a different fee is otherwise prescribed by statute:

(a) There shall be no fee charged for the following:

- (1) inspection of records;
- (2) search for records; or
- (3) any certification pursuant to this Part" (21 NYCRR section 1401.8).

As such, the Committee's regulations specify that no fee may be charged for inspection of or search for records, except as otherwise prescribed by statute. Therefore, absent statutory authority to do so, I do not believe that the Department could validly charge a fee other than a maximum fee of twenty-five cents per photocopy.

Moreover, although compliance with the Freedom of Information Law involves the use of public employees' time, the Court of Appeals has found that the Law is not intended to be given effect "on a cost-accounting basis", but rather that "Meeting the public's legitimate right of access to information concerning government is fulfillment of a governmental obligation, not the gift of, or waste of, public funds" [Doolan v. BOCES, 48 NY 2d 341, 347 (1979)].

I note that confusion has arisen on occasion concerning fees for accident reports due perhaps to the provisions of §202 of the Vehicle and Traffic Law. Section 202(3) authorizes a copying fee of \$15.00 for accident reports obtained from the Department of Motor Vehicles and one dollar per page for copies of other records. Section 202 also authorizes the Department to collect certain fees for searching for records. However, since the provisions of the Vehicle and Traffic Law pertain to particular records in possession of the Department of Motor Vehicles only, in my opinion, other agencies, such as municipal police or sheriff's departments, cannot unilaterally adopt policy or regulations authorizing fees in excess of twenty-five cents per photocopy or other fees without specific statutory authority to do so.

Similarly, §66-a of the Public Officers Law, a statute that deals with accident reports and certain other records maintained by the Division of State Police, provides in subdivision (2) that:

"Notwithstanding the provisions of section twenty-three hundred seven of the civil practice law and rules, the public officers law, or any other law to the contrary, the division of state police shall charge fees for the search and copy of accident reports and photographs. A search fee of fifteen dollars per accident report shall be charged, with no additional fee for a photocopy. An additional fee of fifteen dollars shall be charged for a certified copy of any accident report. A fee of twenty-five dollars per photograph or contact sheet shall be charged. The fees for investigative reports shall be the same as those for accident reports."

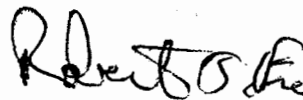
Ms. Susan Dandrow
December 12, 2000
Page - 4 -

Based on the foregoing, it is clear that a statute separate from the Freedom of Information Law authorizes the Division of State Police to charge fifteen dollars for the search and copy of accident reports.

In the two instances cited above, those dealing with the Department of Motor Vehicles and the Division of State Police, statutes have been enacted that enable those agencies to charge fees different from those ordinarily applicable under the Freedom of Information Law. Those are the only situations, however, of which I am aware in which agencies may charge more than twenty-five cents per photocopy in response to requests for accident reports.

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 line extending to the right.

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AD-12410

Committee Members

Mary O. Donohue
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December 13, 2000

Executive Director

Robert J. Freeman

Mr. Michael Taylor
Wechsler Pool & Supply Co.
P.O. Box 333
Monticello, NY 12701

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Taylor:

I have received your letter of November 10 in which you questioned your right to obtain lists of "swimming pools (public) which are regulated" by county health departments. Two counties supplied the lists, four required that you complete their applications, and three denied access because the lists would be used for commercial purposes.

From my perspective, assuming that the lists of your interest involve public facilities rather than residential swimming pools, they must be disclosed. In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

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)]. As stated by the Court of Appeals:

"FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on government decision-making, its ambit is not confined to records actually used in the decision-making process. (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public

right and in the public interest, irrespective of the status or need of the person making the request" [Farbman v. New York City Health and Hospitals Corporation, 62 NY 2d 75, 80 (1984)].

Based on the foregoing, unless there is a basis for withholding records in accordance with the grounds for denial appearing in §87(2), the use of the records, including the potential for commercial use, is in my opinion irrelevant; when records are accessible, once they are disclosed, the recipient may do with the records as he or she sees fit.

The only exception to the principles described above involves the protection of personal privacy. By way of background, §87(2)(b) of the Freedom of Information Law permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." Further, §89(2)(b) of the Law provides a series of examples of unwarranted invasions of personal privacy, one of which pertains to:

"sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes" [§89(2)(b)(iii)].

The provision quoted above represents what might be viewed as an internal conflict in the law. As indicated earlier, the status of an applicant or the purposes for which a request is made are irrelevant to rights of access, and an agency cannot inquire as to the intended use of records. However, due to the language of §89(2)(b)(iii), rights of access to a list of names and addresses, or equivalent records, may be contingent upon the purpose for which a request is made [see Scott, Sardano & Pomeranz v. Records Access Officer of Syracuse, 65 NY 2d 294, 491 NYS 2d 289 (1985); Federation of New York State Rifle and Pistol Clubs, Inc. v. New York City Police Dept., 73 NY 2d 92 (1989); Goodstein v. Shaw, 463 NYS 2d 162 (1983)].

In the context of your inquiry, it is noted that exception involving the protection of privacy has been construed to pertain to intimate, private information relating to people; it does not apply to business entities or public facilities [see e.g., Hanig v. NYS Department of Motor Vehicles, 79 NY2d 106 (1992)]. Therefore, again, unless your request involves residential pools, I do not believe that there would be any basis for a denial of access.

Second, I do not believe that an agency can require that a request be made on a prescribed form. The Freedom of Information Law, §89(3), as well as the regulations promulgated by the Committee on Open Government (21 NYCRR §1401.5), require that an agency respond to a request that reasonably describes the record sought within five business days of the receipt of a request. Further, the regulations indicate that "an agency may require that a request be made in writing or may make records available upon oral request" [§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

Mr. Michael Taylor
December 13, 2000
Page - 3 -

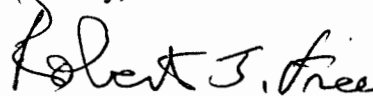
Information Law. For example, assume that an individual requests a record in writing from an agency and that the agency responds by directing that a standard form must be submitted. By the time the individual submits the form, and the agency processes and responds to the request, it is probable that more than five business days would have elapsed, particularly if a form is sent by mail and returned to the agency by mail. Therefore, to the extent that an agency's response granting, denying or acknowledging the receipt of a request is given more than five business days following the initial receipt of the written request, the agency, in my opinion, would have failed to comply with the provisions of the Freedom of Information Law.

While the Law does not preclude an agency from developing a standard form, as suggested earlier, I do not believe that a failure to use such a form can be used to delay a response to a written request for records reasonably described beyond the statutory period. However, a standard form may, in my opinion, be utilized so long as it does not prolong the time limitations discussed above. For instance, a standard form could be completed by a requester while his or her written request is timely processed by the agency. In addition, an individual who appears at a government office and makes an oral request for records could be asked to complete the standard form as his or her written request.

In sum, it is my opinion that the use of standard forms is inappropriate to the extent that is unnecessarily serves to delay a response to or deny a request for records.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12411

Committee Members

Mary O. Donohue
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Executive Director

Robert J. Freeman

December 13, 2000

Mr. Abraham Friedman

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Friedman:

I have received your letter of November 9, as well as the correspondence attached to it. You have raised a series of questions relating to your requests for records of the New York City Department for the Aging. In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Second, when a 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 instance, if the Department maintains records involving repairs done in senior citizen apartments, I believe that those portions of the records that identify tenants residing in the apartments could be withheld on the ground that disclosure would result in "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)]. In that circumstance, you would have no right to inspect the records. Again, a copy could be made following the deletion of personally identifying details. However, in that circumstance, I believe that the Department could charge up to twenty-five cents per photocopy [see §87(1)(b)(iii)]. It is noted, too, that there is nothing in the Freedom of Information Law pertaining to the waiver of fees, and it has been held that an agency may charge its established fee, even when the applicant is indigent [Whitehead v. Morgenthau, 552 NYS2d 518 (1990)].

Further, there no provision in the Freedom of Information Law that deals with a waiver of court fees; only a court itself may determine that fees should be waived on the ground that a litigant is indigent.

Third, I am unaware of the manner in which the Department maintains its records, and 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:

"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 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.

Fourth, assuming that they can be found with reasonable effort, contracts, invoices and similar records must, in my opinion, be disclosed, for none of the grounds for denial would be applicable. Other records of your interest that were prepared by Department staff, such as inspection and financial reports, would likely be available in great measure, if not in their entirety, under §87(2)(g). Although that provision potentially serves as a basis for a denial of access, due to its

Mr. Abraham Friedman

December 13, 2000

Page - 3 -

structure, it often requires disclosure. That provision permits an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations; or
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

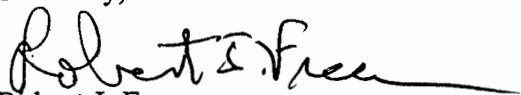
As suggested earlier, portions of the record sought identifiable to tenants could be withheld to protect personal privacy.

Lastly, if you believe that your request has been denied, you may 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.."

I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:tt

cc: Yonhi Park



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AJ-12411A

Committee Members

Mary O. Donohue
Alan Jay Gerson
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December 18, 2000

Executive Director

Robert J. Freeman

Mr. Freddie Graves
86-B-0671
Elmira Correctional Facility
P.O. Box 500
Elmira, NY 14902-0500

Dear Mr. Graves:

I have received your letter of December 7, which reached this office on December 14. You have requested a variety of records relating to the policies and procedures prepared by the Department of Correctional Services that relate to the mess hall at the Wende Correctional Facility.

In this regard, the Committee on Open Government is authorized to offer advice and opinions concerning the Freedom of Information Law. The Committee does not maintain possession or control of records generally, and this office does not have any records that fall within the scope of your request.

As a general matter, a request made under the Freedom of Information Law should be directed to the agency that maintains the records of your interest. 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; to seek records kept at the Department's main offices in Albany, a request may be made to the records access officer, Mr. Mark Shepard.

Lastly, 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 your 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 hope that the foregoing serves to clarify your understanding of the Freedom of Information Law and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12412

Committee Members

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Gary Lewi
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Joseph J. Seymour
Carole E. Stone
Alexander F. Treadwell

December 19, 2000

Executive Director

Robert J. Freeman

Mr. Luciano Di Norcia



The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Di Norcia:

I have received your letter of November 10 and the materials attached to it. You have sought an opinion concerning the propriety of a denial of your request by the New York City Department of Transportation for records indicating the locations of cameras used in the City's Red Light Camera Program. The Department denied the request, indicating that the list of locations "has never been deemed to be public information, because it is used for law enforcement purposes." You contended that the locations should be made public, for the location of a camera is provided whenever a Notice of Liability is issued.

In this regard, I offer the following comments.

First, the provision in the Freedom of Information Law to which you referred that pertains specifically to the Red Light Camera Program, §87(2)(j), expired and was repealed on December 1, 1999. Moreover, that provision did not deal with the location of cameras but rather with the "recorded images" captured by cameras.

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 to which the Department alluded in the determination of the appeal, §87(2)(e), permits an agency to withhold records that:

"are compiled for law enforcement purposes and which, if disclosed, would:

i. interfere with law enforcement investigations or judicial proceedings;

- ii. deprive a person of a right to a fair trial or impartial adjudication;
- iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
- iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

From my perspective, it is difficult to envision how the harmful effects of disclosure described in subparagraphs (i) through (iv) would arise by means of disclosure, particularly in view of the disclosures made through the issuance of Notices of Liability. If locations indicating the use of cameras are made known in the notices, there is nothing secret about them.

Further, if the intent of the Program is to improve traffic safety and encourage drivers to better comply with law, a decision rendered by the Court of Appeals, the State's highest court, suggests that disclosure may be beneficial and proper. Specifically, in Fink v. Lefkowitz [47 NY2d 567 (1979)], the issue involved access to an audit manual prepared by the Special Prosecutor for Nursing Homes, and it was found that:

"...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" (id. at 572).

However, the Court added that:

"To be distinguished from agency records compiled for law enforcement purposes which illustrate investigative techniques, are those which articulate the agency's understanding of the rules and regulations it is empowered to enforce. Records drafted by the body charged with enforcement of a statute which merely clarify procedural or substantive law must be disclosed. Such information in the hands of the public does not impede effective law enforcement. On the contrary, such knowledge actually encourages voluntary compliance with the law by detailing the standards with which a person is expected to comply, thus allowing him to conform his conduct to those requirements (see Stokes v. Brennan, 476 F2d 699, 702; Hawkes v. Internal Revenue Serv., 467 F2d 787, 794-795; Davis, Administrative Law [1970 Supp], section 3A, p 114).

"Indicative, but not necessarily dispositive of whether investigative techniques are nonroutine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel (see Cox v.

United States Dept. of Justice, 576 F2d 1302, 1307-1308; City of Concord v. Ambrose, 333 F Supp 958)."

In applying those criteria to specific portions of the manual, which was compiled for law enforcement purposes, the Court found that:

"Chapter V of the Special Prosecutor's Manual provides a graphic illustration of the confidential techniques used in a successful nursing home prosecution. None of those procedures are 'routine' in the sense of fingerprinting or ballistic tests (see Senate Report No. 93-1200, 93 Cong 2d Sess [1974]). Rather, they constitute detailed, specialized methods of conducting an investigation into the activities of a specialized industry in which voluntary compliance with the law has been less 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).

Posting of the speed limit encourages drivers to comply with law by not exceeding the legal limit. In this region, it is announced in advance that there will be DWI checkpoints; presumably the announcement is intended to discourage drivers from drinking. Similarly, in the context of the situation that you described, if it is known that a camera is used in a certain location, that knowledge may encourage drivers to obey and comply with law.

Lastly, the Court in Fink considered the intent of the Freedom of Information Law and found that "the balance is presumptively struck in favor of disclosure", that an agency must "articulate particularized and specific justification" to deny access to a record, and that a record may properly be withheld only when "the material requested falls squarely within the ambit" of one of the grounds for denial (id., 571).

It is doubtful in my view, in consideration of the disclosures routinely made through the distribution of Notices of Liability and the general thrust of the Freedom of Information Law, that the Department could justify a denial of access to the information sought.

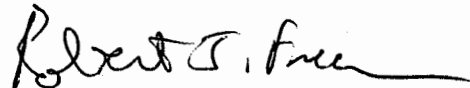
Mr. Luciano Di Norcia

December 19, 2000

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: Susan A. Spector
Seth Cummins



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12413

Committee Members

Mary O. Donohue
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December 19, 2000

Executive Director

Robert J. Freeman

Ms. Wendy A. Banen

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Banen:

As you are aware, I have received your letter of November 12 and the materials relating to it. You have sought guidance concerning a request for a variety of records of the Metro-North Commuter Railroad. The records apparently relate to an accident that occurred on one of Metro-North's trains. As of the date of your correspondence with this office, you had received no response to your requests.

In this regard, I offer the following comments.

First, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body,

who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

If you have not yet received a proper response, it is suggested that you contact Mr. Jerome, the records access officer, to ascertain the name of the person to whom you may appeal.

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, two of the grounds for denial are pertinent to an analysis of rights of access.

Perhaps most relevant is §87(2)(g), which deals with communications between or among officers or employees of government agencies subject to the Freedom of Information Law. As such, that provision would be applicable with respect to statements by the crew or other employees of Metro-North, as well as memoranda or similar communications prepared by Metro-North staff and transmitted to other staff of that agency. It is emphasized that the cited provision potentially serves as a basis for a denial of access, but that, due to its structure, it may require disclosure. Section 87(2)(g) permits an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations; or
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

Ms. Wendy A. Banen

December 19, 2000

Page - 3 -

In the context of your request, statements by Metro-North employees would appear to be available insofar as they consist of statistical or factual information. However, those portions of the materials that reflect their opinions or impressions of what may have occurred would likely be deniable. Additionally, the "Train Service Manual" and similar documentation would appear to consist of instructions to staff that affect the public or represent Metro-North's policy. Maintenance records might also include factual information. If that is so, those records or portions thereof would, in my view, also be available.

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." In my opinion, it is likely that personally identifying details pertaining to witnesses and others who are members of the public, not employees of Metro-North, could be deleted to protect their privacy. Those personally identifying details could be deleted, for example, from statements made by witnesses or from letters or memoranda that identify those persons.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Jerry Jerome



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-A0 - 12414

Committee Members

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December 19, 2000

Executive Director

Robert J. Freeman

Mr. Philip Christe

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Christe:

I have received your letter of November 8, as well as the materials attached to it. You have sought an advisory opinion concerning a denial of access to certain records by the Bedford Central School District. In brief, the records at issue have been withheld on the ground that they are "preliminary" and not final.

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to agency records, and §86(4) of the Law defines the term "record" to mean:

"any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, a draft or other documentation characterized as "preliminary", in my opinion, would constitute a "record" subject to rights of access conferred by the Freedom of Information Law, even though it is not final.

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 primary significance in the context of your inquiry is §87(2)(g). Although that provision serves as one of the grounds for denial of access to records, due to its structure, it often requires substantial disclosure. The cited provision permits an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations; or
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

I note that in a case that reached the Court of Appeals, the state's highest court, one of the contentions was that certain reports could be withheld because they were not final and because they related to incidents for which no final determination had been made. The Court rejected that finding and stated that:

"...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87(2)(g)]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)..."
[Gould et al. v. New York City Police Department, 87 NY2d 267, 276 (1996)].

In short, that the records are "draft" or "preliminary" would not represent an end of an analysis of rights of access or an agency's obligation to review the entirety of their contents to determine rights of access.

The Court also dealt with the issue of what constitutes "factual data" that must be disclosed under §87(2)(g)(i). In its consideration of the matter, the Court found that:

"...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][i]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182).

"Against this backdrop, we conclude that the complaint follow-up reports contain substantial factual information available pursuant to the provisions of FOIL. Sections of the report are devoted to such purely factual data as: the names, addresses, and physical descriptions of crime victims, witnesses, and perpetrators; a checklist that indicates whether the victims and witnesses have been interviewed and shown photos, whether crime scenes have been photographed and dusted for fingerprints, and whether neighborhood residents have been canvassed for information; and a blank space denominated 'details' in which the officer records the particulars of any action taken in connection with the investigation" (id., 276-277)."

I would conjecture that some elements of the records sought, in accordance with the direction offered by the Court of Appeals, would consist of statistical or factual information that must be disclosed, irrespective of their status as draft or preliminary.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm
cc: Dr. Bruce Dennis
Verna Carr



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12415

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December 20, 2000

Executive Director

Robert J. Freeman

Mr. Edmund J. Wiatr, Jr.

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Wiatr:

I have received your letter of November 14 in which you sought an advisory opinion concerning a denial of access to certain records by the City of Utica School District.

As I understand the situation, your daughter was terminated from her position as a probationary teacher, and she requested, among other items, "all documents used by the Superintendent concerning his Recommendation for retention and/or termination together with all handscribed notes giving rise to same." The District Clerk indicated that any such documentation, if it exists, "would be considered intra-agency in nature and exempt from the FOIL law."

In this regard, as you may be aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Pertinent to the matter is §87(2)(g), which deals with "inter-agency" and "intra-agency" materials. Section 86(3) defines the term "agency" to mean:

"any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, "inter-agency" materials consist of communications between or among state or local government agencies. "Intra-agency" materials consist of communications between or among officials of the same agency or, for example, notes prepared by an agency employee. As such, the Superintendent's handwritten notes, as well as communications with the Board of Education or its members or other staff of the District would constitute "intra-agency" materials.

Mr. Edmund J. Wiatr, Jr.

December 20, 2000

Page - 2 -

The contents of those materials represent the factors applicable in determining rights of access. Specifically, §87(2)(g) authorizes an agency to withhold records that:

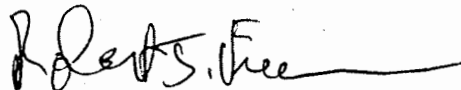
"are inter-agency or intra-agency materials which are not:

- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations; or
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

I hope that the foregoing serves to clarify your understanding of the Freedom of Information Law and that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: David Bruno

FOIA-AO-12416

From: Robert Freeman
To: "JoeT@Highcaliber.com".GWIA.DOS1
Subject: Re: SUNY College Council Handbook?

Dear Mr. Tartaglia:

In my view, the handbook that you described is clearly available under the NY Freedom of Information Law.

In brief, that statute is based on a presumption of access. Stated differently, all government agency records are available, except to the extent that one or more grounds for denial may properly be asserted. In this instance, although the handbook might be characterized as an internal document, or in the words of the Freedom of Information Law, "intra-agency material", the provision dealing with those materials specifies that they must be disclosed insofar as they consist of "instructions to staff that affect the public" or "final agency policy or determinations" [see §87(2)(g)(ii) and (iii)].

The handbook should be available from either the State University's central offices or from any of the colleges that maintain a copy.

I note that agencies are required to designate at least one person 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. Each college within the SUNY system should have a records access officer.

I hope that I have been of assistance. Should any further questions arise, please feel free to contact me.



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FOIL-AO-12417

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Carole E. Stone
Alexander F. Treadwell

December 20, 2000

Executive Director

Robert J. Freeman

E-Mail

TO: Louis Cella [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. Cella:

I have received your letter of November 15. You have raised the following question:

“When requesting Social Services documents that are requested by the individual that received Public Assistance and are repeatedly told that the documents are ready for mailing, how long from the date of the notarized request does Social Services have to release these documents?”

In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Pertinent with respect to the records at issue is §87(2)(a), which authorizes agencies to withhold records that “are specifically exempted from disclosure by state or federal statute.” One such state, §136 of the Social Services Law, prohibits disclosure to the public of records that would identify applicants for or recipients of public assistance. However, as you may be aware, under regulations promulgated by what was formerly the State Department of Social Services and which remain in effect, the subject of such records generally has rights of access to them. As such, rights of access are not in my opinion conferred by the Freedom of Information Law but rather by regulations based on the authority conferred by the Social Services Law.

Second, since the Freedom of Information Law deals with all agency records, I believe that the provisions of that statute serve to provide guidance concerning the time within which agencies

must respond to requests. It is noted that in §84, its statement of intent, that statute provides that accessible records should be made available "wherever and whenever feasible." In my view, that phrase indicates that agencies should not engage in unreasonable delays in disclosing records. Further, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI C-140924/18

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December 27, 2000

Executive Director

Robert J. Freeman

Mr. Anthony Tartaglia, Jr.

Dear Mr. Tartaglia:

As you are aware, a copy of a letter sent to you by Assemblyman Marc W. Butler on December 15 as been forwarded to the Committee on Open Government. Having reviewed the correspondence attached to it, I offer the following comments.

First, I note that there is a federal Freedom of Information Act, which pertains to records maintained by federal agencies. Relevant to the matter in which you are involved is the New York Freedom of Information Law, which applies to records maintained by entities of state and local government. Neither state legislators nor members of Congress are empowered to enforce those statutes, and the primary function of the Committee on Open Government involves providing advice and guidance concerning the New York Freedom of Information Law. The Committee cannot compel an agency to comply with law or otherwise grant or deny access to records.

If a person is denied access to records by an agency, first, he or she may appeal the denial 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. In addition, each agency shall immediately forward to the committee on open government a copy of such appeal and the ensuing determination thereon."

In the case of a town, an appeal would be made to the governing body, the town board, or a person designated by the town board to determine appeals. If an appeal is denied, 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.

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

Mr. Anthony Tartaglia, Jr.

December 27, 2000

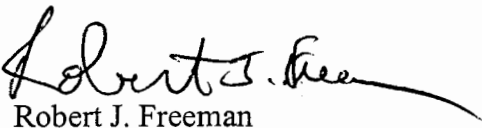
Page - 2 -

response to a request. In one of your letters, you indicated that you could not obtain records from the Town of Northampton that "explain the miss use [sic] of community funds." If there are no records that contain such an explanation, the Town would not be required to prepare records that include an explanation on your behalf. Similarly, in another item of correspondence, you sought documentation reflective of a "verification" that a certain condition is safe. Again, if there is no such record, the Town would not be obliged to create a record, and the Freedom of Information Law would not apply.

Lastly, having discussed the matter with W. Roy Scott of the Codes Division, I was informed that there are currently no code violations relative to the matter to which you have referred, and that it is his belief that the Town has disclosed to you all of the records that it maintains concerning the matter.

I hope that the foregoing serves to enhance your understanding of the Freedom of Information Law and that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Marc W. Butler
W. Roy Scott
Hon. Theodore Collins



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DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

7021-00-12419

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December 27, 2000

Executive Director

Robert J. Freeman

Mark J. Forbes, President
Evans Mills Volunteer Fire Department, Inc.
P.O. Box 172
Evans Mills, NY 13637

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Forbes:

I have received your letter of November 16 in which you sought guidance concerning a request made to the Evans Mills Volunteer Fire Department, which you serve as President. The request involved audits of the Department for the years 1997, 1998 and 1999, and the applicant was informed that there are no annual audits of the Department and that, therefore, the Department does not maintain the records at issue.

In this regard, I offer the following comments.

First, as you may be aware, 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, the Freedom of Information Law generally includes entities of state and local government within its coverage; not-for-profit and other private corporations ordinarily are not subject to that statute. However, twenty years ago, the state's highest court, the Court of Appeals, determined that volunteer fire companies, despite their corporate status, are "agencies" that are required to comply with the Freedom of Information Law [Westchester-Rockland Newspapers v. Kimball, 50 NY2d 575 (1980)]. In brief, the Court found that volunteer fire companies perform what has historically been considered an essential governmental function, and that they would not exist but for their statutory and contractual relationships with units of local government.

Mark J. Forbes, President

December 27, 2000

Page - 2 -

Second, the Freedom of Information Law pertains to existing records, and §89(3) states in part that an agency is not required to create or acquire a record that it does not maintain in order to respond to a request. Therefore, if the Department maintains no audits for the years cited in the request, the Freedom of Information Law would not apply.

Third, since you referred to an audit that has not yet been completed and which is "part of an on-going criminal investigation", I note that it is likely that a record of nature 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.

Of apparent relevance to the matter is §87(2)(e), which authorizes an agency to withhold records that:

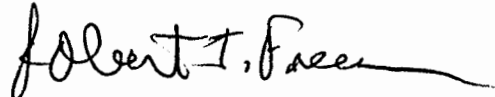
"are compiled for law enforcement purposes and which, if disclosed, would:

- i. interfere with law enforcement investigations or judicial proceedings;
- ii. deprive a person of a right to a fair trial or impartial adjudication;
- iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
- iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

If indeed the record in question is being compiled for a law enforcement purpose and disclosure would interfere with an investigation, it appears that the record might properly be withheld under the provisions of §87(2)(e).

I hope that 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-AD12420

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Executive Director

Robert J. Freeman

December 27, 2000

Mr. Leslie C. Smith, 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 facts presented in your correspondence.

Dear Mr. Smith:

I have received your letter of November 22 and the correspondence attached to it. According to the materials, you transmitted a request under the Freedom of Information Law to the Clerk of the Village of Malverne, but as of the date of your letter to this office, you had received no response. The records sought relate to "any agreement between the Village of Malverne and the School District as to the lease of...particular property by the Village of Malverne."

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. Leslie C. Smith, Sr.

December 27, 2000

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."

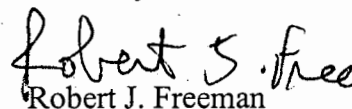
In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge 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, 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. If there is an agreement between the Village and the District, I believe that it would be available. In short, none of the grounds for denial would, in my view, be pertinent or applicable in that situation.

In an effort to enhance their understanding of and compliance with the Freedom of Information Law, copies of this response will be sent to Village officials.

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:tt

cc: Board of Trustees
Claire Salley



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

7021-A012421

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Alexander F. Treadwell

Executive Director

Robert J. Freeman

December 27, 2000

Mr. Robert J. Spence, Esq.
58 School Street, Suite 201
Glen Cove, NY 11542

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Spence:

I have received your letter of November 20, as well as the materials attached to it. I hope that you will accept my apologies for the delay in response and that you will understand that, as a matter of fairness, advisory opinions are prepared in the order in which requests for opinions are received.

By way of background, as the representative of COMPS, Inc., you requested from the Town of Islip "a copy of the most current property assessment tax rolls with inventory on computer tape..." You were informed that the records sought would not be made available unless you signed an affidavit in which you asserted the records "are not being sought...and shall not be used for any commercial/fund raising purpose." It is your view that the Town "has no basis to condition the release of its tax roll on the signing of an affidavit restricting the use of same", and you have requested an opinion on the matter.

In this regard, first, in your correspondence, you cited 5 USC §552 as the basis of your request. That statute is the federal Freedom of Information Act, which applies only to federal agencies. The statute that generally governs access to records of state and local government in New York is the Freedom of Information Law, Public Officers Law, Article 6, §§84-90.

Second, it is my understanding that there is a distinction between an assessment roll and an inventory, and that there may be a distinction in rights of access between the two kinds of records. The former includes the names and addresses of owners of parcels of real property, an identification number, reference to any exemptions, the assessed value of the parcel, the use code, and the like. The latter is analogous to a property record card, for it indicates the features of improved property, such as the square footage, number of rooms, etc.

Mr. Robert J. Spence, Esq.

December 27, 2000

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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.

As a general matter, the reasons for which a request is made and an applicant's potential use of records are irrelevant, and it has been held that if records are accessible, they should be made equally available to any person, without regard to status or interest [see e.g., M. Farbman & Sons v. New York City, 62 NYS 2d 75 (1984) and Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. However, §89(2)(b)(iii) of the Freedom of Information Law permits an agency to withhold "lists of names and addresses if such list would be used for commercial or fund-raising purposes" on the ground that disclosure would constitute an unwarranted invasion of personal privacy. Due to the language of that provision, the intended use of a list of names and addresses or its equivalent may be relevant, and case law indicates that an agency can ask that an applicant certify that the list would not be used for commercial purposes as a condition precedent to disclosure [see Golbert v. Suffolk County Department of Consumer Affairs, Sup. Ct., Suffolk Cty., (September 5, 1980); also, Siegel Fenchel and Peddy v. Central Pine Barrens Joint Planning and Policy Commission, Sup. Cty., Suffolk Cty., NYLJ, October 16, 1996].

In the case of a request for an assessment roll, §89(6) is pertinent, for that provision states that:

"Nothing in this article shall be construed to limit or abridge any otherwise available right of access at law or in equity to any party to records."

Therefore, if records are available as of right under a different provision of law or by means of judicial determination, nothing in the Freedom of Information Law can serve to diminish rights of access. In Szikszay v. Buelow [436 NYS 2d 558, 583 (1981)], it was determined that an assessment roll maintained on computer tape must be disclosed, even though the applicant requested the tape for a commercial purpose, because that record is independently available under a different provision of law, Real Property Tax Law, §516. Since the assessment roll must be disclosed pursuant to the Real Property Tax Law, the restriction concerning lists of names and addresses in the Freedom of Information Law was found to be inapplicable.

With respect to the inventory data, different provisions of the Real Property Tax Law offer direction. As you are aware, §500 requires assessors to prepare an inventory of the real property located within a city or town, and §501 states that the assessor shall publish and post notice indicating that an inventory is available at certain times. As I understand that provision, the inventory must be made available to any person for any reason when it is sought during the period specified in the notice. At that time, as in the case of the assessment roll being available to the public pursuant to a statute other than the Freedom of Information Law, the inventory would be available pursuant to §501 of the Real Property Tax Law. Before or after that specified time, however, it appears that the inventory would be subject to whatever rights exist under the Freedom of Information Law. If that is so, in the context of your inquiry, it appears that the inventory could be withheld if it would be used for a commercial or fund-raising purpose.

Mr. Robert J. Spence, Esq.

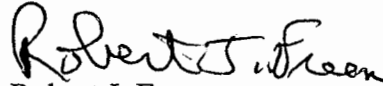
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That is the conclusion, as I interpret the decision, that was reached in a case in which you were involved, COMPS, Inc. v. Town of Huntington [703 NYS2d 225, 269 AD2d 446 (2000); motion for leave to appeal denied, ___NY2D___, NYLJ, July 6, 2000]. The Court concluded that the request was properly denied, for the record consisted of the equivalent of a list of names and addresses that was intended to be used for a commercial purpose. That being so, the record was appropriately withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy. Further, the Court specified that “[b]ecause the respondents have not utilized the inventory data for the purposes of any assessment or reassessment, they are not under any statutory duty to publish the inventory data *at this time*” (*id.*, 226; emphasis mine). Through the inclusion of the phrase, *at this time*, it appears that the Court distinguished rights of access at the time the inventory is required to be made available during the period specified in the notice required by §501 of the Real Property Tax Law from those rights extant at all other times. Based on the decision, it appears that the inventory is available to any person for any reason during the time specified in the notice, but that it may be withheld at other times if it would be used for a commercial or fund raising purpose.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt



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FOI - AD 12422

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Executive Director

Robert J. Freeman

December 27, 2000

Mr. Peter A. Walker
Seyfarth & Shaw
1270 Avenue of the Americas, 25th Floor
New York, NY 10020-1801

Dear Mr. Walker:

I appreciate having received a copy of your response to James J. Cutro relative to complaints submitted to the Katonah-Lewisboro School District by parents concerning particular teacher. You relied primarily upon paragraphs (b) and (g) of the Freedom of Information Law as the basis for denying access to the records. While I agree with the outcome, I disagree in part with the rationale for the denial.

First, you referred to complaints by parents as "intra-agency materials" that fall within the scope of §87(2)(g). In this regard, § 87(2)(g) deals with "inter-agency and intra-agency materials." Section 86(3) of the Freedom of Information Law defines the term "agency" to mean:

"any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, the exception pertains to communications between or among state or local government officials at two or more agencies ("inter-agency materials"), or communications between or among officials at one agency ("intra-agency materials"). Parents of students are not employees of or associated with an agency. Consequently, their letters to the District do not, in my view, constitute inter-agency or intra-agency materials.

Second, I concur with your contention that complaints, allegations or charges against a public employee that have not been substantiated or otherwise resulted in a determination or admission of misconduct may be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [§87(2)(b)]. However, also significant under the

Mr. Peter A. Walker
Seyfarth & Shaw
December 27, 2000
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circumstances is §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is the federal Family Educational Rights and Privacy Act (20 USC §1232g; "FERPA").

In brief, FERPA applies to all educational agencies or institutions that participate in funding, loan or grant programs administered by the United States Department of Education. As such, FERPA includes within its scope virtually all public educational institutions and many private educational institutions. The focal point of the Act is the protection of privacy of students. It provides, in general, that any "education record," a term that is broadly defined, that is personally identifiable to a particular student or students is confidential, unless the parents of students under the age of eighteen waive their right to confidentiality, or unless a student eighteen years or over similarly waives his or her right to confidentiality. The federal regulations promulgated under FERPA define the phrase "personally identifiable information" to include:

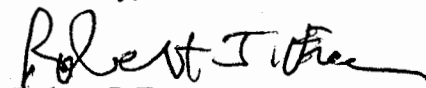
- "(a) The student's name;
- (b) The name of the student's parents or other family member;
- (c) The address of the student or student's family;
- (d) A personal identifier, such as the student's social security number or student number;
- (e) A list of personal characteristics that would make the student's identity easily traceable; or
- (f) Other information that would make the student's identity easily traceable" (34 CFR Section 99.3).

Based upon the foregoing, references to students' names or other aspects of records that would make a student's identity easily traceable, such as the names of their parents, 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.

In short, the letters in question could not, in my opinion, be disclosed insofar as a student's identity is included or is easily traceable, without the consent of a parent.

I hope that the foregoing serves to clarify your understanding of the Freedom of Information Law and that I have been of assistance. If you would like to discuss the matter, please feel free to contact me.

Sincerely,



Robert J. Freeman
Executive Director



STATE OF NEW YORK
DEPARTMENT OF STATE
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FOI-DO 12423

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Executive Director

Robert J. Freeman

December 27, 2000

Mr. Joseph A. Brill
Senior Reporter
The Register-Star
P.O. Box 635
364 Warren Street
Hudson, NY 12534

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Brill:

I have received your letter in which you sought an advisory opinion concerning "the City of Hudson's decision to deny the *Register-Star's* request for information regarding the status of disciplinary charges, financial retirement arrangements and negotiated settlements between the city and retired Police Chief Glenn Martin." The Mayor wrote that the City "cannot disclose any information concerning Mr. Martin due to the constraints of Civil Service 50-A [sic] and pursuant to the ruling of the Court of Appeals found at, In the Matter of Daily Gazette Company et al. vs. City of Schenectady et al., 93 NY2d 145 (1999)."

While I am mindful of the decision rendered in Daily Gazette and the provisions of §50-a of the Civil Rights Law, based on the thrust of the decision and its judicial interpretation, I do not believe that §50-a is applicable if an individual is no longer employed as a police officer. Further, even if §50-a remains as a bar to disclosure, it would not, in my view, serve to exempt certain of the records sought from public rights of access. In this regard, I offer the following comments.

First, as you are likely aware, the statute that generally deals with rights of access to government records in New York is the Freedom of Information Law. In brief, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

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

Mr. Joseph A. Brill

December 27, 2000

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evaluate performance toward continued employment or promotion are confidential. The Court of Appeals, in reviewing the legislative history leading to its enactment, 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 determined that the exemption from disclosure conferred by §50-a of the Civil Rights Law "was designed to limit access to said personnel records by criminal defense counsel, who used the contents of the records, including unsubstantiated and irrelevant complaints against officers, to embarrass officers during cross-examination" (id. at 568). In another decision, which dealt with unsubstantiated complaints against correction officers, the Court of Appeals held that the purpose of §50-a "was to prevent the release of sensitive personnel records that could be used in litigation for purposes of harassing or embarrassing correction officers" [Prisoners' Legal Services v. NYS Department of Correctional Services, 73 NY 2d 26, 538 NYS 2d 190, 191 (1988)].

It is emphasized that the bar to disclosure imposed by §50-a deals with personnel records that "*are used to evaluate performance toward continued employment or promotion.*" Since the officer in question has retired, there is no issue involving continued employment or promotion; he is no longer an employee or a police officer. That being so, in my opinion, the rationale for the confidentiality accorded by §50-a is no longer present, and that statute no longer is applicable or pertinent.

Second, even if the employee in question remained a police officer, and even if §50-a remained a consideration, according to the Court of Appeals' holdings in Daily Gazette and Capital Newspapers, records indicating payments for, in your words, "accrued sick, vacation and/or personal leave time as well as any payment or payments for accrued overtime or compensatory time" and "any other...benefits", those records would be accessible to the public under the Freedom of Information Law. As stated in Daily Gazette:

"...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, 93NY2d 145, 157-158 (1999)].

Because the records reflective of payments or benefits are not used to evaluate performance, and because those records are "neutral", §50-a of the Civil Rights Law would not in my opinion serve to authorize the City to deny access to those records to the public.

In Capital Newspapers, supra, the Court of Appeals unanimously affirmed a decision granting access to records indicating the days and dates of sick leave claimed by a named police officer. Those documents, like those that you requested, might be found in a police officer's personnel file, but they are not the kind of records that fall within the coverage of §50-a of the Civil Rights Law.

While tangential to the matter, I point out that §87(3) 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..."

Although §87(2)(b) of the Freedom of Information Law authorizes an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy", the courts have provided substantial direction regarding the privacy of public employees. First, it is clear that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. Second, with regard to records pertaining to public employees, the courts have found that, as a general rule, records that are relevant to the performance of a public employee's official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are

irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

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. As indicated earlier, Capital Newspapers involved a request for records reflective of the days and dates of sick leave claimed by a particular municipal police officer, and in granting access, the Court of Appeals found that the public has both economic and safety reasons for knowing when public employees perform their duties and whether they carry out those 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 the records involving payments are not exempt from disclosure under the Civil Rights Law, but rather that they must be disclosed under the Freedom of Information Law.

With regard to the settlement agreement, in addition to consideration of §87(2)(b) regarding privacy, also relevant is §87(2)(g), which states that an agency may withhold records that:

"are inter-agency or intra-agency materials which are not:

- i. statistical or factual tabulations or data;

- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations; or
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. Insofar as a request involves a final agency determination, I believe that such a determination must be disclosed, again, unless a different ground for denial could be asserted.

In 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 benefitted 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..."

In another decision involving a settlement agreement between a school district and a teacher, it was held in Anonymous v. Board of Education [616 NYS 2d 867 (1994)] that:

"...it is disingenuous for petitioner to argue that public disclosure is permissible...only where an employee is found guilty of a specific charge. The settlement agreement at issue in the instant case contains the petitioner's express admission of guilt to a number of charges and specifications. This court does not perceive the distinction between a finding of guilt after a hearing and an admission of guilt insofar as protection from disclosure is concerned" (*id.*, 870).

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).

More 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).

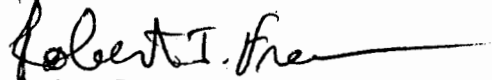
In contrast, when allegations or charges of misconduct have not yet been determined or did not result in disciplinary action or a finding of misconduct, the records relating to such allegations may, in my view, be withheld, for disclosure would result in an unwarranted invasion of personal privacy [see 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.

In sum, if the settlement resulted in the dismissal of disciplinary charges, I believe that the charges may be withheld. However, assuming that §50-a of the Civil Rights Law does not apply, and I do not believe that it does, the terms of the settlement must, in my view, be disclosed.

Mr. Joseph A. Brill
December 27, 2000
Page - 8 -

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: Hon. Kenneth G. Cranna



STATE OF NEW YORK
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Executive Director

Robert J. Freeman

December 27, 2000

Ms. Debbie Beach

The staff of the Committee on 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. Beach:

I have received your letter of November 27, as well as the correspondence attached to it. You have sought an opinion concerning "any limitations regarding the number of FOIL requests that one can do."

From my perspective, while there is no limitation on the number of requests that can be made, depending on the circumstances, an agency is not necessarily obliged to respond by granting or denying access to records.

For instance, in a situation in which a defendant requested records from a district attorney, but the district attorney had previously made the records available to the defendant's attorney, the Appellate Division found that the district attorney was not required to make a second disclosure unless it could be demonstrated that neither the defendant nor the attorney any longer had possession of the records. Specifically, the decision stated 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

Ms. Debbie Beach
December 27, 2000
Page - 2 -


requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" [Moore v. Santucci, 151 AD2d 677,678 (1989)]."

Based on the foregoing, if records were made available to your nephew, to his attorney, or to any person acting on his behalf, by the Niagara County District Attorney, the Sheriff, or any other government agency, I do not believe that any of those officials or agencies would be required to disclose those records again in response to your request, unless you can demonstrate "in evidentiary form" that your nephew, his attorney, or any person acting on behalf of your nephew no longer has possession of the records.

Additionally, in situations in which there have been repetitive requests and an agency, as in this instance, has asserted that the applicant has received all records within its file and that there are no other documents, it has been advised that an agency so inform the applicant of those findings and indicate that it will not respond to additional requests, unless the requests involve records not previously considered. Further, if repeated requests have been made and the agency has denied access to records initially and following an appeal, the person denied access has the right to attempt to resolve the matter by seeking judicial review of the determination by initiating a proceeding under Article 78 of the Civil Practice Law and Rules.

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. Clyde Buhrmaster
Hon. Matthew Murphy
Chief Deputy John T. Taylor
Kathleen Wojtaszek-Gariano



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

O.M.L. AO - 3258
FOIL AO - 12425

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December 27, 2000

Executive Director

Robert J. Freeman

Ms. RaeAnn Fitch

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Fitch:

I have received your letter of November 27 in which you asked whether "fire department commissioners...are required to follow FOIL and open meetings laws." In my view, which is based on the language of the law and its judicial interpretation, both boards of fire commissioners and volunteer fire companies are required to comply with both statutes.

The Open Meetings Law pertains to meetings of public bodies, and §102(2) of the Law defines the phrase "public body" to mean:

"...any entity, for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

Section 174(6) of the Town Law states in part that "A fire district is a political subdivision of the state and a district corporation within the meaning of section three of the general corporation law". Since a district corporation is also a public corporation [see General Construction Law, §66(1)], a board of commissioners of a fire district in my view is clearly a public body subject to the Open Meetings Law.

The Freedom of Information Law is applicable to agency records, and §86(3) of that statute defines the term "agency" to mean:

"any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council,

office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Again, a fire district is a public corporation. Consequently, I believe that it is an "agency" required to comply with the Freedom of Information Law.

With respect to volunteer fire companies, it is my understanding that most are not-for-profit corporations. Although those kinds of entities are generally private and separate from government, the Court of Appeals, the state's highest court, held some twenty years ago that volunteer fire companies are "agencies" subject to the Freedom of Information Law, despite their corporate status [Westchester-Rockland Newspapers v. Kimball, 50 NY2d 575 (1980)]. In so holding, the Court stated that:

"We begin by rejecting respondent's contention that, in applying the Freedom of Information Law, a distinction is to be made between a volunteer organization on which a local government relies for performance of an essential public service, as is true of the fire department here, and on the other hand, an organic arm of government, when that is the channel through which such services are delivered. Key is the Legislature's own unmistakably broad declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (emphasis added; Public Officers Law, §84).

"True, the Legislature, in separately delineating the powers and duties of volunteer fire departments, for example, has nowhere included an obligation comparable to that spelled out in the Freedom of Information statute (see Village Law, art 10; see, also, 39 NY Jur, Municipal Corporations, §§560-588). But, absent a provision exempting volunteer fire departments from the reach of article 6-and there is none-we attach no significance to the fact that these or other particular agencies, regular or volunteer, are not expressly included. For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objections cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely

punctuates with explicitness what in any event is implicit" (id. at 579).

Moreover, although it was contended that documents concerning the lottery were not subject to the Freedom of Information Law because they did not pertain to the performance of the company's fire fighting duties, the Court held that the documents constituted "records" subject to the Freedom of Information Law [see §86(4)].

More recently, another decision confirmed in an expansive manner that volunteer fire companies are required to comply with the Freedom of Information Law. That decision, S.W. Pitts Hose Company et al. v. Capital Newspapers (Supreme Court, Albany County, January 25, 1988), dealt with the issue in terms of government control over volunteer fire companies. In its analysis, the Court states that:

"Section 1402 of the Not-for-Profit Corporation Law is directly applicable to the plaintiffs and pertains to how volunteer fire companies are organized. Section 1402(e) provides:

'...a fire corporation, hereafter incorporated under this section shall be under the control of the city, village, fire district or town authorities having by law, control over the prevention or extinguishment of fires therein. Such authorities may adopt rules and regulations for the government and control of such corporations.'

"These fire companies are formed by consent of the Colonie Town Board. The Town has control over the membership of the companies, as well as many other aspects of their structure, organization and operation (section 1402). The plaintiffs' contention that their relationship with the Town of Colonie is solely contractual is a mischaracterization. The municipality clearly has, by law, control over these volunteer organizations which reprovide a public function.

"It should be further noted that the Legislature, in enacting FOIL, intended that it apply in the broadest possible terms. '...[I]t is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (Public Officers Law, section 84).

"This court recognizes the long, distinguished history of volunteer fire companies in New York State, and the vital services they provide to many municipalities. But not to be ignored is that their existence is inextricably linked to, dependent on, and under the control of the municipalities for which they provide an essential public service."

Ms. RaeAnn Fitch
December 27, 2000
Page - 4 -

Based upon the foregoing, it is clear that volunteer fire companies are subject to the Freedom of Information Law.

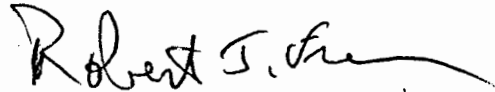
As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

When records are available under the Freedom of Information Law, it has been held that they must be made equally available to any person, without regard to status or interest [see M. Farbman & Sons v. New York City Health & Hosps. Corp., 62 NY 2d 75 (1984); Burke v. Yudelson, 51 AD 2d 673 (1976)]. The Law does not generally distinguish among applicants, and the reason for which a request is made or the residence of an applicant would be largely irrelevant to rights of access.

Lastly, in view of the decisions indicating that volunteer fire companies are subject to the Freedom of Information Law, I believe that the same result can be reached with regard to the inclusion of meetings of those entities under 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", with 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-12426

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Alexander F. Treadwell

December 28, 2000

Executive Director

Robert J. Freeman

Mr. Michael Henderson
98-R-6323
Butler Correctional Facility
P.O. Box 400
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. Henderson:

I have received your letter in which you sought guidance concerning your ability to obtain court records under the Freedom of Information Law.

In this regard, the Freedom of Information Law 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 not subject to the Freedom of Information Law. However, other statutes often deal with access to court records, and it is suggested under the circumstances that you review §166 of the Family Court Act.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12427

Committee Members

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December 28, 2000

Executive Director

Robert J. Freeman

Ms. Joan Homovich

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Homovich:

I have received your letter of December 1 in which you asked how long tape recordings of town board meetings must be retained and whether they are "open to the public for listening."

In this regard, the statute within the advisory jurisdiction of the Committee on Open Government, the Freedom of Information Law, does not address issues involving the retention and disposal of records. 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."

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

Ms. Joan Homovich

December 28, 2000

Page - 2 -

enduring value; to dispose of records in accordance with legal requirements; and to pass on to his successor records needed for the continuing conduct of business of the office...

2. No local officer shall destroy, sell or otherwise dispose of any public record without the consent of the commissioner of education. The commissioner of education shall, after consultation with other state agencies and with local government officers, determine the minimum length of time that records need to be retained. Such commissioner is authorized to develop, adopt by regulation, issue and distribute to local governments retention and disposal schedules establishing minimum retention periods..."

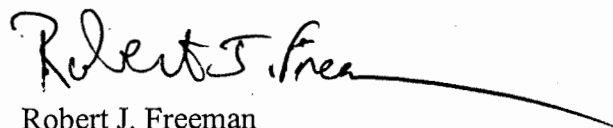
Based on the foregoing, records cannot be destroyed without the consent of the Commissioner of Education, and local officials must "have custody" and "adequately protect" records until the minimum period for the retention of the records has been reached. The functions of the Commissioner in relation to the foregoing are carried out by the State Archives and Records Administration (SARA), a unit of the State Education Department. Having discussed the matter with representatives of SARA, I have been informed that a tape recording of an open meeting must be retained for a period of at least four months from the date of the meeting before it can be destroyed, erased or reused.

With respect to public access to tape recordings of meetings, the Freedom of Information Law is the governing statute. In brief, that law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Since the contents of a tape recording could have been heard by any person present at a meeting, none of the grounds for denial would be applicable or pertinent. Further, it was held more than twenty years ago that a tape recording of an open meeting must be made available for listening and/or copying (Zaleski v. Hicksville Union Free School District, Board of Education, Supreme Court, Nassau County, NYLJ, December 27, 1978).

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL - AO - 124/28

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December 28, 2000

Executive Director

Robert J. Freeman

Mr. Joseph Capaldo
89-C-969
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. Capaldo:

I have received your letter in which you sought guidance concerning requests for records 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 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:

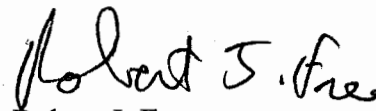
"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Mr. Joseph Capaldo
December 28, 2000
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 that reads "Robert J. Freeman". The signature is written in a cursive style 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

PPPL-AJ -
FOEL-AJ - 12429

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Carole E. Stone
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December 28, 2000

Executive Director

Robert J. Freeman

Mr. Jerald Miller
00-A-0607
Midstate Correctional Facility
P.O. Box 216
Marcy, NY 13403-0216

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Miller:

I have received your letter in which you raised several questions relating to access to records.

The first issue involves requests made under the "privacy act" for records of the Department of Correctional Services. It is assumed that you have referred to the Personal Privacy Protection Law. Although §95(1) of that statute generally grants rights of access to records to a person to whom the records pertain, §95(7) provides that rights of access conferred by that statute "shall not apply to public safety agency records". The phrase "public safety agency record" is defined by §92(8) to mean:

"a record of the commission of corrections, the temporary state commission of investigation, the department of correctional services, the division for youth, the division of probation or the division of state police or of any agency of component thereof whose primary function is the enforcement of civil or criminal statutes if such record pertains to investigation, law enforcement, confinement of persons in correctional facilities or supervision of persons pursuant to criminal conviction or court order, and any records maintained by the division of criminal justice services pursuant to sections eight hundred thirty-seven, eight hundred thirty seven-a, eight hundred thirty-seven-c, eight hundred thirty-eight, eight hundred thirty-nine, eight hundred forty-five, and eight hundred forty-five-a of the executive law."

Therefore, rights of access granted by the Personal Privacy Protection Law do not extend to records of agencies or units within agencies whose primary functions involve investigation, law enforcement or the confinement or persons in correctional facilities.

Second, you questioned the propriety of a denial or your request by the Department to review your pre-sentence report. In this regard, although the Freedom of Information Law provides broad rights of access to records, the first ground for denial, §87(2)(a), states that an agency may withhold records or portions thereof that "...are specifically exempted from disclosure by state or federal statute..." Relevant under the circumstances is §390.50 of the Criminal Procedure Law, which, in my opinion represents the exclusive procedure concerning access to pre-sentence reports.

Section 390.50(1) of the Criminal Procedure Law states that:

"Any pre-sentence report or memorandum submitted to the court pursuant to this article and any medical, psychiatric or social agency report or other information gathered for the court by a probation department, or submitted directly to the court, in connection with the question of sentence is confidential and may not be made available to any person or public or private agency except where specifically required or permitted by statute or upon specific authorization of the court. For purposes of this section, any report, memorandum or other information forwarded to a probation department within this state is governed by the same rules of confidentiality. Any person, public or private agency receiving such material must retain it under the same conditions of confidentiality as apply to the probation department that made it available."

In addition, subdivision (2) of §390.50 states in part that: "The pre-sentence report shall be made available by the court for examination and copying in connection with any appeal in the case..."

In view of the foregoing, I believe that a pre-sentence report may be made available only upon the order of a court, and only under the circumstances described in §390.50 of the Criminal Procedure Law. It is suggested that you review that statute.

The remaining issue relates to the receipt of requests by agencies. From my perspective, if it can be proven that mail was delivered to and an agency received a request on a certain date, the agency has five business days from that date to grant the request, deny access in writing, or acknowledge the receipt of the request in writing that includes an approximate date when it can be anticipated that a request be granted or denied [see Freedom of Information Law, §89(3)].

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-AJ-12430

Committee Members

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December 28, 2000

Executive Director

Robert J. Freeman

Mr. Carter Howard
95-A-1559
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. Howard:

I have received your letter in which you described a series of problems in attempting to obtain records from the Department of Correctional Services.

Based on your commentary, first, it appears that a possible area of difficulty involves the requirement imposed by §89(3) of the Freedom of Information Law that an applicant must "reasonably describe" the records sought. In consideration of that provision, a request must include sufficient detail to enable the staff of an agency to locate and identify the records. I note that whether a request meets that standard may be dependent on the nature of an agency's filing or recordkeeping system. For instance, if as apparently suggested by Mr. Shepard, certain records are maintained by facility rather than by the name of a person involved, a request based on a name might not "reasonably describe" the record, for the record could not be found on that basis.

Second, when a request is properly made, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests and appeals. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been

Mr. Carter Howard
December 28, 2000
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)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12431

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Carole E. Stone
Alexander F. Treadwell

December 28, 2000

Executive Director

Robert J. Freeman

Mr. Ramzan Ali
97-A-1989
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. Ali:

I have received your letter in which you indicated that your requests to the New York City Police Department and a court for your arrest warrant had not been answered.

In this regard, first, I point out that the Freedom of Information Law is applicable to agency records, and that §86(3) defines the term "agency" to include:

"any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines the term "judiciary" to mean:

"the courts of the state, including any municipal or district court, whether or not of record."

Based on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law (see e.g., Judiciary Law, §255) may grant broad public access to those records. Even though other statutes may deal with access to court records, the procedural provisions associated with the Freedom of Information Law (i.e., those involving the designation of a records access officer or the right to appeal a denial) would not ordinarily be applicable. It is suggested that any request for court records be made to the clerk of the appropriate court.

Second, as indicated above, the Freedom of Information Law applies to agencies, such as the Police Department, and the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) require that each agency designate one or more persons as "records access officer." The records access officer has the duty of coordinating the agency's response to requests for records, and requests should generally be made to that person.

Third, the Freedom of Information Law provides direction concerning the time and manner in which an agency must respond to a request. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

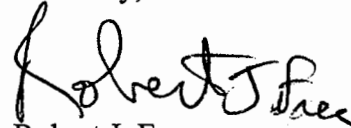
In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Lastly, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 were arrested and apparently convicted, I do not believe that any of the grounds for denial could properly be cited by an agency to withhold the record in question. Further, if a copy is maintained by a court, it would appear to be available under the Judiciary Law.

Mr. Ramzan Ali
December 28, 2000
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



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3262
FOIL-AO-12432

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December 28, 2000

Executive Director

Robert J. Freeman

Mr. Stan Wertheimer

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Wertheimer:

As you are aware, I have received your letter of December 3 in which you sought an advisory opinion involving a request for minutes of meetings of the Centerport Fire Department that has been denied.

In consideration of the requirements imposed by the Open Meetings and Freedom of Information Laws, I believe that the records in question must be disclosed. In this regard, I offer the following comments.

By way of background, the Open Meetings Law pertains to meetings of public bodies, and §102(2) of the Law defines the phrase "public body" to mean:

"...any entity, for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

Section 174(6) of the Town Law states in part that "A fire district is a political subdivision of the state and a district corporation within the meaning of section three of the general corporation law". Since a district corporation is also a public corporation [see General Construction Law, §66(1)], a board of commissioners of a fire district in my view is clearly a public body subject to the Open Meetings Law.

The Freedom of Information Law is applicable to agency records, and §86(3) of that statute defines the term "agency" to mean:

"any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Again, a fire district is a public corporation. Consequently, I believe that it is an "agency" required to comply with the Freedom of Information Law.

With respect to volunteer fire companies, it is my understanding that most are not-for-profit corporations. Although those kinds of entities are generally private and separate from government, the Court of Appeals, the state's highest court, held some twenty years ago that volunteer fire companies are "agencies" subject to the Freedom of Information Law, despite their corporate status [Westchester-Rockland Newspapers v. Kimball, 50 NY2d 575 (1980)]. In so holding, the Court stated that:

"We begin by rejecting respondent's contention that, in applying the Freedom of Information Law, a distinction is to be made between a volunteer organization on which a local government relies for performance of an essential public service, as is true of the fire department here, and on the other hand, an organic arm of government, when that is the channel through which such services are delivered. Key is the Legislature's own unmistakably broad declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (emphasis added; Public Officers Law, §84).

"True, the Legislature, in separately delineating the powers and duties of volunteer fire departments, for example, has nowhere included an obligation comparable to that spelled out in the Freedom of Information statute (see Village Law, art 10; see, also, 39 NY Jur, Municipal Corporations, §§560-588). But, absent a provision exempting volunteer fire departments from the reach of article 6-and there is none-we attach no significance to the fact that these or other particular agencies, regular or volunteer, are not expressly included. For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objections cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely

punctuates with explicitness what in any event is implicit" (id. at 579).

Moreover, although it was contended that documents concerning the lottery were not subject to the Freedom of Information Law because they did not pertain to the performance of the company's fire fighting duties, the Court held that the documents constituted "records" subject to the Freedom of Information Law [see §86(4)].

More recently, another decision confirmed in an expansive manner that volunteer fire companies are required to comply with the Freedom of Information Law. That decision, S.W. Pitts Hose Company et al. v. Capital Newspapers (Supreme Court, Albany County, January 25, 1988), dealt with the issue in terms of government control over volunteer fire companies. In its analysis, the Court states that:

"Section 1402 of the Not-for-Profit Corporation Law is directly applicable to the plaintiffs and pertains to how volunteer fire companies are organized. Section 1402(e) provides:

'...a fire corporation, hereafter incorporated under this section shall be under the control of the city, village, fire district or town authorities having by law, control over the prevention or extinguishment of fires therein. Such authorities may adopt rules and regulations for the government and control of such corporations.'

"These fire companies are formed by consent of the Colonie Town Board. The Town has control over the membership of the companies, as well as many other aspects of their structure, organization and operation (section 1402). The plaintiffs' contention that their relationship with the Town of Colonie is solely contractual is a mischaracterization. The municipality clearly has, by law, control over these volunteer organizations which reprovide a public function.

"It should be further noted that the Legislature, in enacting FOIL, intended that it apply in the broadest possible terms. '...[I]t is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (Public Officers Law, section 84).

"This court recognizes the long, distinguished history of volunteer fire companies in New York State, and the vital services they provide to many municipalities. But not to be ignored is that their existence is inextricably linked to, dependent on, and under the control of the municipalities for which they provide an essential public service."

Based upon the foregoing, it is clear that they are subject to the Freedom of Information Law, and in view of the decisions indicating that volunteer fire companies are subject to the Freedom of Information Law, I believe that the same result can be reached with regard to the inclusion of meetings of those entities under the Open Meetings Law.

Lastly, the Open Meetings Law includes provisions regarding minutes of meetings. Specifically, §106 of that statute states that:

"1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.

2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.

3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

Consequently, minutes must be prepared and made available within two weeks. It is also noted that there is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. Nevertheless, as a matter of practice or policy, many public bodies approve minutes of their meetings. In the event that minutes have not been approved, to comply with the Open Meetings Law, it has consistently been advised that minutes be prepared and made available within two weeks, and that they may be marked "unapproved", "draft" or "non-final", for example. By so doing within the requisite time limitations, the public can generally know what transpired at a meeting; concurrently, the public is effectively notified that the minutes are subject to change.

In an effort to enhance compliance with and understanding of open government laws, a copy of this opinion will be forwarded to Mr. Geffken, the President of the Centerport Fire Department.

Mr. Stan Wertheimer
December 28, 2000
Page - 5 -

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 that extends to the right.

Robert J. Freeman
Executive Director

RJF:jm

cc: Mr. Geffken



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

707-190-12433

Committee Members

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December 28, 2000

Executive Director

Robert J. Freeman

Mr. Willie J. Brown
93-A-3721
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. Brown:

I have received your letter in which sought guidance concerning a request for records made to the Office of the Albany County District Attorney 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, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

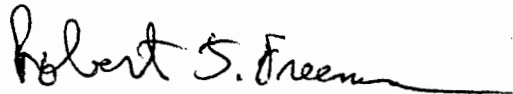
Mr. Willie J. Brown
December 28, 2000
Page - 2 -

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)].

Lastly, you asked how you might obtain information indicating the "exact date when an attorney was appointed to the City Court bench in Cohoes, NY." I would conjecture that there are several possible sources of a record containing the date. You might contact the office of the City Clerk or the Office of Court Administration. In addition, even though court records are not subject to the Freedom of Information Law, other provisions of law often grant access to court records [see e.g., Judiciary Law, §255], and it is suggested that a record including the date would likely be maintained by and available from the clerk of the City Court.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

7081-AD-12434

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December 28, 2000

Executive Director

Robert J. Freeman

Mr. Edward Bennedy
99-B-1303
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. Bennedy:

I have received your letter in which you questioned "how [you] go about getting information from a county agency after they have denied [your] request and [your] appeal."

In this regard, §89(4)(b) of the Freedom of Information Law indicates that a person whose appeal has been denied may initiate a proceeding under Article 78 of the Civil Practice Law and Rules to seek judicial review of the agency's determination to deny access to 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-A0-12435

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December 28, 2000

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 in which you asked that this office comment with respect to a denial of your request for records by the Office of the Nassau County District Attorney.

One category of records sought involves recommendations offered by the Office of the District Attorney to the Division of Parole. In this regard, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Pertinent to the matter is §87(2)(g), which enables an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations; or
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that

Mr. Charles Hili
December 28, 2000
Page - 2 -

are reflective of opinion, advice, recommendation and the like could in my view be withheld. Since the records in question consist of recommendations offered by one agency to another, I believe that they could be withheld under §87(2)(g), and that conclusion was recently confirmed judicially [see Ramalho v. Bruno, 273 AD2d 521 (2000)].

The second category of records appears to involve certain correspondence between the Office of the District Attorney and the FBI. Those records were also withheld under §87(2)(g). From my perspective, that provision is inapplicable as a basis for denial. Section 86(3) of the Freedom of Information Law defines "agency" to include:

"any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

The language quoted above indicated that an "agency" is an entity of state or local government in New York. While there is no case law of which I am aware that deals specifically with the status of communications with a federal agency, since the definition of "agency" does not include a federal agency, it does not appear that §87(2)(g) could be cited as a means of withholding records communicated between the Authority and a federal governmental entity, for such an entity would not be an agency for the purpose of the Freedom of Information Law. I note that there is case law involving the assertion of §87(2)(g) in relation to communications between agencies and entities other than New York state or municipal governments. In both instances, it was held that the assertion of §87(2)(g) was erroneous [see Community Board 7 of Borough of Manhattan v. Schaeffer, 570 NYS 2d 769; affirmed, 83 AD2d 422; reversed on other grounds, 84 NY2d 148 (1994); also Leeds v. Burns, 613 NYS 2d 46, 205 AD2d 540 (1994)].

Next, the response indicates that a certain aspect of your request was unclear. In this regard, §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, as suggested in the response, a request should include sufficient detail to enable agency staff to locate and identify the records.

Lastly, you questioned the propriety of a denial of access to certain statements made to a prosecutor that were not used in open court. 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", and that witness statements may ordinarily be withheld.

Third, assuming that the records involving interviews or statements have not been previously disclosed, I believe that 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 or the contents of other records have already been disclosed. If disclosure of the records in question would not serve to infringe upon a person's 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.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Daniel T. Butler



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOI-1A0-12436

Committee Members

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Executive Director
Robert J. Freeman

December 28, 2000

Mr. Aaron Taylor
87-A-8690
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 facts presented in your correspondence.

Dear Mr. Taylor:

I have received your letter in which you raised a series of questions concerning a request for records made to the office of a district attorney under "both state and federal Freedom of Information Acts." In this regard, I offer the following comments.

First, the federal Freedom of Information Act (5 USC §552) pertains only to federal agencies; it does not apply to records of entities of state and local government, such as offices of district attorneys. The statute that generally deals with rights of access to records of state and local government is the New York Freedom of Information Law.

With respect to the time for responding to requests, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

Based on the foregoing, an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date indicating when it can be anticipated that a request will be granted or denied. The acknowledgement by the records access officer did not make reference to such a date.

I note that there is no precise time period within which an agency must grant or deny access to records. The time needed to do so may be dependent upon the volume of a request, the possibility that other requests have been made, the necessity to conduct legal research, the search and retrieval techniques used to locate the records and the like. In short, when an agency acknowledges the receipt of a request because more than five business days may be needed to grant or deny a request, so long as it provides an approximate date indicating when the request will be granted or denied, and that date is reasonable in view of the attendant circumstances, I believe that the agency would be acting in compliance with law.

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

You have questioned your right to obtain witness statements, an arrest report and the complaint report prepared by the investigating police officer. In this regard, I am unfamiliar with any criminal proceeding or which records might have been disclosed or withheld during such a proceeding. 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 involving interviews of witnesses have not been previously disclosed, I believe that the Freedom of Information Law would determine rights of access. As a

general matter, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, several of the grounds for denial could be pertinent.

Section 87(2)(b) permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". From my perspective, the propriety of a denial of access would, under the circumstances, be dependent upon the nature of statements by witnesses or the contents of other records have already been disclosed. If disclosure of the records in question would not serve to infringe upon witnesses' privacy in view of prior disclosures, §87(2)(b) might not justifiably serve as a basis for denial. However, if the statements in question include substantially different information, that provision may be applicable.

Also potentially relevant is §87(2)(e), which permits an agency to withhold records that:

"are compiled for law enforcement purposes and which, if disclosed, would:

- i. interfere with law enforcement investigations or judicial proceedings;
- ii. deprive a person of a right to a fair trial or impartial adjudication;
- iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
- iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my view, the foregoing indicates that records compiled for law enforcement purposes can be withheld to the extent that disclosure would result in the harmful effects described in subparagraphs (i) through (iv) of §87(2)(e).

Section 87(2)(f) permits an agency to withhold records to the extent that disclosure would "endanger the life or safety of any person." Without knowledge of the facts and circumstances of your case, I could not conjecture as to the relevance of that provision.

Lastly, §87(2)(g), would be relevant with respect to records prepared by police officers or other agency staff. That provision authorizes an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;

Mr. Aaron Taylor
December 28, 2000
Page - 4 -

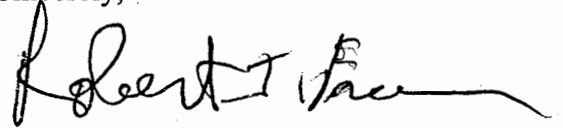
iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those 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:tt



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12437

Committee Members

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Executive Director

Robert J. Freeman

December 28, 2000

Mr. Roshawn Sullivan
92-A-2616
Auburn Correctional Facility
135 State Street, Box 618
Auburn, NY 13024

Dear Mr. Sullivan:

I have received your appeal concerning a denial of a request made under the Freedom of Information Law for records of a unit of the Department of Correctional Services.

In this regard, the Committee on Open Government is authorized to provide advice and opinions relating to 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."

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 the foregoing serves to clarify your understanding of the matter and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL - AO - 12438

Committee Members

Mary O. Donohue
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Executive Director

Robert J. Freeman

December 29, 2000

Mr. Diallo Rafik Madison
94-A-7376
Upstate Correctional Facility
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. Madison:

I have received your letter in which you sought guidance concerning rights of access to records relating to your arrest in Kings County.

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 a request should ordinarily be directed to that person. Under the circumstances, it is suggested that a request be made to the records access officer at the 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

Mr. Diallo Rafik Madison

December 29, 2000

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)].

Third, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Since I am unaware of the contents of the records in which you are interested or the effects of their disclosure, I cannot offer specific guidance. Nevertheless, the following paragraphs will review the provisions that may be significant in determining rights of access to the records in question.

In considering the records falling within the scope of your request, relevant is a decision by the Court of Appeals concerning 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.

Mr. Diallo Rafik Madison

December 29, 2000

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 subparagraphs (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, based on the decision rendered in Moore v. Santucci [151 AD2d 677 (1989)], if a record was previously made available to you or your attorney, i.e., in conjunction with a criminal proceeding, 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

Mr. Diallo Rafik Madison

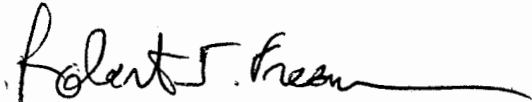
December 29, 2000

Page - 4 -

demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

I hope that I have been of assistance.

Sincerely,

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-90-12439

Committee Members

Mary O. Donohue
Alan Jay Gerson
Walter W. Grunfeld
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Executive Director

Robert J. Freeman

December 29, 2000

Mr. Victor Rivera
88-A-5706
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 facts presented in your correspondence.

Dear Mr. Rivera:

I have received your letter in which you sought guidance concerning a request for certain data made to the Division of Parole. You requested totals of the number of appeals in the past two years involving decisions that were modified or affirmed, the number of violators during 1996 and 1999.

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. Therefore, if the Division does not maintain the "totals" that you are seeking, it would not be required to prepare new records on your behalf in response to the request. On the other hand, if the Department has prepared the totals in which you are interested, I believe that they would be available under §87(2)(g)(i) 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,

Robert J. Freeman
Executive Director

RJF:tt

cc: Terrence X. Tracy



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOL-AD-12440

Committee Members

Mary O. Donohue
Alan Jay Gerson
Walter W. Grunfeld
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Executive Director

Robert J. Freeman

December 29, 2000

Mr. John Murphy
82-A-4853
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 facts presented in your correspondence.

Dear Mr. Murphy:

I have received your letter in which you raised questions concerning rights of access to hospital records, medical examiners' reports and serologist reports.

In this regard, first, if records are maintained by a private hospital, the Freedom of Information Law would not apply. That statute is generally applicable to records of entities of state and local government.

Second, when it does apply, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 hospital and other medical records, it is likely that the initial ground for denial, §87(2)(a), would be pertinent. That provision deals with records that are "specifically exempted from disclosure by state or federal statute." Statutes within the Public Health Law (see e.g., §18) indicate that medical records are available only in certain circumstances, and that they are not available to the public. Further, §87(2)(b) states that an agency may withhold records when disclosure would constitute "an unwarranted invasion of personal privacy", and §89(2)(b) includes a series of examples of unwarranted invasions of privacy. The first two such examples include reference to medical histories and "items involving the medical or personal records of a client or patient in a medical facility."

Mr. John Murphy
December 29, 2000
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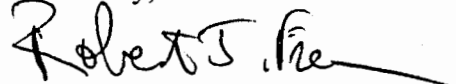
Lastly, another statute that exempts records from disclosure by statute is §677 of the County Law, which refers to autopsy reports and related records. Subdivision (3), paragraph (b) of that provision states that:

"Such records shall be open to inspection by the district attorney of the county. Upon application of the personal representative, spouse or next of kin of the deceased to the coroner or the medical examiner, a copy of the autopsy report, as described in subdivision two of this section shall be furnished to such applicant. Upon proper application of any person who is or may be affected in a civil or criminal action by the contents of the record of any investigation, or upon application of any person having a substantial interest therein, an order may be made by a court of record, or by a justice of the supreme court, that the record of that investigation be made available for his inspection, or that a transcript thereof be furnished to him, or both."

Based upon the foregoing, the Freedom of Information Law in my opinion is inapplicable as a basis for seeking or obtaining an autopsy report or other records described in §677, for the ability to obtain such records is based solely on §677(3)(b). In my view, only a district attorney and the next of kin of the deceased have a right of access to records subject to §677; any others would be required to obtain a court order based on demonstration of substantial interest in the records.

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-RO-12441

Committee Members

Mary O. Donohue
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Executive Director

Robert J. Freeman

December 29, 2000

Mr. Albert Doolen
95-B-2477
Greene Correctional Facility
P.O. Box 975
Coxsackie, NY 12051

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Doolen:

You have asked that I review and comment on a request that you have made under the Freedom of Information Law relating to an investigation that led to your arrest.

In this regard, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Since I am unaware of the contents of the records in which you are interested or the effects of their disclosure, I cannot offer specific guidance. Nevertheless, the following paragraphs will review the provisions that may be significant in determining rights of access to the records in question.

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 subparagraphs (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.

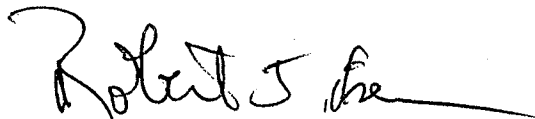
Mr. Albert Doolen
December 29, 2000
Page - 3 -

Lastly, based on the decision rendered in Moore v. Santucci [151 AD2d 677 (1989)], if a record was previously made available to you or your attorney, i.e., in conjunction with a criminal proceeding, there must be a demonstration that neither you nor your attorney possesses the record in order to successfully obtain a second copy. Specifically, the decision states that:

"...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt
Enc.



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

7011-A0 - 12442

Committee Members

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Executive Director

Robert J. Freeman

December 29, 2000

Mr. Nathan Sams
80-B-1042
Fishkill Correctional Facility
P.O. Box 1245
Beacon, NY 12508

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Sams:

I have received your letter in which you asked to whom requests for records and appeals may be made at certain agencies.

In this regard, this office does not maintain a list of those persons. However, 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 ordinarily should be made to that person. His or her name is not needed to make a valid request. Further, in the event of a denial of access to records, a response of that nature must include reference to the applicant's right to appeal the denial and the name and address of the person or body to whom an appeal may be directed.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12443

Committee Members

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Executive Director

Robert J. Freeman

December 29, 2000

Mr. Dennis Gonzalez
96-A-1694
Elmira Correctional Facility
P.O. Box 500
Elmira, NY 14902

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Gonzalez:

I have received your letter and the correspondence attached to it relating to your request for records directed to the Office of the Bronx County District Attorney. It appears that the Assistant District Attorney who responded to your inquiry contends that your attorney must seek records on your behalf because the records sought may be used in conjunction with an appeal.

In this regard, based on a review of the materials, I offer the following comments.

First, since you asked that fees be waived, I note that it has been held that nothing in the Freedom of Information Law refers to the waiver of fees. Further, that being so, 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 courts have provided direction concerning the Freedom of Information Law as opposed to the use of discovery under the Civil Practice Law and Rules (CPLR) in civil proceedings, and discovery in criminal proceedings under the Criminal Procedure Law (CPL). The principle is that the Freedom of Information Law is a vehicle that confers rights of access upon the public generally, while the disclosure provisions of the CPLR or the CPL, for example, are separate vehicles that may require or authorize disclosure of records due to one's status as a litigant or defendant.

As stated by the Court of Appeals in a case involving a request made under the Freedom of Information Law by a person involved in litigation against an agency: "Access to records of a government agency under the Freedom of Information Law (FOIL) (Public Officers Law, Article 6) is not affected by the fact that there is pending or potential litigation between the person making the

request and the agency" [Farbman v. NYC Health and Hospitals Corporation, 62 NY 2d 75, 78 (1984)]. Similarly, in an earlier decision, the Court of Appeals determined that "the standing of one who seeks access to records under the Freedom of Information Law is as a member of the public, and is neither enhanced...nor restricted...because he is also a litigant or potential litigant" [Matter of John P. v. Whalen, 54 NY 2d 89, 99 (1980)]. The Court in Farbman, supra, discussed the distinction between the use of the Freedom of Information Law as opposed to the use of discovery in Article 31 of the CPLR. Specifically, it was found that:

"FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on governmental decision-making, its ambit is not confined to records actually used in the decision-making process (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request.

"CPLR article 31 proceeds under a different premise, and serves quite different concerns. While speaking also of 'full disclosure' article 31 is plainly more restrictive than FOIL. Access to records under CPLR depends on status and need. With goals of promoting both the ascertainment of truth at trial and the prompt disposition of actions (Allen v. Crowell-Collier Pub. Co., 21 NY 2d 403, 407), discovery is at the outset limited to that which is 'material and necessary in the prosecution or defense of an action'" [see Farbman, supra, at 80].

Most recently, the Court of Appeals held that the CPL does not limit a defendant's ability to attempt to obtain records under the Freedom of Information Law [Gould v. New York City Police Department, 89 NY 2d 267, 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. Further, I believe that the Office of the District Attorney must accept your request under the Freedom of Information Law, irrespective of your intended use of the records.

Third, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. While some aspects of the records sought might properly be withheld, relevant is the decision by the Court of Appeals cited earlier, which dealt with DD5's and police officers' memo books in which it was held that a denial of access based on their characterization as intra-agency materials would be inappropriate.

The provision at issue in that case, §87(2)(g) of the Freedom of Information Law, enables an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations; or
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

In its analysis of the matter, the decision states that:

"...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87(2)(g)](111)). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)..."

"...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not

apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][i]). Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182).

"Against this backdrop, we conclude that the complaint follow-up reports contain substantial factual information available pursuant to the provisions of FOIL. Sections of the report are devoted to such purely factual data as: the names, addresses, and physical descriptions of crime victims, witnesses, and perpetrators; a checklist that indicates whether the victims and witnesses have been interviewed and shown photos, whether crime scenes have been photographed and dusted for fingerprints, and whether neighborhood residents have been canvassed for information; and a blank space denominated 'details' in which the officer records the particulars of any action taken in connection with the investigation.

"However, the Police Department argues that any witness statements contained in the reports, in particular, are not 'factual' because there is no assurance of the statements' accuracy and reliability. We decline to read such a reliability requirement into the phrase 'factual data', as the dissent would have us do, and conclude that a witness statement constitutes factual data insofar as it embodies a factual account of the witness's observations. Such a statement, moreover, is far removed from the type of internal government exchange sought to be protected by the intra-agency exemption (see, Matter of Ingram v. Axelrod, 90 AD2d 568, 569 [ambulance records, list of interviews, and reports of interviews available under FOIL as 'factual data']). By contrast, any impressions, recommendations, or opinions recorded in the complaint follow-up report would not constitute factual data and would be exempt from disclosure. The holding herein is only that these reports are not categorically exempt as intra-agency material. Indeed, the Police Department is entitled to withhold complaint follow-up reports, or specific portions thereof, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" (id., 276-277).

Based on the foregoing, neither the Police Department nor an office of a district attorney can claim that DD5's can be withheld in their entirety on the ground that they constitute intra-agency materials. However, the Court was careful to point out that other grounds for denial might apply in consideration of those records, as well as others that you requested.

For instance, of potential significance is §87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". That provision might be applicable relative to the deletion of identifying details in a variety of situations, i.e., where a record identifies a confidential source or a witness, for example.

Often the most relevant provision concerning access to records maintained by law enforcement agencies is §87(2)(e), which permits an agency to withhold records that:

"are compiled for law enforcement purposes and which, if disclosed, would:

- i. interfere with law enforcement investigations or judicial proceedings;
- ii. deprive a person of a right to a fair trial or impartial adjudication;
- iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
- iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in subparagraphs (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:

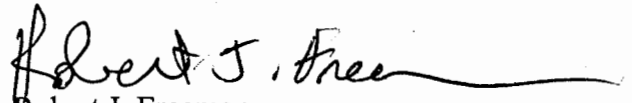
"...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The

Mr. Dennis Gonzalez
December 29, 2000
Page - 6 -

respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

I hope that I have been of assistance.

Sincerely,


Robert J. Freeman
Executive Director

RJF:tt

cc: C.J. Pree



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12444

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Executive Director

Robert J. Freeman

December 29, 2000

Mr. Robert John Ferrara
83-A-1067
Franklin Correctional Facility
Malone, NY 12953-0010

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. Ferrara:

I have received your letter in which you sought assistance in obtaining certain court records, as well those indicating the "history of violence" of a particular person.

In this regard, first, the Freedom of Information Law does not apply to the courts and records. Further and more importantly in this instance, you indicated that the records sought relate to a case in which charges were dismissed. In that situation, the records would be sealed and confidential pursuant to §160.50 of the Criminal Procedure Law.

Second, with respect to criminal history records, the general repository of those records is the Division of Criminal Justice Services. While the subject of a criminal history record may obtain such record from the Division, it has been held that criminal history records maintained by that agency are exempted from public disclosure pursuant to §87(2)(a) of the Freedom of Information Law [Capital Newspapers v. Poklemba, Supreme Court, Albany County, April 6, 1989]. Nevertheless, if, for example, criminal conviction records were used in conjunction with a criminal proceeding by a district attorney, it has been held that the district attorney must disclose those records [see Thompson v. Weinstein, 150 AD 2d 782 (1989)].

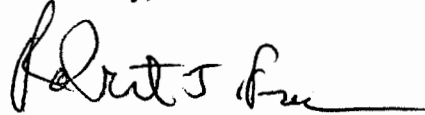
It is noted that in a decision rendered by the Appellate Division, Second Department, the Court reconfirmed its position that criminal history records are, in general, exempt from disclosure [Woods v. Kings County District Attorney's Office, 234AD 2d 554, (1996)]. In Woods, the Court upheld a denial 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

Mr. Robert John Ferrara
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analogous to those found to be available in Thompson, I believe that a district attorney would be required to disclose.

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



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12445

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Executive Director

Robert J. Freeman

December 29, 2000

Mr. Larry Ross
96-A-1571
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 facts presented in your correspondence.

Dear Mr. Ross:

I have received your letter and the materials attached to it relating to difficulties that you have encountered in attempting to obtain records under the Freedom of Information Law. Based on a review of the documentation, I offer the following comments.

First, I point out that the Freedom of Information Law pertains 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."

In consideration of the foregoing, the courts and court records are not subject to the Freedom of Information Law. This is not to suggest that court records may not be accessible, for other provisions of law often provide rights of access to those records (see e.g., Judiciary Law, §255).

Second, as the Freedom of Information Law applies to agencies, it offers direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

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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 agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Third, since you asked that fees be waived, I note that it has been held that nothing in the Freedom of Information Law refers to the waiver of fees. Further, that being so, 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)].

Next, the courts have provided direction concerning the Freedom of Information Law as opposed to the use of discovery under the Civil Practice Law and Rules (CPLR) in civil proceedings, and discovery in criminal proceedings under the Criminal Procedure Law (CPL). The principle is that the Freedom of Information Law is a vehicle that confers rights of access upon the public generally, while the disclosure provisions of the CPLR or the CPL, for example, are separate vehicles that may require or authorize disclosure of records due to one's status as a litigant or defendant.

As stated by the Court of Appeals in a case involving a request made under the Freedom of Information Law by a person involved in litigation against an agency: "Access to records of a government agency under the Freedom of Information Law (FOIL) (Public Officers Law, Article 6) is not affected by the fact that there is pending or potential litigation between the person making the request and the agency" [Farbman v. NYC Health and Hospitals Corporation, 62 NY 2d 75, 78 (1984)]. Similarly, in an earlier decision, the Court of Appeals determined that "the standing of one who seeks access to records under the Freedom of Information Law is as a member of the public, and

is neither enhanced...nor restricted...because he is also a litigant or potential litigant" [Matter of John P. v. Whalen, 54 NY 2d 89, 99 (1980)]. The Court in Farbman, supra, discussed the distinction between the use of the Freedom of Information Law as opposed to the use of discovery in Article 31 of the CPLR. Specifically, it was found that:

"FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on governmental decision-making, its ambit is not confined to records actually used in the decision-making process (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request.

"CPLR article 31 proceeds under a different premise, and serves quite different concerns. While speaking also of 'full disclosure' article 31 is plainly more restrictive than FOIL. Access to records under CPLR depends on status and need. With goals of promoting both the ascertainment of truth at trial and the prompt disposition of actions (Allen v. Crowell-Collier Pub. Co., 21 NY 2d 403, 407), discovery is at the outset limited to that which is 'material and necessary in the prosecution or defense of an action'" [see Farbman, supra, at 80].

Most recently, the Court of Appeals held that the CPL does not limit a defendant's ability to attempt to obtain records under the Freedom of Information Law [Gould v. New York City Police Department, 89 NY 2d 267, 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. Further, I believe that the Office of the District Attorney must accept your request under the Freedom of Information Law, irrespective of your intended use of the records.

Fourth, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. While some aspects of the records sought might properly be withheld, relevant is the decision by the Court of Appeals cited earlier, which dealt with DD5's and police officers' memo books in which it was held that a denial of access based on their characterization as intra-agency materials would be inappropriate.

The provision at issue in that case, §87(2)(g) of the Freedom of Information Law, enables an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations; or
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

In its analysis of the matter, the decision states that:

"...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87(2)(g)](111)). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)..."

"...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87(2)(g)(i). Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of

Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182).

"Against this backdrop, we conclude that the complaint follow-up reports contain substantial factual information available pursuant to the provisions of FOIL. Sections of the report are devoted to such purely factual data as: the names, addresses, and physical descriptions of crime victims, witnesses, and perpetrators; a checklist that indicates whether the victims and witnesses have been interviewed and shown photos, whether crime scenes have been photographed and dusted for fingerprints, and whether neighborhood residents have been canvassed for information; and a blank space denominated 'details' in which the officer records the particulars of any action taken in connection with the investigation.

"However, the Police Department argues that any witness statements contained in the reports, in particular, are not 'factual' because there is no assurance of the statements' accuracy and reliability. We decline to read such a reliability requirement into the phrase 'factual data', as the dissent would have us do, and conclude that a witness statement constitutes factual data insofar as it embodies a factual account of the witness's observations. Such a statement, moreover, is far removed from the type of internal government exchange sought to be protected by the intra-agency exemption (see, Matter of Ingram v. Axelrod, 90 AD2d 568, 569 [ambulance records, list of interviews, and reports of interviews available under FOIL as 'factual data']). By contrast, any impressions, recommendations, or opinions recorded in the complaint follow-up report would not constitute factual data and would be exempt from disclosure. The holding herein is only that these reports are not categorically exempt as intra-agency material. Indeed, the Police Department is entitled to withhold complaint follow-up reports, or specific portions thereof, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" (id., 276-277).

Based on the foregoing, neither the Police Department nor an office of a district attorney can claim that DD5's can be withheld in their entirety on the ground that they constitute intra-agency materials. However, the Court was careful to point out that other grounds for denial might apply in consideration of those records, as well as others that you requested.

For instance, of potential significance is §87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". That provision might be applicable relative to the

deletion of identifying details in a variety of situations, i.e., where a record identifies a confidential source or a witness, for example.

Often the most relevant provision concerning access to records maintained by law enforcement agencies is §87(2)(e), which permits an agency to withhold records that:

"are compiled for law enforcement purposes and which, if disclosed, would:

- i. interfere with law enforcement investigations or judicial proceedings;
- ii. deprive a person of a right to a fair trial or impartial adjudication;
- iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
- iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in subparagraphs (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:

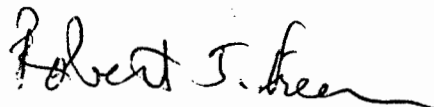
"...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of 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. Larry Ross
December 29, 2000
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copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: C.J. Pree



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12446

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Executive Director

Robert J. Freeman

December 29, 2000

Mr. Tom McVie
80-A-1493
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 facts presented in your correspondence.

Dear Mr. McVie:

I have received your letter in which you sought assistance concerning your request to review:

“...certain sign-in log books which are located at the Facilities law library, a log book for a photocopying machine, and for records and purchase orders and invoices for the Law Library for fiscal year ending 1999, and for a copy of the fiscal budget of operating expenses received from Albany, and any records of non-used budget monies received.”

You added that the log book is “in plain view and inmates see it all day long and can read it anytime they sign the log book.”

In response to the request, you wrote that the facility seeks to deny access to the purchase orders and invoices, and that all information, except references to you, will be deleted and made available to you upon payment of a fee of twenty-five cents per photocopy.

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.

Second, if the records were maintained in a different manner, I would agree that identifying details pertaining to the users of the library could be withheld on the ground that disclosure would constitute “an unwarranted invasion of personal privacy” [see Freedom of Information Law,

Mr. Tom McVie
December 29, 2000
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§87(2)(b). Further, records containing personally identifying details involving the use of library materials in public, school and college and university libraries are confidential (see Civil Practice Law and Rules, §4509). In short, ordinarily, I do not believe that the materials that a patron of a library chooses to read or use would be anybody's business. However, if indeed the records in question are kept in plain sight and can be read by any inmate or other person present at the facility library, the authority to deny access has, in my view, been effectively waived, and there would be no basis for a denial of access.

Purchase orders, invoices and similar materials would in my opinion typically be public, for none of the grounds for denial would apply.

Lastly, 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.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Superintendent