STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12447

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

January 4, 2001

Mr. David Pannell
00-A-0500
Attica Correctional Facility
Box 149
Attica, NY 14011

Dear Mr. Pannell:

I have received your letter of December 27 in which you appealed a constructive denial of your request for records maintained by a law firm.

In this regard, first, the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law; this office is not empowered to render determinations following appeals. For future reference, the provision pertaining to the right to appeal, §89(4)(a), states in relevant part that:

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

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

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

Based on the foregoing, the Freedom of Information Law generally applies to entities of state and local government in New York; that statute does not apply to law firms or other private organizations.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12418

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

January 4, 2001

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 assistance in attempting to obtain records from the New York City Police Department reflective of "communications outlining the intent and purpose, and goal of the combined NYPD/Parole Sweep of the Polo Ground Projects.." on a certain date.

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

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

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

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

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

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all record of an agency are available, except to the extent that records or portions thereof fall within one or more of the grounds for denial appearing in section 87(2)(a) through (i) of the Law. I am unfamiliar with the contents of the records in which you are interested. However, from my perspective, three of the grounds for denial may be relevant to your inquiry.

Specifically, section 87(2)(g) states that an agency may withhold records that:

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

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

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

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

ii. deprive a person of a right to a fair trial or impartial adjudication;

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

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

Under the circumstances, it appears that most relevant is section 87(2)(e)(iv). The leading decision concerning that provision is Fink v. Lefkowitz, which involved access to a manual prepared by a special prosecutor that investigated nursing homes, in which the Court of Appeals held that:

"The purpose of this exemption is obvious. Effective law enforcement demands that violators of the law not be apprised the nonroutine procedures by which an agency obtains its information (see Frankel v. Securities & Exch. Comm., 460 F2d 813, 817, cert den 409 US 889). However beneficial its thrust, the purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution.

"To be distinguished from agency records compiled for law enforcement purposes which illustrate investigative techniques, are those which articulate the agency's understanding of the rules and regulations it is empowered to enforce. Records drafted by the body charged with enforcement of a statute which merely clarify procedural or substantive law must be disclosed. Such information in the hands of the public does not impede effective law enforcement. On the contrary, such knowledge actually encourages voluntary compliance with the law by detailing the standards with which a person is expected to comply, thus allowing him to conform his conduct to those requirements (see Stokes v. Brennan, 476 F2d 699, 702; Hawkes v. Internal Revenue Serv., 467 F2d 787, 794-795; Davis, Administrative Law [1970 Supp], section 3A, p 114).

"Indicative, but not necessarily dispositive of whether investigative techniques are nonroutine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel (see Cox v. United States Dept. of Justice, 576 F2d 1302, 1307-1308; City of Concord v. Ambrose, 333 F Supp 958). It is no secret that numbers on a balance sheet can be made to do magical things by scrupulous nursing home operators the path that an audit is likely to take and alerting them to items to which investigators are instructed to pay

> particular attention, does not encourage observance of the law. Rather, release of such information actually countenances fraud by enabling miscreants to alter their books and activities to minimize the possibility or being brought to task for criminal activities. In such a case, the procedures contained in an administrative manual are, in a very real sense, compilations of investigative techniques exempt from disclosure. The Freedom of Information Law was not enacted to furnish the safecracker with the combination to the safe" (id. at 572-573).

In applying those criteria to specific portions of the manual, which was compiled for law enforcement purposes, the Court found that:

> "Chapter V of the Special Prosecutor's Manual provides a graphic illustration of the confidential techniques used in a successful nursing home prosecution. None of those procedures are 'routine' in the sense of fingerprinting or ballistic tests (see Senate Report No. 93-1200, 93 Cong 2d Sess [1974]). Rather, they constitute detailed, specialized methods of conducting an investigation into the activities of a specialized industry in which voluntary compliance with the law has been less then exemplary.
>
> "Disclosure of the techniques enumerated in those pages would enable an operator to tailor his activities in such a way as to significantly diminish the likelihood of a successful prosecution. The information detailed on pages 481 and 482 of the manual, on the other hand, is merely a recitation of the obvious: that auditors should pay particular attention to requests by nursing homes for Medicaid reimbursement rate increases based upon projected increase in cost. As this is simply a routine technique that would be used in any audit, there is no reason why these pages should not be disclosed" (id. at 573).

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: William Tesler

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 12449

41 State Street, Albany, New York 12231
(518) 474-2518
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January 4, 2001

Mr. Elmond Winchell
96-B-1866
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. Winchell:

I have received your letter in which you sought assistance in obtaining letters that you wrote to your daughter that were "confiscated" and used by the District Attorney in your trial. Although the District Attorney sent five of the letters to you at no cost, he indicated that you would be required to pay a twenty-five dollar deposit and that he would "bill [you] accordingly for the other letters."

In this regard, first, the Freedom of Information Law 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 on the foregoing, it is assumed for the purposes of this response that the letters are "records" maintained by the District Attorney that fall within the coverage of the Freedom of Information Law.

Second, if that is so, I do not believe that the District Attorney would be required to relinquish custody of the letters or provide you with the originals; rather, upon payment of the proper fee, I believe that copies of the records should be made available. 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.

With respect to the deposit, it has been advised by this office and held judicially that an agency may require payment in advance, particularly if a request involves a substantial volume of material (see Sambucci v. McGuire, Supreme Court, New York County, November 4, 1982).

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Robert M. Winn

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12450

41 State Street, Albany, New York 12231
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January 4, 2001

Mr. Luis Colon, Jr.
99-A-2946
Upstate Correctional Facility
309 Bare Hill Road
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. Colon:

I have received your letter in which you appealed with respect to requests for records that had not been answered. In this regard, based on a review of your correspondence, I offer the following comments.

First, since you referred to 5 USC §§552 and 552a, I note that those provisions are, respectively, the federal Freedom of Information and Privacy Acts. Those statutes apply to records maintained by federal agencies. The statute that deals most generally with public access to government records in New York is this state's Freedom of Information Law.

Second, 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."

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

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

Based on the foregoing, a police department or an office of a district attorney, for example, would constitute an "agency" that fall within the coverage of the Freedom of Information Law. However, the courts and court records are outside the scope of that statute. This not to suggest that court records are confidential; on the contrary, most court records are accessible under other provisions of law (see e.g., Judiciary Law, §255).

Third, 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.

Lastly, when a request is made to an agency, the Freedom of Information Law provides direction concerning the time and manner in which the agency must respond to a request and an appeal. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

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

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

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

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12451

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

January 8, 2001

Mr. Sharwn Catlett
94-A-3583
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. Catlett:

I have received your letter concerning unanswered requests for records.

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

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

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

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12452

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

January 8, 2001

Mr. John Kwiatkowski
98-A-5116
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 facts presented in your correspondence.

Dear Mr. Kwiatkowski:

I have received your correspondence concerning your unsuccessful efforts in obtaining records from the Fulton County Sheriff's office. The records sought involve recordings of a 911 telephone call, log entries indicating the time that the call was received and related information, and the name of the ambulance company that responded to a call.

Since you asked that this office "compel" the Office of the Sheriff to respond and comply with law, I note that the Committee on Open Government is authorized to offer advice and opinions concerning the Freedom of Information Law. The Committee is not empowered to compel an agency to grant or deny access to records or otherwise comply with law. However, in an effort to provide guidance, I offer the following comments.

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

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges

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

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

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

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

Assuming that Fulton County has an enhanced 911 system, relevant to the matter would be the initial ground for denial, §87(2)(a), which relates to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §308(4) of the County Law, which states that:

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

In many instances, although an agency may withhold records, it has discretionary authority to disclose the records [see e.g., Capital Newspapers v. Burns, 67 NY 2d 562, 567 (1986)]. In this instance, however, I believe that the language of 1308 (4) is restrictive, for it specifies that the records of calls made to an E-911 system "shall not be made available", except in the circumstances provided later in that provision. Therefore, unless one of those circumstances authorizing disclosure is present, the County, in my view, would be prohibited from disclosing the records in question.

With respect to the remaining records, it appears that information identifying the ambulance company that responded, as well as the time a call was received, the time of dispatch and the arrival of an ambulance would be accessible. Pertinent is §87(2)(g), which, due to its structure, may require disclosure. That provision permits an agency to withhold records that:

of an ambulance would be accessible. Pertinent is §87(2)(g), which, due to its structure, may require 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. From my perspective, the log entries to which you referred would consist of factual information that must be disclosed, unless a different ground for denial is applicable.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Fulton County Sheriff

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12453

41 State Street, Albany, New York 12231
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January 8, 2001

Mr. David McHaney
98-R-2579
Camp Gabriels Correctional Facility
P.O. Box 100
Gabriels, NY 12939-0100

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

Dear Mr. McHaney:

I have received your letter in which you sought guidance concerning a delay in responding to a request for records of the New York City Police Department.

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

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

Based on the foregoing, an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date indicating when it can be anticipated that a request will be granted or denied. The acknowledgement by the records access officer did not make reference to such a date.

I note that there is no precise time period within which an agency must grant or deny access to records. The time needed to do so may be dependent upon the volume of a request, the possibility that other requests have been made, the necessity to conduct legal research, the search and retrieval

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

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

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

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

I 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-1454

41 State Street, Albany, New York 12231
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January 8, 2001

Mr. Charles Rein
99-A-6840
Gowanda Correctional Facility
P.O. Box 311
Gowanda, NY 14070-0311

Dear Mr. Rein:

I have received your letter in which you asked how you might seek and obtain various statistical information from the Division of Parole.

In this regard, first, it is noted at the outset that the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) require that each agency designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests, and a request should ordinarily be made to that person.

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

Third, 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. Therefore, if, for example, the Division of Parole does not maintain the statistical information in which you are interested, it would not be required to create or prepare new records on behalf.

Lastly, insofar as the statistical data of your interest does exist, it appears that the data would be accessible. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Statistical data contained within internal agency records is accessible under §87(2)(g)(i), unless a different ground for denial is pertinent, and in this instance, I do not believe that any ground for denial would be applicable.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

From: Robert Freeman
To: Internet[redacted]

Dear Mr. Pfuelb:

My assistant indicated that she provided our website address and reference to our publication, "Your Right to Know", which contains a sample FOIL request letter. I would like to add to the information that she offered in response to your inquiry.

First, a request need not include reference to particular provisions within the FOIL; any request made in writing that "reasonably describes" the records sought should suffice.

Second, I note that the Law pertains to existing records and that an agency need not create a record in response to a request. Therefore, if, for instance, a request is made for a list and no list exists, the agency is not required to prepare a list on behalf of the applicant. For that reason, it is suggested that a request involve "records containing" the information at issue rather than a list if it is not known that a list exists. Similarly, if information is communicated orally and no record has been prepared, the FOIL would not apply.

Third, FOIL requires that this office (the Committee on Open Government) promulgate general regulations that govern the procedural implementation of the law (they are available in full text in our website). In turn, the governing body of each municipality is required to adopt its own regulations consistent with the law and the regulations promulgated by the Committee. A unit of local government cannot establish a local law or policy that is in any way more restrictive than the FOIL.

Lastly, with respect to your questions regarding bids and the bid process, since those issues involve matters beyond the expertise or jurisdiction of this office, I cannot effectively answer. It is suggested that information on the subject can be obtained from the Office of the State Comptroller, which can be reached by phone at (518)474-4015 or at <www.osc.state.ny.us>.

I hope that I have been of assistance.

From: Robert Freeman
To: Internet:mvolforte@goer.state.ny.us
Date: 1/10/01 9:00AM
Subject: Dear Mr. Volforte:

Dear Mr. Volforte:

You have asked that I confirm your conclusion that your agency, GOER, must honor a request for certain records, PERB decisions that are contained in volumes of decisions that GOER purchases.

In short, I agree with your contention. Since the volumes fall within the definition of "record" appearing in §86(4) of the FOIL, I believe that you would be obliged to respond and disclose.

I note that questions have arisen regarding, for example, a copies of the Education Law or some other chapter of New York statutes. Typically, those records are published, with case notes, forms, legislative history and the like in copyrighted materials. It has been advised that reproduction of the work in its entirety would be expensive at 25 cents per photocopy, that duplication might involve copyright infringement, and that the applicant should purchase the work directly from the publisher. However, if an applicant seeks a particular section or statute within a chapter (i.e., the Freedom of Information Law, which consists of sections 84 - 90 of the Public Officers Law) reproduction of so minimal an aspect of the work would constitute a "fair use" under the Copyright Act and would, therefore, be permissible.

If you would like to discuss the matter further, 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-1257

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

January 10, 2001

Mr. Harold Moody
99-A-2743
Sing Sing Correctional Facility
354 Hunter Street
Ossinging, NY 10562

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

Dear Mr. Moody:

I have received your letter in which you sought assistance concerning an unanswered request for records of the New York City Department of Correction.

In this regard, 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, 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 records access officer, if you have not yet received a response, it is suggested that a request be made to the Department of Correction's records access officer, Mr. Thomas Antenen.

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

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

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1258

41 State Street, Albany, New York 12231
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January 10, 2001

Mr. Ronald Dorsey
88-A-3091
Cape Vincent Correctional Facility
Route 12E, Box 739
Cape Vincent, NY 13618

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

Dear Mr.Dorsey:

I have received your letter in which you sought assistance concerning access to the contents of a database pertaining to you that you have requested from the New York City Police Department. You indicated that the Department has not answered your requests.

In this regard, first, it is doubtful in my view that the Department maintains a database pertaining to a particular individual. It would be more likely that databases include information relating to many individuals and that portions might pertain to you.

Second, assuming that there is no database pertaining specifically to you, I point out that §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, a request should include sufficient detail to enable agency staff to locate and identify the records of your interest.

Third, the 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 requests for records, and requests should ordinarily be made to that person.

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

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

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

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

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

For your information, the person designated by the Police Department to determine appeals is William Tesler, Special Assistant Counsel.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

FOIL-AO-12459

From: Robert Freeman
To: [redacted]".GWIA.DOS1
Subject: Re: LANCASTER VILLAGE PARTNERSHIP, INC.

Dear Mr. Symer:

I have received your note. If the entity in question is, as you indicated, a public benefit corporation, it is required to comply with the Freedom of Information Law. A public benefit corporation is a kind of public corporation, and all public corporations are subject to that statute. If it is not a public benefit corporation, but rather a not-for-profit corporation, its coverage under the Freedom of Information Law would be dependent upon the extent to which there is governmental control over the corporation.

Even if the corporation is not covered by the Freedom of Information Law, I would guess that many of the records of your interest would be maintained by either the Town of Lancaster or the IDA. If that is so, the records should be available from those entities, for both are subject to the Freedom of Information Law.

To obtain a sample letter of request, go to our website (the address will be given below), click onto "publications" and to to "Your Right to Know." That is our general guide to the Freedom of Information Law and it includes a sample letter of request.

If you need additional information, please feel free to contact me.

I hope that I have been of assistance.

>>> Donald Symer [redacted]> 01/15/01 07:26AM >>>
DEAR MR. FREEMAN:

I WOULD LIKE TO SUBMIT A FOIL REQUEST TO THE VILLAGE
OF LANCASTER TO OBTAIN INFORMATION ABOUT THE LANCASTER
VILLAGE PARTNERSHIP, INC. I AM NOT A RESIDENT OF THE
VILLAGE BUT AM INSTEAD A RESIDENT OF THE TOWN OF
LANCASTER WHO'S IDA HAS ADVANCED SIGNIFICANT MONEY TO
THE PARTNERSHIP.

IT IS MY UNDERSTANDING THAT THE PARTNERSHIP IS A NON
PROFIT PUBLIC BENEFIT CORPORATION WHICH REPORTEDLY HAS
REFUSED TO DIVULGE INFORMATION TO THE PUBLIC IN THE
PAST. AS BACKGROUND THE PARTNERSHIP'S FORMER (?)
EXECUTIVE DIRECTOR HAS RECENTLY ADMITTED TO FELONIOUS
EMBEZZLEMENT OF PARTNERSHIP FUNDS.

MORE SPECIFICALLY, I SEEK INFORMATION ON:
o NAME, TITLE, OFFICE ADDRESS OF ALL OFFICERS,
DIRECTORS, SHAREHOLDERS (?) AND MEMBERS.

o AMOUNT OF MONEY AND DATES RECEIVED EITHER AS GRANTS
OR LOANS FROM EITHER THE TOWN OF LANCASTER OR THE
LANCASTER IDA AND UNDER WHAT CONDITIONS.

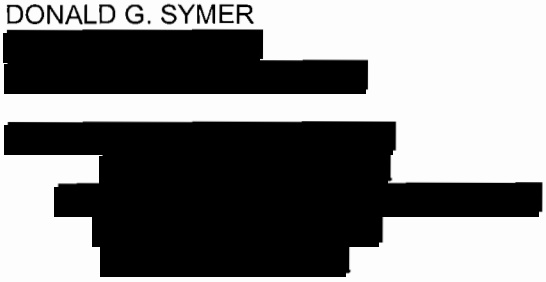
o NAMES AND ADDRESSES OF BOTH THE LAW FIRM
REPRESENTING
THE PARTNERSHIP AND IT'S CONSULTING ARCHITECTURAL OR
PROFESSIONAL ENGINEERING FIRM.

I ANTICIPATE A DENIAL OF INFORMATION BASED UPON MY
ABOVE PROPOSED WORDING OF THE REQUEST AND THEREFORE

WOULD APPRECIATE YOUR ADVICE ON HOW THIS REQUEST SHOULD BE PROPERLY WORDED TO COMPLY WITH FREEDOM OF INFORMATION LAWS AND TO OBTAIN DESIRED RESULTS.

YOUR TIMELY RESPONSE IS MOST APPRECIATED.

DONALD G. SYMER



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12460

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

January 17, 2001

Ms. Linda J. Keeling
President
Concerned Citizens of Red Hook
and Rhinebeck
238 Pitcher Lane
Red Hook, NY 12571

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

Dear Ms. Keeling:

I have received your letter of December 11 in which you sought assistance in encouraging the Town of Red Hook to comply with laws dealing with public access to records. You made specific reference to difficulties associated with gaining access to records relating to a draft environmental impact statement (DEIS).

In this regard, it is emphasized at the outset that the Committee on Open Government is authorized to provide advice and opinions relating to public access to government records, primarily under the Freedom of Information Law. Although it is our goal that opinions rendered by this office be educational and persuasive, the Committee cannot compel an agency to grant or deny or access or otherwise comply with law. Nevertheless, in an effort to enhance compliance with law by the Town, 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 disclosure, in view of those and perhaps the other kinds of factors mentioned earlier, might be reasonable. On the other hand, if records are clearly public and can be found easily, there would appear to be no rational basis for delaying disclosure. In a case in which it was found that an agency's "actions demonstrate an utter disregard for compliance set by FOIL", it was held that "[t]he records finally produced were not so voluminous as to justify any extension of time, much less an extension beyond that allowed by statute, or no response to appeals at all" (Inner City Press/Community on the Move, Inc. v. New York City Department of Housing Preservation and Development, Supreme Court, New York County, November 9, 1993).

Second, 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, and 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 Town, in my view, cannot limit the ability to inspect records to a period less than its regular business hours.

Third, 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..."

Even while others may have physical possession of Town records, I point out that §30 of the Town Law indicates that the Town Clerk is the legal custodian of all Town records. Consistent with that provision is §57.19 of the Arts and Cultural Affairs Law, which states in part that a town clerk is the "records management officer" for a town.

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 form continuing from doing so."

As such, the Town 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 Town 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, I believe that the DEIS and related records must be made "readily available" pursuant to provisions of law other than the Freedom of Information Law. For instance, §8-0109(6) of the Environmental Conservation Law states that:

> "To the extent as may be prescribed by the Commissioner pursuant to section 8-0113, the environmental impact statement prepared pursuant to subdivision two of this section together with the comments of public and federal agencies and members of the public, shall be filed with the commissioner and made available to the public prior to acting on the proposal which is the subject of the environmental impact statement.

The regulations prescribed by the Commissioner, which appear in 6 NYCRR 617.10, refer to "Draft EIS's" (environmental impact statements), and state in subdivision (e) that:

> "The draft EIS, together with the notice of its completion, shall be filed and made available for copying as follows:
>
> (1) one copy with the commissioner;
>
> (2) one copy with the appropriate regional office of the department;
>
> (3) one copy with the chief executive officer of the political subdivision in which the action will be principally located;
>
> (4) if other agencies are involved in the approval of the action, with each such agency;
>
> (5) one copy with persons requesting it. When sufficient copies of a statement are not available, the lead agency may charge a fee to persons requesting the statement to cover the costs in making the additional statement available..."

Subdivision (h), which pertains to "final" EIS's, states that "The final EIS, together with notice of its completion, shall be filed in the same manner as a draft EIS". Further, subdivision (i) provides that "Each agency which prepares notices, statements and findings required in this part shall retain copies thereof in a file which is readily available for public inspection"(emphasis added).

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

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Margaret Doty, Town Clerk
Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12461

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January 17, 2001

Ms. Mona Goodman
[redacted]

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

Dear Ms. Goodman:

I have received your letter of December 20 and appreciate your kind words. According to your letter and the form attached to it, financial disclosure statements prepared by Nassau County officials may be reviewed only after a person seeking a statement has submitted a signed and notarized form. Further, the statements are available for inspection only; they cannot be photocopied.

You have questioned the propriety of those practices and, in this regard, I offer the following comments.

First, as a general matter, when records are accessible under the Freedom of Information Law, it has been held that they should be made equally available to any person, regardless of one's status, interest or the intended use of the records [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Moreover, the Court of Appeals has held that:

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

Farbman pertained to a situation in which a person involved in litigation against an agency requested 1 rds 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 rights as a member of the public when using the

Freedom of Information Law, irrespective of the intended use of the records. Similarly, unless there is a basis for withholding records in accordance with the grounds for denial appearing in §87(2) of the Freedom of Information Law, the purpose for which a request is made is in my opinion irrelevant. Based upon the foregoing and for reasons to be discussed later, I do not believe that the County can require that an applicant for records submit a signed and notarized form. In short, the identity of the applicant is, in my view, irrelevant in determining rights of access.

Second, the question concerning the ability to inspect but not to obtain a photocopy, involves complex issues relating to the Ethics in Government Act as well as the Freedom of Information Law. The provisions of the Act pertaining to municipalities, such as counties, are found in the General Municipal Law. It is noted that those provisions include references to the New York State Temporary Commission on Local Government Ethics ("the Commission"). Although the Commission has been abolished, 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.

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 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.

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.

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.

If 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 that the County 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: Nassau County Board of Ethics

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3267
FOIL-AO-12462

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

January 18, 2001

Mr. Rich Quaglietta
[redacted]

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. Quaglietta:

I have received your letter of December 11. You have questioned whether you are entitled to "a separate copy" of minutes of executive sessions held by a town board.

In this regard, I direct your attention to §106 of the Open Meetings Law which provides that:

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

In view of the foregoing, as a general rule, a public body may take action during a properly convened executive session [see Open Meetings Law, §105(1)]. If action is taken during an executive session, minutes reflective of the action, the date and the vote must be recorded in minutes pursuant to §106(2) of the Law. If no action is taken, there is no requirement that minutes of the executive session be prepared.

It is noted that minutes of executive sessions need not include information that may be withheld under the Freedom of Information Law. From my perspective, even when a public body makes a final determination during an executive session, that determination will, in most instances, be public. For example, although a discussion to hire or fire a particular employee could clearly be discussed during an executive session [see Open Meetings Law, §105(1)(f), a determination to hire or fire that person would be recorded in minutes and would be available to the public under the Freedom of Information Law. On other hand, if a public body votes to initiate a disciplinary proceeding against a public employee, minutes reflective of its action would not have include reference to or identify the person, for the Freedom of Information Law authorizes an agency to withhold records to the extent that disclosure would result in an unwarranted personal privacy [see Freedom of Information Law, §87(2)(b)].

Lastly, I point out that a public body must approve a motion, in public, before entry into an executive session, and that the motion must include reference to the "general area or areas of the subject or subjects to be considered..." [Open Meetings Law, §105(1)]. Since a motion to enter into executive session must be made during an open meeting, and since §106(1) requires that minutes include references to all motions, the minutes of an open meeting must always include an indication that an executive session was held, as well as the reason for the executive session.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12463

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

January 19, 2001

Ms. Laura Stiles
Suffolk Life Newspapers
41 Marilyn Street
East Islip, NY 11730

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

Dear Ms. Stiles:

I have received your letter of December 20 and the correspondence attached to it. You have sought assistance in relation to your unanswered request for records of the Brentwood Legion Ambulance Service ("the Service") relating to accidents and vehicle maintenance.

From my perspective, the key issue is whether the Service is subject to the Freedom of Information Law. That statute is applicable to agency records, and §86(3) of the Law defines the term "agency" to mean:

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

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

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

> "We begin by rejecting respondent's contention that, in applying the Freedom of Information Law, a distinction is to be made between a volunteer organization on which a local government relies for performance of an essential public service, as is true of the fire department here, and on the other hand, an organic arm of

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

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

Based upon the foregoing, it is clear that volunteer fire companies are subject to the Freedom of Information Law, despite their status as private, not-for-profit corporations.

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

> "The Court of Appeals has rejected any distinction between a volunteer organization on which a local government relies for the performance of an essential public service and an organic arm of government (*see, Matter of Westchester Rockland Newspapers v. Kimball,* 50 N.Y.2d 575, 579, 430 N.Y.S.2d 574, 408 N.E.2d 904).

> "The appellant performs a governmental function, and it performs that function solely for the Mastic Ambulance District, a municipal entity and a municipal subdivision of the Town of Brookhaven (hereinafter the Town). The appellant submits a budget to and receives all of its funding from the Town, and the allocation of its funds is scrutinized by the Town. Thus, the appellant clearly falls within the definition of an agency and is subject to the requirements of FOIL" [Ryan v. Mastic Ambulance Company, 212 AD 2d 716, 622 NYS 2d 795, 796 (1995)].

I am unaware of the specific nature of the Service. If it is analogous to the entity that was the subject of the Ryan decision, I believe that it would be subject to the Freedom of Information Law. If, however, it is significantly different and does not maintain a similar relationship with one or more municipal entities, that statute might not apply.

Assuming that the Service falls within the coverage of the Freedom of Information Law, I point out that that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, the kinds of records that you requested would be available, for none of the grounds for denial would be applicable.

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

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

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Brentwood Legion Ambulance Service

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12464

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

January 19, 2001

Mr. Harold Johnson
Johnson Investigation Services
P.O. Box 26
Blooming Grove, NY 10914-0026

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

Dear Mr. Johnson:

I have received your letter of December 14 and the correspondence attached to it. Having requested records from the Town of Wallkill Police Department, you were charged fifteen dollars for copies, even though only nine pages were provided. It is your view that you were overcharged, and you have sought assistance concerning your unsuccessful attempts to obtain a proper refund from the Town.

In this regard, §87(1)(b)(iii) of the Freedom of Information Law provides that agencies can charge up to twenty-five cents per photocopy up to nine by fourteen inches or the actual cost of reproducing other records (i.e., computer tapes or disks), unless a different is prescribed by statute. Therefore, in the context of your comments, unless an act of the State Legislature authorizes an agency to charge in excess of twenty-five cents per photocopy, it would be limited to that fee. In the context of the situation that you described, I believe that the maximum fee for photocopying nine pages would have been $2.25, and that you are owed a refund of $12.75.

I note that there has been confusion in some instances because certain agencies may charge higher fees based on specific statutory authority to do so. For example, one of the situations in which an agency may charge a fee different from that generally permitted by the Freedom of Information Law may relate to the matter that you described. Specifically, §66-a of the Public Officers Law, a statute that deals with accident reports and certain other records maintained by the Division of State Police, provides in subdivision (2) that:

> "Notwithstanding the provisions of section twenty-three hundred seven of the civil practice law and rules, the public officers law, or any other law to the contrary, the division of state police shall charge fees for the search and copy of accident reports and photographs. A search fee of fifteen dollars per accident report shall be charged, with no additional fee for a photocopy. An additional fee of fifteen dollars

> shall be charged for a certified copy of any accident report. A fee of twenty-five dollars per photograph or contact sheet shall be charged. The fees for investigative reports shall be the same as those for accident reports."

Based on the foregoing, it is clear that a statute separate from the Freedom of Information Law authorizes the Division of State Police to charge fifteen dollars for copies of accident or investigative reports.

I note that §202 of the Vehicle and Traffic Law, which pertains only to records maintained by the Department of Motor Vehicles, contains similar provisions regarding fees for copies of accident reports. It is emphasized, however, that a municipal police or sheriff's department would be governed by the Freedom of Information Law and would be limited to charging twenty-five cents per photocopy in response to a request for records.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Tom Nosworthy
Town of Wallkill Police Commission

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12465

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January 19, 2001

Ms. Joanne M. Deuel
[redacted]

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

Dear Ms. Deuel:

I have received your letter of December 9 and the materials attached to it. You have sought assistance relating to a request for records of the Village of Depew.

In this regard, first, it is noted that the Freedom of Information Law pertains to existing records, and that §89(3) of that statute provides in part that an agency, such as a village, is not required to create or prepare a record in response to a request. Therefore, to the extent that the Village does not maintain records of your interest, the Freedom of Information Law would not apply.

Second, insofar as records are maintained by or for the Village, the Freedom of Information Law provides direction concerning the time and manner in which an agency must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

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

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Joan M. Priebe

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3269
FOIL-AO-12466

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

January 19, 2001

Mr. Thomas Sobczak, Jr.
[redacted]

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

Dear Mr. Sobczak:

As you are aware, I have received your letter of December 26 and the materials attached to it. You have sought my views concerning your contention that the Carle Place Board of Education "seems to treat one group of citizens different from another group." You referred, for example, to a statement by the President of the Board indicating that the Board deals only with "known entities." However, when you requested records defining that phrase or specifying the Board's policy on the subject, you were informed that there are no such records and that the phrase "known entities" was "a figure of speech."

In this regard, I point out that the Committee on Open Government is authorized to advise with respect to the Freedom of Information and Open Meetings Laws. As such, the following comments will be limited to matters relating to those statutes.

With respect to the Freedom of Information Law, the identity of an applicant for records, his or her residence, and that person's interest in the records are factors largely irrelevant in consideration of rights of access. As a general matter, when records are accessible under the Freedom of Information Law, it has been held that they should be made equally available to any person, regardless of one's status, interest or the intended use of the records [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Moreover, the Court of Appeals, the State's highest court, has held that:

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

person making the request" [Farbman v. New York City Health and Hospitals Corporation, 62 NY 2d 75, 80 (1984)].

Farbman pertained to a situation in which a person involved in litigation against an agency requested records from that agency under the Freedom of Information Law. In brief, it was found that one's status as a litigant had no effect upon that person's right as a member of the public when using the Freedom of Information Law, irrespective of the intended use of the records. Similarly, unless there is a basis for withholding records in accordance with the grounds for denial appearing in §87(2), the use of the records, including the potential for commercial use or the status of the applicant, is in my opinion irrelevant.

Similarly, §103 of the Open Meetings Law states that meetings of public bodies "shall be open to the general public." While that statute 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), I note that it 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.

Further, 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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12467

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

January 22, 2001

Mr. and Mrs. Jerry Brixner
[redacted]

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

Dear Mr. and Mrs. Brixner:

I have received your letter of December 24 in which you questioned whether a substantial delay in determining to grant or deny access to records is consistent with the requirements of the Freedom of Information Law.

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

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

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

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

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

Further, in my opinion, if, as a matter of practice or policy, an agency acknowledges the receipt of requests and indicates in every instance that it will determine to grant or deny access to records "in 36 business days" or some other particular period, following the date of acknowledgement, such a practice or policy would be contrary to the thrust of the Freedom of Information Law. If a request is voluminous and a significant amount of time is needed to locate records and review them to determine rights of access, thirty-six 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-six days. In a case in which it was found that an agency's "actions demonstrate an utter disregard for compliance set by FOIL", it was held that "[t]he records finally produced were not so voluminous as to justify any extension of time, much less an extension beyond that allowed by statute, or no response to appeals at all" (Inner City Press/Community on the Move, Inc. v. New York City Department of Housing Preservation and Development, Supreme Court, New York County, November 9, 1993).

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: John S. Riley, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12468

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January 22, 2001

Mr. Edward Nelson
[redacted]

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

Dear Mr. Nelson:

I have received your letter in which you questioned your right to obtain certain records from the Division of Parole. Specifically, you sought copies of a manual and handbook prepared by the "Parole and Probation Compact Administrator's Association", as well as all records pertaining to you.

In this regard, I offer the following comments.

First, if the handbook and the manual are maintained by the Division, I believe that they would constitute agency "records" that fall within the coverage of the Freedom of Information Law [see definition of "record", §86(4)].

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, three of the grounds for denial may be relevant to your inquiry.

Specifically, §87(2)(g) states that an agency may withhold records that:

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

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

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

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

Under the circumstances, it appears that most relevant is §87(2)(e)(iv). The leading decision concerning that provision is Fink v. Lefkowitz, which involved access to a manual prepared by a special prosecutor that investigated nursing homes, in which the Court of Appeals held that:

> "The purpose of this exemption is obvious. Effective law enforcement demands that violators of the law not be apprised the nonroutine procedures by which an agency obtains its information (see Frankel v. Securities & Exch. Comm., 460 F2d 813, 817, cert den 409 US 889). However beneficial its thrust, the purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution.
>
> "To be distinguished from agency records compiled for law enforcement purposes which illustrate investigative techniques, are those which articulate the agency's understanding of the rules and regulations it is empowered to enforce. Records drafted by the body charged with enforcement of a statute which merely clarify procedural or substantive law must be disclosed. Such information in the hands of the public does not impede effective law enforcement.

> On the contrary, such knowledge actually encourages voluntary compliance with the law by detailing the standards with which a person is expected to comply, thus allowing him to conform his conduct to those requirements (see Stokes v. Brennan, 476 F2d 699, 702; Hawkes v. Internal Revenue Serv., 467 F2d 787, 794-795; Davis, Administrative Law [1970 Supp], section 3A, p 114).
>
> "Indicative, but not necessarily dispositive of whether investigative techniques are nonroutine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel (see Cox v. United States Dept. of Justice, 576 F2d 1302, 1307-1308; City of Concord v. Ambrose, 333 F Supp 958). It is no secret that numbers on a balance sheet can be made to do magical things by scrupulous nursing home operators the path that an audit is likely to take and alerting them to items to which investigators are instructed to pay particular attention, does not encourage observance of the law. Rather, release of such information actually countenances fraud by enabling miscreants to alter their books and activities to minimize the possibility or being brought to task for criminal activities. In such a case, the procedures contained in an administrative manual are, in a very real sense, compilations of investigative techniques exempt from disclosure. The Freedom of Information Law was not enacted to furnish the safecracker with the combination to the safe" (id. at 572-573).

In applying those criteria to specific portions of the manual, which was compiled for law enforcement purposes, the Court found that:

> "Chapter V of the Special Prosecutor's Manual provides a graphic illustration of the confidential techniques used in a successful nursing home prosecution. None of those procedures are 'routine' in the sense of fingerprinting or ballistic tests (see Senate Report No. 93-1200, 93 Cong 2d Sess [1974]). Rather, they constitute detailed, specialized methods of conducting an investigation into the activities of a specialized industry in which voluntary compliance with the law has been less then exemplary.
>
> "Disclosure of the techniques enumerated in those pages would enable an operator to tailor his activities in such a way as to significantly diminish the likelihood of a successful prosecution. The information detailed on pages 481 and 482 of the manual, on the other hand, is merely a recitation of the obvious: that auditors should pay particular attention to requests by nursing homes for Medicaid reimbursement rate increases based upon projected increase in cost.

> As this is simply a routine technique that would be used in any audit, there is no reason why these pages should not be disclosed" (id. at 573).

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

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

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

Lastly, since you are interested in obtaining all records pertaining to you, I point out that §89(3) of the Freedom of Information Law provides in relevant part that an applicant must "reasonably describe" the records sought. Therefore, a request must contain sufficient detail to enable agency staff to locate and identify the records. I am unaware of the means by which the Division of Parole maintains its records. It is questionable in my view, however, whether a request for all records pertaining to you would meet the standard that records be reasonably described.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Terrence X. Tracy

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12469

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January 22, 2001

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

I have received your letter and the material attached to it. You inquired as to the steps that might be taken when an agency fails to respond to a request for records.

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

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

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

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

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

Having reviewed your request, I note that the judicial interpretation of the Freedom of Information Law indicates that much of what you are seeking could be withheld.

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

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

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

In a decision rendered in 1989 that dealt with the kinds of records concerning transfers in which you are interested, it was stated that:

> "The petitioner seeks disclosure of unredacted portions of five Program Security and Assessment Summary forms, prepared semi-annually or upon the transfer of an inmate from one facility to another, which contain information to assist the respondents in determining the placement of the inmate in the most appropriate facility. The respondents claim that these documents are exempted from disclosure under the intra-agency memorandum exemption contained in the Freedom of Information Law (Public Officers Law, section 87[2][g]). We have examined in camera unredacted copies of the documents at issue (see Matter of Nalo v. Sullivan, 125 AD 2d

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Patricia Priestly

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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January 22, 2001

Mr. Gregory Carter
#94-A-2924
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. Carter:

I have received your letter in which you complained that you had not received a response to your request from the Department of Correctional Services. According to the correspondence attached to your letter, your request was made to the Department's main office in Albany. You were informed in writing, however, that the record sought was maintained at your facility and that it was forwarded for a reply. Nevertheless, as of the date of your letter to this office, you had received no further reply. You asked that this office conduct an "investigation of the matter."

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. This office has neither the jurisdiction nor the resources to conduct investigations. In an effort to assist you, however, I offer the following comments.

First, I believe that the initial recipient of your request acted appropriately. Since his office does not maintain the record of your interest, it was proper in my view to have forwarded the request to your facility. I note that the regulations of the Department of Correctional Services indicate that requests for records maintained at a facility should be made to the facility superintendent or his designee.

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

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

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

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

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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 Freedom of Information Law pertains to existing records and that §89(3) of that statute provides in part that an agency is not required to create a record in response to a request. I am unfamiliar with the nature of records kept at facilities containing the information of your interest. While it is possible that a statement containing the information sought can be prepared, doing so would in my view involve an action different from the duties imposed 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

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January 22, 2001

Mr. Tyrone Nowlin
99-A-5738
Downstate Correctional Facility
Box F
Red Schoolhouse Road
Fishkill, NY 12524-0445

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

Dear Mr. Nowlin:

I have received your letters in which you sought assistance in obtaining records under the Freedom of Information Law from a variety of sources. 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 section 86(3) of that statute defines the term "agency" to mean:

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

Based on the foregoing, in general, the Freedom of Information Law applies to entities of state and local government in New York. It does not include private or not-for-profit organizations. I would conjecture that the recreation center to which you referred is not part of government. If that is so, it would not be subject to the requirements of that statute. The sporting goods store that you mentioned is a private company and, therefore, falls beyond the coverage of the Freedom of Information Law.

Second, when the Freedom of Information Law applies, that statute 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)].

Third, you referred to a request made to the Westchester County Jail for portions of the visitor log book indicating the dates when you visited your son. You were informed that you would need a court order to obtain the records of your interest. From my perspective, the log book is clearly is clearly subject to rights access conferred by the Freedom of Information Law. As indicated earlier, that statute pertains to agency records, and section 86(4) defines the term "record" to include:

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

In consideration of the definition, I believe that the log book constitutes 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. In my view, if the log book is kept in plain sight, and if visitors and perhaps others have the ability to read its contents,

there would be no basis for a denial of access. If it is not open to review, I believe that those portions pertaining to you and your visits would be available to you; the remainder consisting of entries identifiable to others could, in my opinion, be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, section 89(2)(b)].

Notwithstanding the foregoing, a primary consideration may involve the requirement imposed by section 89(3) that a request must "reasonably describe" the records sought. In considering that standard, the State's highest court has found that to meet the standard, the terms of a request must be adequate to enable the agency to locate the records, and that an agency must "establish that 'the descriptions were insufficient for purposes of locating and identifying the documents sought'...before denying a FOIL request for reasons of overbreadth" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Records Access Officer, Westchester County Jail

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2472

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January 22, 2001

Mr. Eddie Cuadrado
88-T-0901
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. Cuadrado:

I have received your letter in which you wrote that the Appellate Division directed the Office of the New York County District Attorney "to provide records." Notwithstanding the decision, the agency in question has engaged in a series of delays, and you had not yet received the records as of the date of your letter to this office.

In this regard, I am familiar with the decision to which you referred [Cuadrado v. Morgenthau, 699 NYS2d 367, 267 AD2d 46 (1999)], and I do not believe that it involved an order to disclose records. Rather, it was found that the Office of the District Attorney did not sustain its burden of demonstrating that a diligent search was made for the records sought, and the agency was directed to determine whether the records exist, and if they do, to make them available or indicate why they need not be disclosed.

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)].

If you have not yet received a determination from the Office of the District Attorney, it is suggested that you contact the Court for the purpose of ensuring that its order is given effect.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Richard Nahas, Assistant District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12473

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January 22, 2001

Mr. Shawn White
98-A-5372
Camp Gabriels Correctional Facility
P.O. Box 100
Gabriels, NY 12939-0100

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

Dear Mr. White:

I have received your letter concerning your ability to obtain a copy of your pre-sentence report under the Freedom of Information Law.

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 state..." 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 materials 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 state in part that: "The pre-sentence report shall be made available by the court for examination and copying in connection with any appeal in the case..."

In view of the foregoing, I believe that a pre-sentence report may be made available only upon the order of a court, and only under the circumstances described in §390.50 of the Criminal Procedure law. It is suggested that you review that statute.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Clark J. Putnam

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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January 22, 2001

Mr. Christopher Lue-Shing
92-a-9582
Clinton Correctional Facility
P.O. Box 2002
Dannemora, NY 12929-2002

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

Dear Mr. Lue-Shing:

I have received your letter in which you asked "how...it [is] legally determined what records are 'instructions to staff that affect the public' or are 'final agency policy or determinations.'" You also inquired as to the distinction between "final and non-final agency policy."

With regard to the distinction between "final and non-final agency policy", from my perspective, if an item has not yet been adopted as policy, it is not final. In that circumstance, I believe that the item would essentially constitute a recommendation. If that is so, as indicated in my letter to you of July 31, I believe that it could be withheld under section 87(2)(g) of the Freedom of Information Law.

With respect to "instructions to staff that affect the public" and final agency policy or determinations, I believe that my comments in the letter of July 31 are responsive to your inquiry. Enclosed is a copy of that opinion.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt
Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1275

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January 22, 2001

Mr. Derrick Caldwell
93-A-4157
Clinton Correctional Facility
P.O. Box 2002
Dannemora, NY 12929

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

Dear Mr. Caldwell:

I have received your letters in which you sought assistance in obtaining a variety of records.

In this regard, first, the Committee on Open Government is authorized to provide advice and opinions concerning the New York Freedom of Information Law, which generally applies to records of state and local government in New York.

One area of inquiry relates to the FBI. As you are likely aware, the FBI is a federal agency which, therefore, is subject to the federal Freedom of Information Act. That being so, matters involving that agency are beyond the jurisdiction of this office.

With regard to the Mollen Report, I would conjecture that it would be available from many sources, such as the New York City Police Department, the New York State Archives or the New York City Municipal Archives. It is noted, however, that entities subject to the Freedom of Information Law may charge up to twenty-five cents per photocopy [see section 87(1)(b)(iii)]. Further, since there is nothing in that statute dealing with the waiver of fees, it has been held that an agency may charge its established fee, even when the applicant for the records is an indigent inmate [see Whitehead v. Morgenthau, 552 NYS2d 518 (1990)].

Lastly, the newspaper article that you enclosed suggests that Assemblyman John Faso may have prepared a report on the subject of your interest. If that is so, and if such a report exists, it is suggested that a request be directed to the Records Access Officer for the State Assembly. As you may be aware, section 89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the record sought. Therefore, a request should include sufficient detail to enable Assembly staff to locate and identify the report.

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-1247b

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January 22, 2001

Mr. Detroy Livingston
87-T-985
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 facts presented in your correspondence.

Dear Mr. Livingston:

I have received your letter in which you sought guidance in obtaining "documents on plea offers" that were apparently made to your attorney.

In this regard, first, I note that the Freedom of Information Law pertains to existing records, and that section 89(3) of that statute provides in part that an agency is not required to create a record in response to a request. Therefore, if, for example, a plea offer was expressed verbally and there is no written record of such an offer, the Freedom of Information Law would not apply.

Second, if there is such a record and it was given to your attorney, you would be required to demonstrate that the attorney no longer has a copy of the record before the Office of the District Attorney would be required to consider your request. In Moore v. Santucci [151 AD 2d 677, 679 (1989)], it was found that :

> "...if the petitioner or his attorney, previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioners' request under the FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee...unless the

> requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

Lastly, since you referred to appealing a denial of access to records, I direct your attention to section 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 bu 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: Records Access Officer, Office of the Kings County District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12477

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

January 22, 2001

Mr. Moises E. Ventura
95-A-4524
Mid-Orange Correctional Facility
900 Kings Highway
Warwick, NY 10990

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

Dear Mr. Ventura:

I have received your letter in which you sought assistance in obtaining portions of a visitors log indicating that a certain person visited you.

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. From my perspective, portions of a visitors log or similar record identifying those persons who visited you would be accessible under the Freedom of Information Law, for none of the grounds for denial would apply.

Notwithstanding the foregoing, however, a potential issue may involve the requirement in §89(3) of the Freedom of Information Law that an applicant must "reasonably describe" the records sought. It has been held that a request reasonably describes the records when the agency can locate and identify the records based on the terms of a request, and that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

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

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the

> 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 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 items of your interest can be located on the basis of your name or that of your visitor, I believe that a request for those portions of the log would meet the standard of reasonably describing the records. On the other hand, however, if a visitors log is kept chronologically and an entry cannot be found except by reviewing every entry on every page, it is unlikely that a request on the basis of a name would meet that standard.

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-12478

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

January 22, 2001

Mr. Andre Bethea
Annex 7-2-15
Clinton Correctional Facility
P.O. Box 2002
Dannemora, NY 12929

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

Dear Mr. Bethea:

I have received your letter in which you asked whether trial minutes, grand jury minutes and grand jury indictments are available to inmates.

In this regard, I point out that the statute within the Committee's advisory jurisdiction, the Freedom of Information Law, is applicable to agency records, and that §86(3) defines the term "agency" to include:

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

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

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

Based on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law (see e.g., Judiciary Law, §255) may grant broad public access to those records. Even though other statutes may deal with access to court records, the procedural provisions associated with the Freedom of Information Law (i.e., those involving the designation of a records access officer or the right to appeal a denial) would not ordinarily be applicable.

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

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

As such, grand jury minutes and related records would be outside the scope of rights conferred by the Freedom of Information Law. Any disclosure of those records would be based upon a court order or perhaps a vehicle authorizing or requiring disclosure that is separate and distinct from the Freedom of Information Law.

I hope that the foregoing serves to enhance your understanding of the 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-12479

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

January 22, 2001

Mr. Vertis Addison
a99-a-1357
Riverview Correctional Facility
P.O. Box 247
Ogdensburg, NY 13669

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

Dear Mr. Addison:

I have received your letter in which you wrote that money was taken out of your account to pay for copies of records requested under the Freedom of Information Law, but that you had neither received copies of the records nor a refund. You asked that this office "look into the matter."

In this regard, if an agency has indicated that copies of records would be made available upon payment of a fee, and if the fee has been paid, I believe that the agency has the responsibility of promptly making the records available. If an agency has failed to do within a reasonable time, I believe that the applicant may consider the request to have been denied may appeal on that basis pursuant to section 89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Ms. A. Charlebois

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12480

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

January 22, 2001

Mr. Curtis Davis
99-A-2681
Attica Correctional Facility
149 Exchange Street
Attica, NY 14011-0149

Dear Mr. Davis:

I have received your letter in which you asked that this office contact your attorney for the purpose of ensuring that he provide you with a certified copy of the file of your case.

In this regard, the primary function of the Committee on Open Government involves providing advice relative to the Freedom of Information Law. The Committee is not empowered to compel an entity to comply with law or grant or deny access to records.

Further, I note that the Freedom of Information Law is applicable to agency records, and that section 89(3) of that statute defines the term "agency" to mean:

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

Based on the foregoing, the Freedom of Information Law is generally applicable to records maintained by entities of state and local government in New York; it does not apply to records maintained by a private attorney or a law firm, for example. As such, the matter appears to be beyond the jurisdiction of this office.

I hope that the foregoing serves to clarify your understanding of the scope of the Freedom of Information Law and the duties of this office.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12481

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

January 22, 2001

Mr. Rafael Ramirez
89-A-8935
Attica Correctional Facility
P.O. Box 149
Exchange Street Road
Attica, NY 14011

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

Dear Mr. Ramirez:

I have received your letter in which you sought assistance in obtaining records from the Office of the New York County District Attorney. The correspondence attached to your letter indicates that you were informed that the records in question were made available to your attorney.

In this regard, based on judicial decisions, unless you can demonstrate that your attorney no longer has possession of the records, I do not believe that the Office of the District Attorney is required to honor your request under the Freedom of Information Law. In the first such decision, Moore v. Santucci, (151 AD 2d 677, 679 (1989)], it was found that:

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

The Court in Moore also specified that an agency "is not required to make available for inspection or copying any suppression hearing or trial transcripts of a witness' testimony in its possession, because the transcripts are court records, not agency records" (id. at 680).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Patricia Bailey

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12182

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

January 22, 2001

Mr. Thomas P. Walsh
96-A-5765
Marcy Correctional Facility
Box 3600
Marcy, NY 13403

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

Dear Mr. Walsh:

I have received your letters relating your unsuccessful efforts in obtaining records from the Suffolk County Police Department and the Office of the District Attorney. Having reviewed your correspondence, I offer the following comments.

First, the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee cannot obtain records on behalf of applicants for records. Similarly, the Committee is not empowered to compel an agency to comply with law or grant or deny access to records.

Second, as I understand the matter, you were informed that the records of you interest do not exist. In this regard, the Freedom of Information Law pertains to existing records, and section 89(3) of that statute provides in relevant part that an agency is not required to create a record in response to a request. In short, if the records in question do not exist, the Freedom of Information Law would not apply.

I note that the same provision of the Freedom of Information Law states that an applicant must reasonably describe the records sought. Therefore, an applicant is not required to name the record of his interest or identify the record with particularity. Rather, the applicant must provide sufficient detail to enable agency staff to locate and identify the record sought. For instance, there may be no single record that can be characterized as an "inventory of the tapes" or a "chain of custody of the tapes"; however, there may be records that include the inventory of a variety of items. Stated differently, your request might have been so specific that the agency could validly respond by stating that no such record exists. It is suggested that you might reformulate your requests so that they include, in a more general manner, records that contain the information of your interest.

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Records Access Officer, Suffolk County Police Department
Records Access Officer, Office of the Suffolk County District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12483

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

January 22, 2001

Mr. Edward Bennedy
99-B-1303
Wyoming Correctional Facility
Box 501
Attica, NY 14011-501

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. Bennedy:

I have received your letter in which you sought assistance and asked that this office "investigate" the Cortland Department of Probation and the Office of the County Attorney.

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee has neither the jurisdiction nor the resources to "investigate" the practices of agencies. Similarly, the Committee is not empowered to compel an agency to comply with law or grant or deny access to records. Nevertheless, I offer the following comments.

First, you referred to a failure of those agencies to maintain or disclose a "master index." As a general matter, the Freedom of Information Law pertains to existing records, and section 89(3) states that an agency generally is not required to create a record in response to a request. An exception to that general rule relates to the record in question. The phrase "master index" is used in the regulations promulgated by the Department of Correctional Services under the Freedom of Information Law. Those regulations are based upon §87 (3)(c) of the Freedom of Information Law, which requires that each agency maintain:

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

The subject matter list is not, in my opinion, required to identify each and every record of an agency; rather, by category and in reasonable detail, to the kinds of records maintained by an agency. Further, although a subject matter list is not prepared with respect to records pertaining to a single

individual, such a list should be sufficiently detailed to enable an individual to identify a file category of the record or records in which that person may be interested. Rather than seeking a "master index" from an agency, it is suggested that you request the subject matter list maintained pursuant to §87 (3)(c) of the Freedom of Information Law.

With regard to probation records, §243(2) of the Executive Law states in relevant part that the director of the Division of Probation and Correctional Alternatives has the authority to promulgate regulations and that "[s]uch rules and regulations shall be binding upon all counties and eligible programs...and when duly adopted shall have the force and effect of law". Section 348.1(b) of the Division's regulations states that:

> "(b) Cumulative case record is a single case file containing all information with respect to a case from its inception through its conclusion. All records developed and/or received by the probation department and which are related to the carrying out of authorized probation functions and services are considered probation records for the purpose of retention and destruction. Reports and other records material developed by the probation department and transmitted to the courts of other agencies become the responsibility of the court or other agencies as records."

Further, §348.4(k) of the regulations provides that: "Case records shall be accessible, in whole or in part, only to those authorized by law or court order." Based on the foregoing, in my opinion, records identifiable to persons or probation are beyond the scope of public rights of access.

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: Lawrence Knickerbocker
James J. Cunningham

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12484

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

January 22, 2001

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 in which you asked that the Committee on Open Government "compel NY State Police to respond to [your] requests for documents to which [you are] legally entitled." As I interpret your remarks, records pertaining to a warrant for arrest and an arraignment do not exist, and you want the Division of State Police to "admit" that is so.

In this regard, it is emphasized that the Committee on Open Government is authorized to offer advice and opinions concerning the Freedom of Information Law. The Committee is not empowered to "compel" an agency to take a certain action or otherwise require an agency to grant or deny access to records. Nevertheless, I offer the following comments.

First, the Freedom of Information Law pertains to existing records, 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.

Second, when an agency receives a request for records, I believe that there are three possibilities in terms of its response: the agency may grant access to records, it may deny access in whole or in part, or it may indicate that it does not maintain the records sought. 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."

If my understanding of the matter is accurate, you might want to seek a certification pursuant to §89(3) of the Freedom of Information Law.

Lastly, I note that the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) require that each agency designate one or more persons as "records access

officer." The records access officer has the duty of coordinating an agency's response to requests, and requests should ordinarily be made to that person. For your information, I believe that the records access officer for the Division of State Police is Lt. Laurie Wagner.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12485

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

January 22, 2001

Mr. Michael Jones
90-A-5292
Attica Correctional Facility
P.O. Box 149
Attica, NY 14011

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

Dear Mr. Jones:

I have received your letter in which you asked whether an office of a district attorney must disclose statements under the Freedom of Information Law "that consist of Brady and/or Exculpatory in nature, even if that person who gave the statement never testified."

In this regard, 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, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Although I am unaware of the facts relative to the situation that you described, it is possible that one or more of the grounds for denial may be pertinent with respect to the records in question. For instance, §87(2)(b) permits an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy", and §87(2)(f) authorizes an agency to withhold records when 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-AO-12486

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

January 22, 2001

Mr. Edward MacKenzie
94-A-2495
Shawangunk Correctional Facility
Box 700
Wallkill, NY 12589-0700

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

Dear Mr. MacKenzie:

I have received your letters in which you sought assistance in relation to a request for records concerning an arrest. You expressed the belief that most of the records sought should be public because they were used in open court.

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

Relevant to your inquiry is the decision rendered by the Appellate Division, Second Department, in Moore v. Santucci [151 AD 2d 677 (1989)]. In my view, Moore generally stands for the principle that records maintained by an agency, including a police department, that would ordinarily be deniable under the Freedom of Information Law become available to the public if they have been disclosed by means of a public judicial proceeding. As stated in that decision: "once the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public" (id. at 679). However, the decision specified that the respondent office of a district attorney "is not required to make available for inspection or copying any suppression hearing or trial transcripts of a witness' testimony in its possession, because the transcripts are court records, not agency records" (id. at 680).

Court records are not subject to the Freedom of Information Law. However, other statutes often require the disclosure of those records (see e.g., Judiciary Law, §255), and it is suggested that any request for court records be made to the clerk of the court in which the proceeding was conducted.

Lastly, if charges are dismissed in favor of an accused, the records relating to the event are usually sealed pursuant to the provisions of §160.50 of the Criminal Procedure Law. If that is so, neither the records of a police department nor the courts would be accessible to the public.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer, Nassau County Police Department

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12487

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

January 23, 2001

Mr. Rodney Harris
87-C-0760
Riverview Correctional Facility
P.O. Box 247
Ogdensburg, NY 13669

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

Dear Mr. Harris:

I have received your letter in which you sought guidance concerning your ability to gain access to a "warrant/detainer", as well as pre-sentence materials.

In this regard, since a warrant or similar record would have been issued by a court, it is suggested that you seek such record from the clerk of the issuing court. I note that the Freedom of Information Law does not apply to the courts or court records. However, other provisions of law (see e.g., Judiciary Law, §255) generally grant access to court records.

With respect to pre-sentence reports and related materials, although the Freedom of Information Law provides broad rights of access to records, the first ground for denial, §87(2)(a), states that an agency may withhold records or portions thereof that "...are specifically exempted from disclosure by state or federal statute..." Relevant is §390.50 of the Criminal Procedure Law, which, in my opinion represents the exclusive procedure concerning access to pre-sentence reports.

Section 390.50(1) of the Criminal Procedure Law states that:

> "Any pre-sentence report or memorandum submitted to the court pursuant to this article and any medical, psychiatric or social agency report or other information gathered for the court by a probation department, or submitted directly to the court, in connection with the question of sentence is confidential and may not be made available to any person or public or private agency except where specifically required or permitted by statute or upon specific authorization of the court. For purposes of this section, any report, memorandum or other information forwarded to a probation department within this state is governed by the same rules of confidentiality. Any person, public or

> private agency receiving such material must retain it under the same conditions of confidentiality as apply to the probation department that made it available."

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

In view of the foregoing, I believe that a pre-sentence report and related materials may be made available only upon the order of a court, and only under the circumstances described in §390.50 of the Criminal Procedure Law. It is suggested that you review that statute.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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January 23, 2001

Mr. Gillian Torres
93-A-2711
Great Meadow Correctional Facility
P.O. Box 51
Comstock, NY 12821-0051

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

Dear Mr. Torres:

I have received your letter in which it appears that you asked whether certain "bulletins" issued by a police department are accessible under the Freedom of Information Law. While I am not familiar with the records in question, I offer the following comments for the purpose of offering guidance regarding that statute and its judicial interpretation.

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

Specifically, §87(2)(g) states that an agency may withhold records that:

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different basis for denial is

applicable. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. It would appear that the records sought would consist of instructions to staff that affect the public or an agency's policy. Therefore, I believe that they would be available, unless a different basis for denial could be asserted.

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

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

Under the circumstances, most relevant is §87(2)(e)(iv). The leading decision concerning that provision is Fink v. Lefkowitz, which involved access to a manual prepared by a special prosecutor that investigated nursing homes, in which the Court of Appeals held that:

> "The purpose of this exemption is obvious. Effective law enforcement demands that violators of the law not be apprised the nonroutine procedures by which an agency obtains its information (see Frankel v. Securities & Exch. Comm., 460 F2d 813, 817, cert den 409 US 889). However beneficial its thrust, the purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution.
>
> "To be distinguished from agency records compiled for law enforcement purposes which illustrate investigative techniques, are those which articulate the agency's understanding of the rules and regulations it is empowered to enforce. Records drafted by the body charged with enforcement of a statute which merely clarify procedural or substantive law must be disclosed. Such information in the hands of the public does not impede effective law enforcement. On the contrary, such knowledge actually encourages voluntary compliance with the law by detailing the standards with which a person is expected to comply, thus allowing him to conform his

> conduct to those requirements (see Stokes v. Brennan, 476 F2d 699, 702; Hawkes v. Internal Revenue Serv., 467 F2d 787, 794-795; Davis, Administrative Law [1970 Supp], section 3A, p 114).
>
> "Indicative, but not necessarily dispositive of whether investigative techniques are nonroutine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel (see Cox v. United States Dept. of Justice, 576 F2d 1302, 1307-1308; City of Concord v. Ambrose, 333 F Supp 958). It is no secret that numbers on a balance sheet can be made to do magical things by scrupulous nursing home operators the path that an audit is likely to take and alerting them to items to which investigators are instructed to pay particular attention, does not encourage observance of the law. Rather, release of such information actually countenances fraud by enabling miscreants to alter their books and activities to minimize the possibility or being brought to task for criminal activities. In such a case, the procedures contained in an administrative manual are, in a very real sense, compilations of investigative techniques exempt from disclosure. The Freedom of Information Law was not enacted to furnish the safecracker with the combination to the safe" (id. at 572-573).

In applying those criteria to specific portions of the manual, which was compiled for law enforcement purposes, the Court found that:

> "Chapter V of the Special Prosecutor's Manual provides a graphic illustration of the confidential techniques used in a successful nursing home prosecution. None of those procedures are 'routine' in the sense of fingerprinting or ballistic tests (see Senate Report No. 93-1200, 93 Cong 2d Sess [1974]). Rather, they constitute detailed, specialized methods of conducting an investigation into the activities of a specialized industry in which voluntary compliance with the law has been less then exemplary.
>
> "Disclosure of the techniques enumerated in those pages would enable an operator to tailor his activities in such a way as to significantly diminish the likelihood of a successful prosecution. The information detailed on pages 481 and 482 of the manual, on the other hand, is merely a recitation of the obvious: that auditors should pay particular attention to requests by nursing homes for Medicaid reimbursement rate increases based upon projected increase in cost. As this is simply a routine technique that would be used in any audit, there is no reason why these pages should not be disclosed" (id. at 573).

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12489

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

January 23, 2001

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

I have received your letter in which you asked whether you may obtain the "verdict sheet" pertaining to your conviction from the Office of the Queens County District Attorney.

In this regard, first, if the verdict sheet is a court record, the Freedom of Information Law may not be applicable. In that event, although the courts are not subject to that statute, other provisions of law generally grant access to court records (see e.g., Judiciary Law, §255), and a request may be made to the clerk of the appropriate court.

Second, if the verdict is not a court record and is maintained by the Office of the District Attorney, it would fall within the coverage of 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. As I understand the contents of a verdict sheet, it would appear to be accessible to you.

Third, if a copy of the verdict sheet was given to your attorney, judicial decisions indicate that the Office of the District Attorney is not required to provide a copy, unless it can be demonstrated that neither you nor your attorney currently has possession of that record [see e.g., Moore v. Santucci, 151 AD2d 677 (1989)].

Lastly, I am unaware of the identity of the person designated as records access officer by the Queens County District Attorney. However, correspondence may be directed to: Records Access Officer, Office of the Queens County District Attorney, Queens Criminal Court Building, 125-01 Queens Blvd., Kew Gardens, NY 11415.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
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January 23, 2001

Mr. Bernie Daniels
Wyoming County Jail
151 North Main Street
Warsaw, NY 14569

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

Dear Mr. Daniels:

I have received your letter in which you sought guidance concerning an unanswered request for medical records pertaining to you maintained by the Wyoming County Jail.

In this regard, I offer the following comments.

First, you cited 5 USC 552 and 552a as the basis of your request. Those provisions are, respectively, the federal Freedom of Information and Privacy Acts, and they apply only to federal agencies. The statute that generally deals with rights of access to records of state and local government in New York is the Freedom of Information Law.

Second, that statute provides direction concerning the time and manner in which an agency must respond to a request 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)].

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

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

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

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

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

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Medical Director, Wyoming County Jail

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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January 23, 2001

Mr. Wilton Wongshing
95-A-1454
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 facts presented in your correspondence.

Dear Mr. Wongshing:

I have received your letter and the materials attached to it. You have asked that this office "intervene" on your behalf in obtaining information from your attorney, who is employed by the Legal Aid Society in New York City.

In this regard, the statute within the advisory jurisdiction of the Committee on Open Government, the Freedom of Information Law, pertains to records maintained by agencies. Section 86(3) of the Freedom of Information Law defines the term "agency" to mean:

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

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

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

I believe that the Legal Aid Society in New York City is a corporate entity separate and distinct from government, that it is not an "agency" subject to the Freedom of Information Law and that, therefore, neither the Legal Society nor its employees are required to disclose records pursuant to the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
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January 23, 2001

Mr. Bradford Applegate
89-T-2501
Upstate Correctional Facility
P.O. Box 2001
Malone, NY 12953

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

Dear Mr. Applegate:

I have received your letter in which you asked that this office "instruct" the Upstate Correctional Facility to make available its list required to be maintained pursuant to §87(3)(c) of the Freedom of Information Law. You contend that the records of your interest are "instructions to staff that affect the public" that must be disclosed, and you referred specifically to guidelines followed by the nursing and medical staff at the facility.

In this regard, it is noted at the outset that the primary function of the Committee on Open Government involves providing advice and opinions relating to public access to government records. The Committee is not empowered to compel an agency to grant or deny access to records. In an effort to offer guidance, however, I offer the following comments.

First, the subject matter list referenced in the Freedom of Information Law is characterized as a "master index" in the regulations promulgated by the Department of Correctional Services. Section 87(3)(c) of the Freedom of Information Law, requires that each agency maintain:

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

The subject matter list is not, in my opinion, required to identify each and every record of an agency; rather I believe that it must refer, by category and in reasonable detail, to the kinds of records maintained by an agency. Further, although a subject matter list is not prepared with respect to records pertaining to a single individual, such a list should be sufficiently detailed to enable an individual to identify a file category of the record or records in which that person may be interested. I direct your attention to the regulations promulgated by the Department of Correctional Services, which in §5.13 state that:

> "(a) Every custodian of records under these regulations shall maintain an up-to-date subject matter list, reasonably detailed, of all records in their possession. The records access officer shall maintain a master index, reasonably detailed, of all records maintained by the

> department. The master index shall include the lists kept by all custodians as well as a list of records maintained at the department's central office.
>
> (b) Each subject matter list and the master index shall be sufficiently detailed to permit identification of the file category of the record sought.
>
> (c) The master index shall be updated not less than twice per year. The most recent update shall appear on the first page of the subject matter list. Each custodian of records and the records access officer shall make available the index kept by him for inspection and copying. Any person desiring a copy of such list may request in writing a copy and upon payment of the appropriate fee, unless waived, a copy of such list shall be mailed or delivered."

Based on the foregoing, it is clear in my view that a master index must be maintained and made available for inspection at each facility.

Second, the subject matter list or master index is different from the records to which it refers. Again, it is a categorization of the kinds of records maintained by an agency. The records themselves may be accessible or deniable, in whole or in part, under other provisions of the Freedom of Information Law.

With respect to access to the guidelines and similar records to which you alluded, 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, insofar as records that are the subject of your inquiry exist, three of the grounds for denial may be relevant to your inquiry.

Specifically, §87(2)(g) states that an agency may withhold records that:

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

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

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

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

Under the circumstances, it appears that most relevant is §87(2)(e)(iv). The leading decision concerning that provision is Fink v. Lefkowitz, which involved access to a manual prepared by a special prosecutor that investigated nursing homes, in which the Court of Appeals held that:

> "The purpose of this exemption is obvious. Effective law enforcement demands that violators of the law not be apprised the nonroutine procedures by which an agency obtains its information (see Frankel v. Securities & Exch. Comm., 460 F2d 813, 817, cert den 409 US 889). However beneficial its thrust, the purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution.
>
> "To be distinguished from agency records compiled for law enforcement purposes which illustrate investigative techniques, are those which articulate the agency's understanding of the rules and regulations it is empowered to enforce. Records drafted by the body charged with enforcement of a statute which merely clarify procedural or substantive law must be disclosed. Such information in the hands of the public does not impede effective law enforcement. On the contrary, such knowledge actually encourages voluntary compliance with the law by detailing the standards with which a person is expected to comply, thus allowing him to conform his conduct to those requirements (see Stokes v. Brennan, 476 F2d 699, 702; Hawkes v. Internal Revenue Serv., 467 F2d 787, 794-795; Davis, Administrative Law [1970 Supp], section 3A, p 114).
>
> "Indicative, but not necessarily dispositive of whether investigative techniques are nonroutine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel (see Cox v. United States Dept. of Justice, 576 F2d 1302, 1307-1308; City of Concord v. Ambrose, 333 F Supp 958). It is no secret that numbers on a balance sheet can be made to do magical things by scrupulous nursing home operators the path that an audit is likely to take and alerting them to items to which investigators are instructed to pay particular attention, does not encourage observance of the law. Rather, release of such information actually countenances fraud by

> enabling miscreants to alter their books and activities to minimize the possibility or being brought to task for criminal activities. In such a case, the procedures contained in an administrative manual are, in a very real sense, compilations of investigative techniques exempt from disclosure. The Freedom of Information Law was not enacted to furnish the safecracker with the combination to the safe" (id. at 572-573).

In applying those criteria to specific portions of the manual, which was compiled for law enforcement purposes, the Court found that:

> "Chapter V of the Special Prosecutor's Manual provides a graphic illustration of the confidential techniques used in a successful nursing home prosecution. None of those procedures are 'routine' in the sense of fingerprinting or ballistic tests (see Senate Report No. 93-1200, 93 Cong 2d Sess [1974]). Rather, they constitute detailed, specialized methods of conducting an investigation into the activities of a specialized industry in which voluntary compliance with the law has been less then exemplary.
>
> "Disclosure of the techniques enumerated in those pages would enable an operator to tailor his activities in such a way as to significantly diminish the likelihood of a successful prosecution. The information detailed on pages 481 and 482 of the manual, on the other hand, is merely a recitation of the obvious: that auditors should pay particular attention to requests by nursing homes for Medicaid reimbursement rate increases based upon projected increase in cost. As this is simply a routine technique that would be used in any audit, there is no reason why these pages should not be disclosed" (id. at 573).

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

The remaining ground for denial of likely significance 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 accessible, others may in my opinion be withheld in conjunction with the preceding commentary.

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

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

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

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

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

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

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: Superintendent, Upstate Correctional Facility

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12193

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January 23, 2001

Mr. Nathaniel Greene
99-A-2642
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. Greene:

I have received your letter concerning a request for various records kept at your facility. Although you referred to the letter as an appeal, you indicated at the end that the appeal and the determination that followed should be forwarded to the Committee on Open Government. As such, the function of your letter is unclear. Nevertheless, in an effort to provide guidance, I offer the following comments.

First, the Committee on Open Government is authorized to provide advice and opinions regarding the Freedom of Information Law. The Committee is not empowered to determine appeals or otherwise compel an agency to grant or deny access to records. The provision dealing with the right to appeal, §89(4)(a) of the Freedom of Information Law, states in relevant part that:

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

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

Second, since you indicated that you did not have the funds to pay for copies, I point out that the Freedom of Information Law does not refer to or contain provisions regarding the waiver of fees. Further, it has been held that an agency may charge its established fee for copies, even if the applicant is an indigent inmate [Whitehead v. Morgenthau, 552 NYS2d 518 (1990)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
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January 23, 2001

Mr. Anthony Bennett
96-B-1530
Attica Correctional Facility
P.O. Box 149
Attica, NY 14011

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

Dear Mr. Bennett:

I have received your letter in which you sought assistance in relation to a request made under the Freedom of Information Law for copies of employment records maintained by an accounting firm.

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 includes records of state and local government within its coverage; private companies fall beyond the scope of that law. Further, I know of no provision of law that generally provides employees of private companies with rights of access to employment records pertaining to themselves.

I regret that I cannot be of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12495

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

January 23, 2001

Mr. L. Leath
97-A-5249
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. Leath:

I have received your letter in which you asked whether telephone companies are subject to the Freedom of Information Law and have designated "FOIL officers."

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 pertains ' -ds of entities of state and local government. Since telephone companies are private corr -v would fall outside the coverage of that law.

I note that the Public Service Commission performs regulat- -one companies, and that agency may have records of interest to you.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12496

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

January 23, 2001

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

I have received your letter in which you asked whether, in my view, an aspect of the holding in Miller v. Clark (Supreme Court, Erie County, May 30, 1997) is "good law in this State anymore." You focused on the portion of the decision dealing with "testifying and non-testifying witness's prior statement disclosure."

The court in Miller relied on Gould v. New York City Police Department [89 NY2d 267 (1996)] and concluded that the holding in that decision "does not differentiate between the witnesses that were called to testify and those who were not" and that "any witness statement, made by any witness, whether or not that witness testified at the trial, should be disclosed...." From my perspective, that conclusion is not fully consistent with the holding in Gould.

As I understand the Gould decision, the Court of Appeals rejected the Police Department's contention that internal documents, so-called complaint follow-up reports, could be withheld in their entirety as intra-agency materials under §87(2)(g) because they did not relate to any final determination. Rather, the Court found that portions of those materials, specifically statistical or factual information, cannot be withheld under that exception. The Court also determined that the exception is intended to deal with internal governmental communications, and that statements by members of the public fell beyond the scope of that exception.

Even though factual information could not be withheld under §87(2)(g), the Court in my view was careful to point out that other exceptions might justifiably be asserted, for the decision states that:

> "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. In this connection, we are well aware that any indeterminate amount of data collected during a criminal investigation may find its way into police files regardless of whether it ultimately proves to be reliable, credible, or relevant. Disclosure of such documents could potentially endanger the safety of witnesses, invade personal rights, and expose confidential information of nonroutine police procedures. The statutory exemptions contained in the Public Officers Law, however, strike a balance between the public's right to open government and the inherent risks carried by disclosure of police files (*see, e.g.,* Public Officers Law § 87[2][b], [e], [f])."

I do not believe that the Court in Gould focused on the distinction between witnesses who testified at trial and those who did not. Rather, it appears to have focused on the content of records and the effects of disclosure.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1249?

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

January 24, 2001

Mr. Thomas J. Chisholm II
99-A-3631
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. Chisholm:

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

The first issue deals with access to a cassette tape recording or transcript of the "alleged commission" of the crime for which you were convicted. You indicated that you sought the record from the office of a district attorney, but that "the D.A.'s office shot it down."

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

I am unfamiliar with the contents of the tape recording/transcript, and you did not indicate the rationale for the denial of your request by the office of the district attorney. Since you have been convicted and the matter is likely closed, I would conjecture that the basis for a denial would involve an attempt to protect the privacy or safety of others. If that is so, several of the grounds for denial might be pertinent. For instance, §87(2)(b) permits an agency to withhold records when disclosure would constitute "an unwarranted invasion of personal privacy"; §87(2)(e)(iii) authorizes an agency to withhold records compiled for law enforcement purposes when disclosure would identify a confidential source; and §87(2)(f) enables an agency to deny access when disclosure would "endanger the life or safety of any person."

If there was a trial and the tape recording was used in evidence, I believe that it would be available from either the office of the district or the court. It has been held that when records are submitted into evidence in a public proceeding, they are accessible, notwithstanding the grounds for

denial [see Moore v. Santucci, 151 AD2d 677 (1989)]. Further, while the courts are not subject to the Freedom of Information Law, court records are generally available from the clerk of the court under other statutes (see e.g., Judiciary Law, §255).

It is also noted that when a request for records is denied, the person denied access may appeal pursuant to §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

The other issue raised involves your ability to acquire the "tier approved layout/bedding variance authorization" from the Commission of Correction. 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 sent to that person.

Second, that you may be a litigant has no impact on your rights as a member of the public under the Freedom of Information Law [see Farbman v. New York City, 62 NY2d 75 (1984)].

Lastly, again, I am unfamiliar with the nature of the record in question or the effects of its disclosure. In some instances, the disclosure of the physical or architectural aspects of a correctional facility has an impact on security and the safety of inmates and staff. In those cases, a provision cited above, §87(2)(f) dealing with endangering life and safety, is pertinent in considering the ability of an agency to withhold records.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Jack Barry, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1248

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

January 24, 2001

Mr. Adrian Salas
98-R-6819
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 facts presented in your correspondence.

Dear Mr. Salas:

I have received your letter in which you sought guidance in your attempt to obtain copies of court records 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) may grant broad public access to those records. Even though other statutes may deal with access to court records, the procedural provisions associated with the Freedom of Information Law (i.e., those involving the designation of a records access officer or the right to appeal a denial) would not ordinarily be applicable.

It is suggested that you seek the records from the clerk of the appropriate court, citing an applicable provision of law as the basis for the request.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12199

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

January 24, 2001

Mr. Ruben Fuentes
92-B-0666
C-33-33
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. Fuentes:

I have received your letter in which you sought guidance in your attempt to obtain copies of court records 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) may grant broad public access to those records. Even though other statutes may deal with access to court records, the procedural provisions associated with the Freedom of Information Law (i.e., those involving the designation of a records access officer or the right to appeal a denial) would not ordinarily be applicable.

It is suggested that you seek the records from the clerk of the appropriate court, citing an applicable provision of law as the basis for the request.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1250

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

January 24, 2001

Mr. Toindra Ramdeo
97-A-3482
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. Ramdeo:

I have received your letter in which you asked whether the Guyanese Consulate is required to honor a request made under the Freedom of Information Law.

In this regard, the Freedom of Information Law is a New York state statute that 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 New York Freedom of Information Law generally includes entities of state and local government within its coverage. I note that there is a federal Freedom of Information Act, which applies to agencies of the federal government.

From my perspective, it is clear that neither the New York nor the federal freedom of information states would apply to the records of a foreign consulate.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:im

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1250

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

January 24, 2001

Mr. Nathaniel Jay
94-R-0474
Orleans Correctional Facility
3531 Gaines Basin Road
Albion, NY 14411-0100

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

Dear Mr. Jay:

I have received your letter, which I found difficult to read. As I understand its contents, you have sought guidance concerning your ability to gain access to medical records from your facility.

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

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

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12502

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

January 24, 2001

Mr. Arthur Brown
92-A-4278
Upstate Correctional Facility
P.O. Box 2001
Malone, NY 12953

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

Dear Mr. Brown:

I have received your letter in which you sought guidance in your attempt to obtain copies of court records 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) may grant broad public access to those records. Even though other statutes may deal with access to court records, the procedural provisions associated with the Freedom of Information Law (i.e., those involving the designation of a records access officer or the right to appeal a denial) would not ordinarily be applicable.

It is suggested that you seek the records from the clerk of the appropriate court, citing an applicable provision of law as the basis for the request.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12503

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

January 25, 2001

Mr. Mark Shervington
87-T-0520
Fishkill Correctional Facility
Box 1245
Beacon, NY 12508

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

Dear Mr. Shervington:

I have received your letter in which you sought assistance in expunging what you believe to be "false, inaccurate and misleading information [in your] prison records."

In this regard, the Freedom of Information Law is silent with respect to the ability to amend or correct records that may contain inaccurate information. However, §5.50 of the regulations promulgated by the Department of Correctional Services states that:

> "If the completeness or accuracy of any item of information contained in the personal history or correctional supervision history portion of an inmate's record is disputed by the inmate, the inmate shall convey such dispute to the custodian of the record or the designee of the custodian reviewing the record with him. The inmate may obtain a copy of any record that contains information the accuracy or completeness of which the inmate disputes. The fee for copies shall be in accordance with section 5.36 of this Part."

Section 5.5 of the regulations define "correctional supervision history" means:

> "...records constituting disciplinary charges and dispositions, good behavior allowance reports, warrants and cancellations of warrants, legal papers, court orders, transportation orders, records of institutional transfers and changes in program assignments, reports of injury to inmates and records relating to inmate property including the personal property lists and postage account card."

The same provision defines "personal history" as follows:

> "....records consisting of inmate name, age, birthdate, birthplace, city of previous residence, physical description, occupation, correctional facilities in which the inmate has been incarcerated, commitment information and departmental actions regarding confinement and release."

Based on the foregoing, the ability to attempt to correct records maintained by your facility is somewhat limited. I note that the regulations promulgated by the Division of Criminal Justice Services authorize individuals to attempt to correct criminal history records that may be inaccurate, and it is suggested that you contact that agency.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: C. Jacobsen

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12504

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

January 25, 2001

Mr. Curtis Van Stuyvesant
99-A-4590
Marcy Correctional Facility
Box 3600
Marcy, NY 13403-3600

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

Dear Mr. Van Stuyvesant:

I have received your lengthy letter in which you described a series of difficulties relating to your experience with the criminal justice system. Although your commentary was, in some instances difficult to read, based on my understanding of the matter, I offer the following general remarks.

First, the courts have provided direction concerning the Freedom of Information Law as opposed to the use of discovery under the Civil Practice Law and Rules (CPLR) in civil proceedings, and discovery in criminal proceedings under the CPL. The principle is that the Freedom of Information Law is a vehicle that confers rights of access upon the public generally, while the disclosure provisions of the CPLR or the CPL, for example, are separate vehicles that may require or authorize disclosure of records due to one's status as a litigant or defendant.

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

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

I note that the Court of Appeals held that the CPL does not limit a defendant's ability to attempt to obtain records under the Freedom of Information Law (Gould v. New York City Police Department, [89 NY2d 267 (1996)].

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

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. While some aspects of the records sought might properly be withheld, relevant is the decision by the Court of Appeals cited earlier, which dealt with "complaint follow-up reports" and police officers' memo books in which it was held that a denial of access based on their characterization as intra-agency materials would be inappropriate.

The provision at issue in that case, §87(2)(g) of the Freedom of Information Law, enables an agency to withhold records that:

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

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

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

In its analysis of the matter, the decision states that:

> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)...
>
> "...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][i]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182).

> "Against this backdrop, we conclude that the complaint follow-up reports contain substantial factual information available pursuant to the provisions of FOIL. Sections of the report are devoted to such purely factual data as: the names, addresses, and physical descriptions of crime victims, witnesses, and perpetrators; a checklist that indicates whether the victims and witnesses have been interviewed and shown photos, whether crime scenes have been photographed and dusted for fingerprints, and whether neighborhood residents have been canvassed for information; and a blank space denominated 'details' in which the officer records the particulars of any action taken in connection with the investigation.
>
> "However, the Police Department argues that any witness statements contained in the reports, in particular, are not 'factual' because there is no assurance of the statements' accuracy and reliability. We decline to read such a reliability requirement into the phrase 'factual data', as the dissent would have us do, and conclude that a witness statement constitutes factual data insofar as it embodies a factual account of the witness's observations. Such a statement, moreover, is far removed from the type of internal government exchange sought to be protected by the intra-agency exemption (see, Matter of Ingram v. Axelrod, 90 AD2d 568, 569 [ambulance records, list of interviews, and reports of interviews available under FOIL as 'factual data']). By contrast, any impressions, recommendations, or opinions recorded in the complaint follow-up report would not constitute factual data and would be exempt from disclosure. The holding herein is only that these reports are not categorically exempt as intra-agency material. Indeed, the Police Department is entitled to withhold complaint follow-up reports, or specific portions thereof, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made(id., 276-277).

Based on the foregoing, an agency cannot in most instances claim that internal government communications can be withheld in their entirety on the ground that they constitute inter-agency or intra-agency materials. However, the Court was careful to point out that other grounds for denial might apply in consideration of those records, as well as others that you requested.

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

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

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

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

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

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

However, in the same decision, it was also found that:

> "...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish

another copy upon payment of the appropriate fee...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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January 25, 2001

Mr. Jacob Doris
99-A-4234
Upstate Correctional Facility
P.O. Box 2001
Malone, NY 12953

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

Dear Mr. Doris:

I have received your letter in which you sought guidance concerning access to records relating to your case, as well as other matters.

In this regard, the primary function of the Committee on Open Government involves providing guidance concerning the Freedom of Information Law. Consequently, my remarks will be limited to matters that you raised that relate to that statute.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. While some aspects of the records sought might properly be withheld, relevant is a decision by the Court of Appeals that dealt with "complaint follow-up reports" and police officers' memo books in which it was held that a denial of access based on their characterization as intra-agency materials would be inappropriate.

The provision at issue in that case, §87(2)(g) of the Freedom of Information Law, enables an agency to withhold records that:

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

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

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

In its analysis of the matter, the decision states that:

> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)...
>
> "...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][i]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182).

> "Against this backdrop, we conclude that the complaint follow-up reports contain substantial factual information available pursuant to the provisions of FOIL. Sections of the report are devoted to such purely factual data as: the names, addresses, and physical descriptions of crime victims, witnesses, and perpetrators; a checklist that indicates whether the victims and witnesses have been interviewed and shown photos, whether crime scenes have been photographed and dusted for fingerprints, and whether neighborhood residents have been canvassed for information; and a blank space denominated 'details' in which the officer records the particulars of any action taken in connection with the investigation.
>
> "However, the Police Department argues that any witness statements contained in the reports, in particular, are not 'factual' because there is no assurance of the statements' accuracy and reliability. We decline to read such a reliability requirement into the phrase 'factual data', as the dissent would have us do, and conclude that a witness statement constitutes factual data insofar as it embodies a factual account of the witness's observations. Such a statement, moreover, is far removed from the type of internal government exchange sought to be protected by the intra-agency exemption (see, Matter of Ingram v. Axelrod, 90 AD2d 568, 569 [ambulance records, list of interviews, and reports of interviews available under FOIL as 'factual data']). By contrast, any impressions, recommendations, or opinions recorded in the complaint follow-up report would not constitute factual data and would be exempt from disclosure. The holding herein is only that these reports are not categorically exempt as intra-agency material. Indeed, the Police Department is entitled to withhold complaint follow-up reports, or specific portions thereof, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made(id., 276-277).

Based on the foregoing, an agency cannot in most instances claim that internal government communications can be withheld in their entirety on the ground that they constitute inter-agency or intra-agency materials. However, the Court was careful to point out that other grounds for denial might apply in consideration of those records, as well as others that you requested.

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

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

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

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

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

Also relevant is 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 in which it was held that "once the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public" [see Moore v. Santucci, 151 AD 2d 677, 679 (1989)]. Based upon that decision, it appears that records introduced into evidence or disclosed during a public judicial proceeding should be available.

However, in the same decision, it was also found that:

> "...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish

> another copy upon payment of the appropriate fee...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

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

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

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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January 25, 2001

Mr. Albert DeLeon
95-R-0576
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. DeLeon:

I have received your letter in which you questioned your right to obtain various records from the office of a district attorney under the Freedom of Information Law. They include investigative reports, medical and psychological reports pertaining to a "plaintiff", grand jury minutes, and a variety of other materials.

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. 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.

Medical and psychological reports pertaining to persons other than yourself could in my view be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" under §§87(2)(b) and 89(2)(b). The latter includes a series of examples of unwarranted invasions of personal privacy, two of which relate to medical information.

In considering other 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, as indicated earlier, permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". That provision might be applicable relative to the deletion of identifying details in a variety of situations, i.e., where a record identifies a confidential source or a witness, for example.

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

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

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

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

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

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

As such, grand jury related records would be outside the scope of rights conferred by the Freedom of Information Law. Any disclosure of those records would be based upon a court order or perhaps a vehicle authorizing or requiring disclosure that is separate and distinct from the Freedom of Information Law.

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

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

The Court in Moore also specified that an agency "is not required to make available for inspection or copying any suppression hearing or trial transcripts of a witness' testimony in its possession, because the transcripts are court records, not agency records" (id. at 680).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1250?

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January 26, 2001

Mr. Charles Bressette
68-B-0038
Box 149
Attica, NY 14011-049

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. Bressette:

I have received your letter in which you questioned whether you could obtain certain records from the Division of Parole under the Freedom of Information Law. The memorandum attached to your letter indicates that the records were withheld "for security reasons."

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

It appears that most relevant under the circumstances is §87(2)(f), which authorizes an agency to withhold records when disclosure "would endanger the life or safety of any person." In my view, if disclosure of the records sought could jeopardize the security of inmates or staff at a facility, §87(2)(f) could properly be asserted.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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January 26, 2001

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 facts presented in your correspondence.

Dear Mr. Hall:

I have received your letter in which you sought an opinion concerning a variety of issues relating to your requests under the Freedom of Information Law.

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

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

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

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

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

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

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. While it is likely that many aspects of the records sought might properly be withheld, relevant is a decision by the Court of Appeals that dealt with "complaint follow-up reports" and police officers' memo books in which it was held that a denial of access based on their characterization as intra-agency materials would be inappropriate.

The provision at issue in that case, §87(2)(g) of the Freedom of Information Law, enables an agency to withhold records that:

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

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

In its analysis of the matter, 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, an agency cannot in most instances claim that internal government communications can be withheld in their entirety on the ground that they constitute inter-agency or intra-agency materials. However, the Court was careful to point out that other grounds for denial might apply in consideration of those records, as well as others that you requested.

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

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

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

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

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

Also relevant is 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 in which it was held that "once the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public" [see Moore v. Santucci, 151 AD 2d 677, 679 (1989)]. Based upon that decision, it appears that records introduced into evidence or disclosed during a public judicial proceeding should be available.

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).

Also pertinent in consideration of your requests is §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute. One such statute deals with records of 911 calls made in an enhanced 911 system. Section 308(4) of the County Law states that:

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

Lastly, with regard to probation records, §243(2) of the Executive Law states in relevant part that the director of the Division of Probation and Correctional Alternatives has the authority to promulgate regulations and that "[s]uch rules and regulations shall be binding upon all counties and eligible programs...and when duly adopted shall have the force and effect of law". Section 348.1(b) of the Division's regulations states that:

> "(b) Cumulative case record is a single case file containing all information with respect to a case from its inception through its conclusion. All records developed and/or received by the probation department and which are related to the carrying out of authorized probation functions and services are considered probation records for the purpose of retention and destruction. Reports and other records material developed by the probation department and transmitted to the courts of other agencies become the responsibility of the court or other agencies as records."

Further, §348.4(k) of the regulations provides that: "Case records shall be accessible, in whole or in part, only to those authorized by law or court order." Based on the foregoing, in my opinion, records identifiable to persons or probation are beyond the scope of public rights of access.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
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January 26, 2001

Mr. Ken McIntyre
97-A-0652
P.O. Box 8451
Rome, NY 13442

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

Dear Mr. McIntyre:

I have received your letter in which you questioned the propriety of a denial of access to your medical records at your facility and asked whether you could obtain the license of a nurse at the facility.

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.

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

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

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

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

Second, it has consistently been advised that licenses and similar, related kinds of records are available to the public, even though they identify particular individuals. From my perspective, various activities are licensed due to some public interest in ensuring that individuals or entities are qualified to engage in certain activities, such as teaching, selling real estate, owning firearms, practicing law or medicine, etc. I believe that licenses and similar records are available, for they are intended to enable the public to know that an individual has met appropriate requirements to be engaged in an activity that is regulated by the state or in which the state has a significant interest.

The standard in the Freedom of Information Law pertaining to the protection of privacy in my opinion is flexible and agency officials must, in some instances, make subjective judgments when issues of privacy arise. However, it is clear that not every item within a record that identifies an individual may be withheld. Disclosure of intimate details of peoples' lives, such as medical information, one's employment history and the like, might, if disclosed, constitute an unwarranted invasion of personal privacy [see Freedom of Information Law, §87(2)(b)]. Nevertheless, other types of personal information maintained by an agency, particularly those types of information that are relevant to an agency's duties, would if disclosed often result in a permissible rather than an unwarranted invasion of personal privacy.

In short, I believe that a record indicating that a person is licensed must be disclosed, but that certain details included on such a record may be deleted. For instance, the Freedom of Information Law specifies that the home addresses of public employees need not be disclosed.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Inmate Records Coordinator

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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January 26, 2001

Mr. Terry Williams-Bey
99-A-6316
Adirondack Correctional Facility
P.O. Box 110
Raybrook, NY 12977-0110

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

Dear Mr. Williams:

I have received your letter in which you asked whether the "NYSDOCS Employee Rule Manual" is accessible under the Freedom of Information Law.

In this regard, I offer the following comments.

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

Specifically, §87(2)(g) states that an agency may withhold records that:

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

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

determinations or external audits must be made available, unless a different basis for denial is applicable. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. It would appear that the records sought would consist of instructions to staff that affect the public or an agency's policy. Therefore, I believe that they would be available, unless a different basis for denial could be asserted.

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

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

Under the circumstances, most relevant is §87(2)(e)(iv). The leading decision concerning that provision is Fink v. Lefkowitz, which involved access to a manual prepared by a special prosecutor that investigated nursing homes, in which the Court of Appeals held that:

> "The purpose of this exemption is obvious. Effective law enforcement demands that violators of the law not be apprised the nonroutine procedures by which an agency obtains its information (see Frankel v. Securities & Exch. Comm., 460 F2d 813, 817, cert den 409 US 889). However beneficial its thrust, the purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution.
>
> "To be distinguished from agency records compiled for law enforcement purposes which illustrate investigative techniques, are those which articulate the agency's understanding of the rules and regulations it is empowered to enforce. Records drafted by the body charged with enforcement of a statute which merely clarify procedural or substantive law must be disclosed. Such information in the hands of the public does not impede effective law enforcement. On the contrary, such knowledge actually encourages voluntary compliance

> with the law by detailing the standards with which a person is expected to comply, thus allowing him to conform his conduct to those requirements (see Stokes v. Brennan, 476 F2d 699, 702; Hawkes v. Internal Revenue Serv., 467 F2d 787, 794-795; Davis, Administrative Law [1970 Supp], section 3A, p 114).
>
> "Indicative, but not necessarily dispositive of whether investigative techniques are nonroutine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel (see Cox v. United States Dept. of Justice, 576 F2d 1302, 1307-1308; City of Concord v. Ambrose, 333 F Supp 958). It is no secret that numbers on a balance sheet can be made to do magical things by scrupulous nursing home operators the path that an audit is likely to take and alerting them to items to which investigators are instructed to pay particular attention, does not encourage observance of the law. Rather, release of such information actually countenances fraud by enabling miscreants to alter their books and activities to minimize the possibility or being brought to task for criminal activities. In such a case, the procedures contained in an administrative manual are, in a very real sense, compilations of investigative techniques exempt from disclosure. The Freedom of Information Law was not enacted to furnish the safecracker with the combination to the safe" (id. at 572-573).

In applying those criteria to specific portions of the manual, which was compiled for law enforcement purposes, the Court found that:

> "Chapter V of the Special Prosecutor's Manual provides a graphic illustration of the confidential techniques used in a successful nursing home prosecution. None of those procedures are 'routine' in the sense of fingerprinting or ballistic tests (see Senate Report No. 93-1200, 93 Cong 2d Sess [1974]). Rather, they constitute detailed, specialized methods of conducting an investigation into the activities of a specialized industry in which voluntary compliance with the law has been less then exemplary.
>
> "Disclosure of the techniques enumerated in those pages would enable an operator to tailor his activities in such a way as to significantly diminish the likelihood of a successful prosecution. The information detailed on pages 481 and 482 of the manual, on the other hand, is merely a recitation of the obvious: that auditors should pay particular attention to requests by nursing homes for Medicaid reimbursement rate increases based upon projected increase in cost.

> reimbursement rate increases based upon projected increase in cost. As this is simply a routine technique that would be used in any audit, there is no reason why these pages should not be disclosed" (id. at 573).

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

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

In sum, while some aspects of the record in question might be accessible, others may be deniable.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
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January 29, 2001

Mr. Jose Velez
97-A-5334
Great Meadow Correctional Facility
P.O. Box 51
Comstock, NY 12821-0051

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

Dear Mr. Velez:

I have received your letter in which you assistance in obtaining various records from the New York City Police Department and attorney visitation records from the Department of Correction.

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 many of the records in which you are interested, or the effects of their disclosure, I cannot offer specific guidance. Nevertheless, the following paragraphs will review the provisions that may be significant in determining rights of access to the records in question.

In considering the records falling within the scope of your request, relevant is a decision by the Court of Appeals concerning "complaint follow up reports", also known as "DD5's", prepared by police officers 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 persons other than yourself, a confidential source or a witness, for example.

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

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

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

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

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

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

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

The Court in Moore also specified that an agency "is not required to make available for inspection or copying any suppression hearing or trial transcripts of a witness' testimony in its possession, because the transcripts are court records, not agency records" (id. at 680).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: William Tesler
Thomas Antenen

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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January 29, 2001

Mr. Willie Williams
93-A-6546
Collins Correctional Facility
P.O. 340
Collins, NY 14034-0340

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

Dear Mr. Williams:

I have received your letter and the materials attached to it. As I understand the matter, you are attempting to obtain grand jury minutes from the Office of the Washington County District Attorney.

In this regard, first, the provisions that you cited as the basis for your request are the federal Freedom of Information and Privacy Acts, which apply only to records maintained by federal agencies. The statute that deals generally with access to government records in New York is the New York Freedom of Information Law.

Second, 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.

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

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

As such, grand jury minutes would be outside the scope or rights conferred by the Freedom of Information Law. Any disclosure of those records would be based upon court order or perhaps a vehicle authorizing or requiring disclosure that is separate and distinct from the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

cc: District Attorney

STATE OF NEW YORK
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January 30, 2001

Mr. David Baker
[redacted]

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

Dear Mr. Baker:

I have received your letter of January 28, as well as the correspondence attached to it. In brief, you sought a variety of information from the Rensselaer City School District concerning an incident in which a student was left unattended on a school bus. You wrote that the District denied the request, indicating, in your words, that "no accessible records were generated regarding the information [you] requested, and that any other records generated are either intra-agency communications or an unwarranted invasion of personal privacy." You specified, however, the information sought "would not identify either the child or the driver who reportedly left the child unattended on her bus."

In conjunction with the foregoing and a review of the correspondence, I offer the following comments.

First, in your request to the District, you raised a series of questions and asked that the records access offer "state whether or not any vote has been taken by the Board of Education on any motion related to this incident." In this regard, I note that the title of the Freedom of Information Law may be somewhat misleading, for it is not a vehicle that requires agencies to provide information *per se*, answer questions or confirm that action may have been taken. Rather, it is a statute that deals with requests for existing records, and §89(3) states in relevant part that an agency is not required to create or prepare a record in response to a request. Therefore, although the District could choose to supply information by answering your questions, I do not believe that it would be required to do so by the Freedom of Information Law. In the future, it is suggested that you request records, rather than seeking information or asking questions. For instance, you might seek records indicating the age of the child, the date of the incident, etc., and minutes of meetings in which action was taken relating to the incident.

Second, insofar as records as District 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.

Perhaps of greatest significance under the circumstances is the initial ground for denial, §87(2)(a), which pertains to records that are "specifically exempted from disclosure by state or federal statute." In this instance, insofar as disclosure of the records in question would or could identify a student or students, I believe that they must be withheld. A statute that exempts records from disclosure is the FERPA (20 U.S.C. §1232g). In brief, FERPA applies to all educational agencies or institutions that participate in grant programs administered by the United States Department of Education. As such, FERPA includes within its scope virtually all public educational institutions and many private educational institutions.

The focal point of FERPA is the protection of privacy of students. It provides, in general, that any "education record," a term that is broadly defined, that is personally identifiable to a particular student or students is confidential, unless the parents of students under the age of eighteen waive their right to confidentiality, or unless a student eighteen years or over similarly waives his or her right to confidentiality. Further, the federal regulations promulgated under FERPA define the phrase "personally identifiable information" to include:

"(a) The student's name;
(b) The name of the student's parents or other family member;
(c) The address of the student or student's family;
(d) A personal identifier, such as the student's social security number or student number;
(e) A list of personal characteristics that would make the student's identity easily traceable; or
(f) Other information that would make the student's identity easily traceable" (34 CFR Section 99.3).

Based upon the foregoing, references to students' names, parents' names, or other aspects of records that would make a student's identity easily traceable must in my view be withheld in order to comply with federal law.

Third, records prepared by District staff concerning the incident would constitute "intra-agency materials" that fall within the coverage of §87(2)(g). While that provision potentially serves as a basis for a denial of access, due to its structure, it frequently requires disclosure. The cited provision enables an agency to withhold records that:

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

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

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

One of the contentions offered by an agency in a case that led to a decision rendered by the state's highest court, the Court of Appeals, was that certain reports could be withheld because they are not final and because they relate to incidents for which no final determination had been made. The Court 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", "non-final" or that it relates to a matter for which no final determination has been made 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, unless a different ground for denial (i.e., the assertion of FERPA permits the agency to deny access).

From my perspective, the kind of information that you sought by raising questions, if it exists in the form of a record or records, would consist of factual information that must be disclosed, so long as the student's identity is not easily traceable. Further, any vote taken by the Board of Education must be included in minutes of its meetings, which are accessible.

Lastly, although records might identify the bus driver, I believe that his or her name must be disclosed. As suggested in the response to your request, the Freedom of Information Law authorizes an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy" [§87(2)(b)]. While the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public officers and employees. It is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public officers and employees are required to be more accountable than others. With regard to records pertaining to public officers and employees, the courts have found that, as a general rule, records that are relevant to the performance of a their official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, supra; Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

In terms of the judicial interpretation of the Freedom of Information Law, it is emphasized that in situations in which allegations or charges have resulted in the issuance of a written reprimand, disciplinary action, or findings that public employees have engaged in misconduct, records reflective

of those kinds of determinations have been found to be available, including the names of those who are the subjects of disciplinary action [see Powhida v. City of Albany, 147 AD 2d 236 (1989); also Farrell, Geneva Printing, Scaccia and Sinicropi, supra].

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.

Lastly, if the bus driver is not a public employee, again, I believe that a record indicating his or her identity would be public. Such a record would relate to the person in his or her business capacity. Consequently, disclosure would not, in my view, constitute an unwarranted invasion of personal privacy.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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January 31, 2001

Ms. Fran Hohenberger
[redacted]

Mr. Richard Miesemer
[redacted]

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

Dear Ms. Hohenberger and Mr. Miesemer:

As you are aware, I have received your letters of November 28 and January 2, as well as related materials concerning the implementation of the Open Meetings and Freedom of Information Laws by the Connetquot Central School District Board of Education.

The matter pertains to a "Special Executive Session Meeting" held by the Board on October 30. Because notice of the meeting indicated that the meeting would be an executive session, you wrote that no member of the public attended and that you were informed that the purpose of the meeting was to interview candidates for the position of district clerk. However, having reviewed the notes relating to the meeting, you wrote that they indicated that a "budget workshop" was held prior to the executive session. You added, however, that upon questioning, the Superintendent stated that the Board had recently attended a conference held by the New York State School Boards Association and sessions dealing with budgets, reserves and fund balances, and that the Board asked to discuss those matters at the meeting in question. When you asked for reference materials used in consideration of those issues, you were initially told that there were no materials, and later that the Board discussed the documentation distributed at the conference. It is your belief that another document, a copy of which you enclosed, was reviewed at the meeting. That document involves the same subjects as those presented in the conference materials, but they focus specifically on the District.

In this regard, I offer the following comments.

First, 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.

Second, while I believe that interviews of or discussions involving candidates for the position of district clerk could clearly have been conducted during an executive session, insofar as the executive session involved consideration of budgetary or fiscal matters, I believe that those issues should have been discussed in public at a meeting preceded by proper notice. Often a discussion

concerning the budget has an impact on personnel. Despite its frequent use, I note that the term "personnel" appears nowhere in the Open Meetings Law. Although one of the grounds for entry into executive session often relates to personnel matters, from my perspective, the term is overused and is frequently cited in a manner that is misleading or causes unnecessary confusion. To be sure, some issues involving "personnel" may be properly considered in an executive session; others, in my view, cannot. Further, certain matters that have nothing to do with personnel may be discussed in private under the provision that is ordinarily cited to discuss personnel.

The language of the so-called "personnel" exception, §105(1)(f) of the Open Meetings Law, is limited and precise. In terms of legislative history, as originally enacted, the provision in question permitted a public body to enter into an executive session to discuss:

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

Under the language quoted above, public bodies often convened executive sessions to discuss matters that dealt with "personnel" generally, tangentially, or in relation to policy concerns. However, the Committee consistently advised that the provision was intended largely to protect privacy and not to shield matters of policy under the guise of privacy.

To attempt to clarify the Law, the Committee recommended a series of amendments to the Open Meetings Law, several of which became effective on October 1, 1979. The recommendation made by the Committee regarding §105(1)(f) was enacted and states that a public body may enter into an executive session to discuss:

> "...the medical, financial, credit or employment history of a <u>particular</u> person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a <u>particular</u> person or corporation..." (emphasis added).

Due to the insertion of the term "particular" in §105(1)(f), I believe that a discussion of "personnel" may be considered in an executive session only when the subject involves a particular person or persons, and only when at least one of the topics listed in §105(1)(f) is considered.

When a discussion concerns matters of policy, such as the manner in which public money is 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". For example, if a discussion involves staff reductions or layoffs due to budgetary concerns, the issue in my view would involve matters of policy. Similarly, if a discussion of possible layoff relates to positions and whether those positions should be retained or abolished, the discussion would involve the means by which public monies would be allocated. In none of the instances described would the focus involve a "particular person" and how well or poorly an individual has performed his or her duties. To reiterate, in order to enter into an executive session pursuant to §105(1)(f), I believe that the discussion must focus on a particular person (or persons)

in relation to a topic listed in that provision. As stated judicially, "it would seem that under the statute matters related to personnel generally or to personnel policy should be discussed in public for such matters do not deal with any particular person" (Doolittle v. Board of Education, Supreme Court, Chemung County, October 20, 1981).

It has been advised that a motion describing the subject to be discussed as "personnel" or "specific personnel matters" is inadequate, and that the motion should be based upon the specific language of §105(1)(f). For instance, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in my opinion have to identify the person or persons who may be the subject of a discussion. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

It is noted that the Appellate Division has confirmed the advice rendered by this office. In discussing §105(1)(f) in relation to a matter involving the establishment and functions of a position, the Court stated that:

> "...the public body must identify the subject matter to be discussed (See, Public Officers Law § 105 [1]), and it is apparent that this must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette Co. v Town Bd., Town of Cobleskill, 111 Misc 2d 303, 304-305). Additionally, the topics discussed during the executive session must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsburgh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY 2d 807).
>
> "Applying these principles to the matter before us, it is apparent that the Board's stated purpose for entering into executive session, to wit, the discussion of a 'personnel issue', does not satisfy the requirements of Public Officers Law § 105 (1) (f). The statute itself requires, with respect to personnel matters, that the discussion involve the 'employment history of a particular person" (id. [emphasis supplied]). Although this does not mandate that the individual in question be identified by name, it does require that any motion to enter into executive session describe with some detail the nature of the proposed discussion (see, State Comm on Open Govt Adv Opn dated Apr. 6, 1993), and we reject respondents' assertion that the Board's

> reference to a 'personnel issue' is the functional equivalent of identifying 'a particular person'" [Gordon v. Village of Monticello, 620 NY 2d 573, 575; 207 AD 2d 55 (1994)].

Third, with respect to the materials that you described, I point out that the Freedom of Information Law pertains to all agency records, and that §86(4) of the Law defines the term "record" to mean:

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

Based on the foregoing, when information is maintained by an agency in some physical form (i.e., drafts, worksheets, computer disks, etc.), I believe that it would constitute a "record" subject to rights of access.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 regard to materials prepared by the District is §87(2)(g), which permits an agency to withhold records that:

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

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

In a case involving "budget worksheets", it was held that numerical figures, including estimates and projections of proposed expenditures, are accessible, even though they may have been

advisory and subject to change. In that case, I believe that the records at issue contained three columns of numbers related to certain areas of expenditures. One column consisted of a breakdown of expenditures for the current fiscal year; the second consisted of a breakdown of proposed expenditures recommended by a state agency; the third consisted of a breakdown of proposed expenditures recommended by a budget examiner for the Division of the Budget. Although the latter two columns were merely estimates and subject to modification, they were found to be "statistical tabulations" accessible under the Freedom of Information Law as originally enacted [see Dunlea v. Goldmark, 380 NYS 2d 496, aff'd 54 AD 2d 446, aff'd 43 NY 2d 754 (1977)]. At that time, the Freedom of Information Law granted access to "statistical or factual tabulations" [see original Law, §88(1)(d)]. Currently, §87(2)(g)(i) requires the disclosure of "statistical or factual tabulations or data". As stated by the Appellate Division in Dunlea:

> "[I]t is readily apparent that the language statistical or factual tabulation was meant to be something other than an expression of opinion or naked argument for or against a certain position. The present record contains the form used for work sheets and it apparently was designed to accomplish a statistical or factual presentation of data primarily in tabulation form. In view of the broad policy of public access expressed in §85 the work sheets have been shown by the appellants as being not a record made available in §88" (54 Ad 2d 446, 448)."

The Court was also aware of the fact that the records were used in the deliberative process, stating that:

> "The mere fact that the document is a part of the deliberative process is irrelevant in New York State because §88 clearly makes the back-up factual or statistical information to a final decision available to the public. This necessarily means that the deliberative process is to be a subject of examination although limited to tabulations. In particular, there is no statutory requirement that such data be limited to 'objective' information and there no apparent necessity for such a limitation" (id. at 449).

Based upon the language of the determination quoted above, which was affirmed by the state's highest court, it is my view that the records in question, to the extent that they consist of "statistical or factual tabulations or data", are accessible, unless a provision other than §87(2)(g) could be asserted as a basis for denial.

Further, another decision highlighted that the contents of materials falling within the scope of section 87(2)(g) represent the factors in determining the extent to which inter-agency or intra-agency materials must be disclosed or may be withheld. For example, in Ingram v. Axelrod, the Appellate Division held that:

> "Respondent, while admitting that the report contains factual data, contends that such data is so intertwined with subject analysis and

> opinion as to make the entire report exempt. After reviewing the report in camera and applying to it the above statutory and regulatory criteria, we find that Special Term correctly held pages 3-5 ('Chronology of Events' and 'Analysis of the Records') to be disclosable. These pages are clearly a 'collection of statements of objective information logically arranged and reflecting objective reality'. (10 NYCRR 50.2[b]). Additionally, pages 7-11 (ambulance records, list of interviews) should be disclosed as 'factual data'. They also contain factual information upon which the agency relies (Matter of Miracle Mile Assoc. v Yudelson, 68 AD2d 176, 181 mot for lve to app den 48 NY2d 706). Respondents erroneously claim that an agency record necessarily is exempt if both factual data and opinion are intertwined in it; we have held that '[t]he mere fact that some of the data might be an estimate or a recommendation does not convert it into an expression of opinion' (Matter of Polansky v Regan, 81 AD2d 102, 104; emphasis added). Regardless, in the instant situation, we find these pages to be strictly factual and thus clearly disclosable" [90 AD 2d 568, 569 (1982)].

Similarly, the Court of Appeals has specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

> "While the reports in principle may be exempt from disclosure, on this record - which contains only the barest description of them - we cannot determine whether the documents in fact fall wholly within the scope of FOIL's exemption for 'intra-agency materials,' as claimed by respondents. To the extent the reports contain 'statistical or factual tabulations or data' (Public Officers Law section 87[2][g][i], or other material subject to production, they should be redacted and made available to the appellant" (id. at 133).

In short, even when 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 materials obtained by the School Board Association would, in my view, be accessible for your review in their entirety, for none of the grounds for denial would apparently be pertinent. It is noted that §86(3) of the Freedom of Information Law defines the term "agency" to mean:

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

Based on the foregoing, 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 Association is not an "agency", the materials that it prepared would not fall within the exception regarding inter-agency or intra-agency materials.

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."

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

In an effort to enhance compliance with and understanding of open government laws, copies of this response will be sent to District officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Joseph A. Laria

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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January 31, 2001

Mr. Sean Myers
99-A-3843
Summit Correctional Facility
HCR 2, Box 56, Dibbles Road
Summit, NY 12175-9608

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. Myers:

I have received your letter concerning your ability to obtain transcripts of a 911 call made to the White Plains Police Department.

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

Second, of likely relevance in the context of your correspondence is the initial ground for denial, §87 (2)(a), which relates to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §308 (4) of the County Law, which states that:

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

In my view, the language of §308 (4) is restrictive, for it specifies that the records of calls made to an E-911 system "shall not be made available", except in the circumstances provided later in that provision. Therefore, unless one of those circumstances authorizing disclosure is present, the City in my opinion, would be prohibited from disclosing the record in question.

Second, since you indicated that your request for a "reconsideration" of a denial of your 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)].

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: Department of Law, City of White Plains

STATE OF NEW YORK
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January 31, 2001

Mr. Abdul Shariff
90-A-2895
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. Shariff:

I have received your letter in which you asked that this office conduct a "review proceeding" in relation to your request to the New York City Law Department for "index sheets" or an itemized list of documents contained in its litigation files.

In this regard, it is noted at the outset that the Committee on Open Government is authorized to provide advice and opinions concerning public access to records. The Committee is not empowered to render a binding determination or otherwise compel an agency to grant or deny access to records. Nevertheless, having reviewed your appeal to the Law Department, I offer the following comments.

First, the stated basis for the appeal is 5 USC §552, which is the federal Freedom of Information Act. That statute applies only to federal agencies; it does not apply to entities of state or local government. The provision that generally deals with access to records of state and local government in New York is the New York Freedom of Information Law.

Second, in a related vein, since you referred to a "Vaughn index", I point out that there is no provision in the Freedom of Information Law or judicial decision of which I am aware that would require that a denial at the agency level identify every record withheld or 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)].

Third, 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. Therefore, if the records sought do not exist, the Department would not be required to prepare a new record on your behalf.

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

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

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Jeffrey D. Friedlander

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1251?

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

February 1, 2001

Mr. Noel Vazquez
83-A-4444
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. Vazquez:

I have received your letter in which you sought guidance concerning a delay in granting or denying your request for records by 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..."

Based on the foregoing, an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date indicating when it can be anticipated that a request will be granted or denied.

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

that date is reasonable in view of the attendant circumstances, I believe that the agency would be acting in compliance with law.

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

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

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

For your information, the person designated by the Police Department to determine appeals is William Tesler, 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-1258

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

February 1, 2001

Mr. Edmund Boyle
99-B-2837
Collins Correctional Facility
P.O. Box 340
Collins, NY 14034-0340

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

Dear Mr. Boyle:

I have received your letter in which you questioned the propriety of a fee of one dollar per page charged by a county clerk.

In this regard, county clerks perform a variety of functions, some of which involve county records that are subject to the Freedom of Information Law, others of which may be held in the capacity as clerk of a court. As you may be aware, under the Freedom of Information Law, an agency may charge up to twenty-five cents per photocopy, "except when a different fee is otherwise prescribed by statute."

In the case of fees that may be assessed by county clerks, §§8018 through 8021 of the Civil Practice Law and Rules require that county clerks charge certain fees in their capacities as clerks of court and other than as clerks of the court. Since those fees are assessed pursuant to statutes other tan the Freedom of Information Law, the fees may exceed those permitted under the Freedom of Information Law. Section 8019 of the Civil Practice Law and Rules provides in part that "The fees of a county clerk specified in this article shall supersede the fees allowed by any other statute for the same services...".

Since county clerks are authorized by statute to charge certain fees, the limitations concerning fees appearing in the Freedom of Information Law would not be applicable.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Suffolk County Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12519

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

February 1, 2001

Mr. I. Serrano
93-B-0029
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 in which you asked whether you may seek your medical and mental health records under the Freedom of Information Law. In this regard, although the Freedom of Information Law pertains to all government records, other statutes deal specifically with medical and mental health records.

With respect to medical records, §18 of the Public Health Law, generally grants rights of access to medical records to the subjects of the records. As such, that statute may provide greater access to medical records than the Freedom of Information Law. To obtain additional information concerning access to medical records and the fees that may be charged for searching and copying those records, you may write to:

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

Similarly, §33.16 of the Mental Hygiene Law pertains to access to mental health records by the subjects of the records. Under that statute, a patient may direct a request for inspection or copies of his or her mental health records to the "facility", as that term is defined in the Mental Hygiene Law, which maintains the records. It is my understanding that mental health "satellite units" that operate within state correctional facilities are such "facilities" and are operated by the New York State Office of Mental Health. Further, I have been advised that requests by inmates for records of such "satellite units" pertaining to themselves may be directed to the Director of Sentenced Services,

Bureau of Forensic Services, Office of Mental Health, 44 Holland Avenue, Albany, NY 12229. Lastly, it is noted that under §33.16, there are certain limitations on rights of access.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12520

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

February 1, 2001

Mr. Jose Heredia
85-A-5244
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 facts presented in your correspondence.

Dear Mr. Heredia:

I have received your letter in which you indicated that you need to obtain documents to prepare an appeal, and you asked whether you may have your family obtain records on your behalf.

In this regard, since you indicated that you had a trial, I believe that the best and most complete source of documentation and evidence would be the court in which the proceeding was conducted. I point out that 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) often grant broad public access to those records. It is recommended that you or a family member request court records from

the clerk of the court in which the proceeding was conducted. In addition or alternatively, many of the records of your interest are likely maintained by the attorney who represented you at trial.

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-12521

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

February 1, 2001

Mr. Melvin Wells
98-A-1188
Clinton Correctional Facility
Dannemora, NY 12929

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

Dear Mr. Wells:

I have received your letter in which you sought guidance in your efforts in obtaining records containing comments made by your parole officer concerning your conduct. You wrote that the agencies that you contacted indicated that they did not maintain the records of your interest.

In this regard, it is emphasized that the Freedom of Information Law pertains to existing records, and that §89(3) of that law provides that an agency is not required to create a record in response to a request. Therefore, if the records in question do not exist, the Freedom of Information Law would not apply.

I point out that when an agency indicates that it does not 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, 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.

Further, 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)].

Even if the records exist and can be found, it is likely in my view that they could be withheld in great measure. As a general matter, the Freedom of Information Law is based upon a presumption

of access. Stated differently, all records of an agency are available, except to the 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 records at issue is §87(2)(g), which authorizes an agency to withhold records that:

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. As I understand the contents of the records, they would consist largely of the parole officer's opinions concerning your conduct. If that is so, those portions of the records could 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:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12522

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

February 1, 2001

Mr. Darryl L. Smith
99-B-2276
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 facts presented in your correspondence.

Dear Mr. Smith:

I have received your letter in which you sought assistance in ascertaining whether the Monroe County Public Safety Laboratory was certified to conduct DNA testing during a certain period.

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

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

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

By its name, the entity in question appears to be part of Monroe County government. If that is so, it would be subject to the Freedom of Information Law, and a request for records could be made to the County's records access officer at the County's central offices. The records access officer, pursuant to regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), has the duty of coordinating the agency's response to requests for records. In the alternative, it is possible that records indicating certification of a DNA laboratory may be in possession of the State Department of Health or the Division of Criminal Justice Services. Again, when contacting those agencies, requests should be directed to their records access officers.

Lastly, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, a record indicating that a facility is certified or licensed to carry out certain functions would be accessible, for none of the grounds for denial would be applicable.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2523

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

February 1, 2001

Mr. Maurice Dudley
98-A-6821
Ogdensburg Correctional Facility
One Correction Way
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 facts presented in your correspondence.

Dear Mr. Dudley:

I have received your letter in which you sought assistance in relation to an unanswered request for court records.

In this regard, the Freedom of Information Law, the statute within the advisory jurisdiction of the Committee on Open Government, is applicable to agency records. Section 86(3) of that statute defines the term "agency" to include:

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

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

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

Based on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law (see e.g., Judiciary Law, §255) may grant broad public access to those records. It is recommended that a request for court records be directed to the clerk of the court in which the proceeding was conducted, citing an applicable provision of law as the basis for the request.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1252

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

February 1, 2001

Mr. Timothy J. Taylor
94-B-2378
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. Taylor:

I have received your letter in which you complained with respect to delays in relation to your requests for records 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)].

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: Ken Weaver

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12525

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

February 5, 2001

Mr. Reginald Coleman
96-A-5238
Mohawk Correctional Facility
6100 School Road
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. Coleman:

I have received your letter in which you sought assistance in obtaining a record of a "911 Sprint printout" from the New York City Police Department.

In this regard, first, it is emphasized that the Freedom of Information Law pertains to existing records [see section 89(3)]. Since you indicated that you have been attempting for years to obtain the printout, it is possible that the record may no longer exist. If that is so, the Freedom of Information Law would not apply.

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. If you have not done so already, it is suggested that you submit a request to the Department's records access officer, Room 110C, One Police Plaza, New York, NY 10038. It is noted, too, that section 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 agency staff to locate and identify the record.

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

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

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

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

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

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

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

Under the circumstances , if the record exists, several grounds for denial may be relevant.

One such ground for denial might be §87(2)(b) of the Freedom of Information Law, which permi6ts an agency to withhold records or portions thereof when disclosure would result in an "unwarranted invasion of personal privacy." It is possible that transcripts or recordings might be withheld under the cited provision, for there might be privacy considerations concerning those identified in the records.

Another ground for denial of possible relevance is §87(2)(e), which states that an agency may withhold records that:

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

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

The language quoted above indicates that it is based largely upon potentially harmful effects of disclosure, and its assertion would be limited to the capacity to withhold in conjunction with the harmful effects described in subparagraphs (i) through (iv) of the provision.

Also of possible significance is §87(2)(f), which permits an agency to withhold records to the extent that disclosure would "endanger the life or safety of any person." Since I am unfamiliar with the events to which the transmissions relate or the effects of their disclosure, the applicability of §87(2)(f) is conjectural.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12526

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

February 5, 2001

Mr. Jarquay Pratt
92-A-0515
Franklin Correctional Facility
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. Pratt:

I have received your letter in which you wrote that several entities had failed to respond to your requests for records relating to the New York State Clean Indoor Air Act.

In this regard, first, pursuant to regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), each agency subject to the Freedom of Information Law must designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests, and requests should ordinarily be sent to that person. Since you made specific reference to the State Senate, I believe that its records officer is the Secretary of the Senate.

Second, section 89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, a request must contain sufficient detail to enable the staff of an agency to locate and identify the records of your interest.

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

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

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-0527

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

February 5, 2001

Mr. Ron Latham
91-A-0736
Washington Correctional Facility
P.O. Box 180
Comstock, NY 12821-0180

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

Dear Mr. Latham:

I have received your letter in which you asked whether you may obtain from the Division of Parole or some other agency the following:

"1) Parole statistics for denials for this year & the past 3 or 4 years.

2) The rate that parole release has been granted to violent offenders.

3) Parole statistical data from people convicted in certain counties."

In this regard, if such statistics have been tabulated, I would conjecture that they would be maintained by either the Division of Parole or the Division of Criminal Justice Services. It is emphasized, however, that the Freedom of Information Law pertains to existing records, and that section 89(3) of that statute states that an agency is not required to create records in response to a request. Therefore, if the statistics in which you are interested have not been prepared, an agency in receipt of a request would not be required to do so on your behalf.

On the other hand, if an agency has prepared the statistics of your interest, I believe that they would be accessible. 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, in the event that the records in question exist, none of the grounds for denial would be applicable.

I am unaware of the nature of any reports that may be prepared involving the information to which you referred. It is noted, too, that nothing in the Freedom of Information Law refers to the waiver of fees, and that it has been held that an agency may charge its established fee, even when a request is made by an indigent inmate [see Whitehead v. Morgenthau, 552 NYS2d 518 (1990)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12528

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

February 5, 2001

Mr. Michael M. Bradley
00-B-0294
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. Bradley:

I have received our letter in which you raised questions concerning access to and the use of telephone books, and whether a facility library is supposed to retain a copy of a local phone book for use by inmates.

In this regard, I know of no judicial decision, rule or policy concerning the maintenance or use of phone books at facilities by inmates. However, I note that the Freedom of Information Law pertains to all agency records, and that §86(4) of that statute defines the term "record" expansively to include:

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

From my perspective, if a facility library maintains telephone books, they would constitute "records" that should be made available for inspection and copying. However, the foregoing is not intended to suggest that inmates can use telephones as they see fit or that facility libraries are required to maintain telephone books. Again, I am unaware of rules or policies concerning the use of telephones or any requirement that facility libraries have telephone books on hand.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12529

41 State Street, Albany, New York 12231
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February 5, 2001

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 in which you sought an advisory opinion concerning your right to review "copies of all [your] complaints to Southport officials and their responses..." You wrote that you were informed that the records in question could be withheld based on a court decision.

Without additional information concerning the nature of your complaints, I cannot offer specific guidance. However, if the complaints relate to the conduct of correction officers, it is likely that the records were properly withheld.

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

Of potential relevance is the first ground for denial, §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §50-a of the Civil Rights Law. That provision, in brief, states that personnel records pertaining to police and correction officers that are used to evaluate performance toward continued employment or promotion are confidential and cannot be disclosed, except by means of a court order or the consent of the police or correction officer. The courts have upheld denials of access to unsubstantiated complaints against correction officers [see Prisoners' Legal Services of New York v. NYS Department of Correctional Services, 73 NY2d 26 (1988)] and records indicating findings or admissions of misconduct [see Daily Gazette v. City of Schenectady, 93 NY2d 145 (1999)].

If your complaints are unrelated to the conduct of correction officers and you can supply additional information, perhaps I could offer more applicable guidance.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2530

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

February 5, 2001

Mr. Frederick A. Jones
88-A-0439 [HU118-2-18]
Otisville Correctional Facility
P.O. Box 8
Otisville, NY 10963-0008

The staff of the Committee on Open 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 in which you sought assistance in attempting to gain access to the criminal history record of a person who testified against you at your trial.

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

With respect to criminal history records, the general repository of those records is the Division of Criminal Justice Services. While the subject of a criminal history record may obtain such record from the Division, it has been held that criminal history records maintained by that agency are exempted from public disclosure pursuant to §87(2)(a) of the Freedom of Information Law [Capital Newspapers v. Poklemba, Supreme Court, Albany County, April 6, 1989]. Nevertheless, if, for example, criminal conviction records were used in conjunction with a criminal proceeding by a district attorney, it has been held that the district attorney must disclose those records [see Thompson v. Weinstein, 150 AD 2d 782 (1989)].

It is noted that in a decision rendered by the Appellate Division, Second Department, the Court reconfirmed its position that criminal history records are, in general, exempt from disclosure [Woods v. Kings County District Attorney's Office, 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, it is also noted that while records relating to convictions may be available from the courts or other sources, when charges are dismissed in favor of an accused, records relating to arrests that did not result in convictions are generally sealed pursuant to §160.50 of the Criminal Procedure Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12531

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

February 5, 2001

Mr. John Johnson
95-A-5257
Washington Correctional Facility
P.O. Box 180
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. Johnson:

I have received your letter in which you asked which law is applicable to records maintained by a police department or a county jail, for example.

In this regard, 5 USC 552 is the federal Freedom of Information Act, which applies only to federal agencies. The New York Freedom of Information Law, Article 6 of the Public Officers Law, §§84 to 90, generally governs rights of access to records of entities of state and local government in New York. Specifically, 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."

Although the Freedom of Information Law authorizes an agency to require that a request be made in writing, there is no particular form that must be used to seek records. I note, too, that §89(3) of the Freedom of Information Law states that an applicant must "reasonably describe" the records sought. Therefore, a request should contain sufficient detail to enable agency staff to locate and identify the records.

Enclosed is a copy of a sample letter of request.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12532

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

February 5, 2001

Mr. Herbert Washington
88-A-2845
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. Washington:

I have received your letter in which you wrote that you received no response from your facility following a request for records.

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

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

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

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: C. Youmans

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12533

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

February 5, 2001

Mr. Tyheem Y. Allah
90-B-0548
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. Allah:

I have received your letter and the correspondence attached to it. You wrote that the New York City Police Department has not responded to your requests under the Freedom of Information Law.

In this regard, I offer the following comments.

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

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

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

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

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

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

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

In considering the records falling within the scope of your request, relevant is a decision rendered by the Court of Appeals concerning "complaint follow up reports" prepared by police officers and police officers' memo books in which it was held that a denial of access based on their characterization as intra-agency materials would be inappropriate.

The provision at issue, §87(2)(g) of the Freedom of Information Law, enables an agency to withhold records that:

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

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

appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

In its analysis of the matter, the decision states that:

> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)...
>
> "...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][i]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182).
>
> "Against this backdrop, we conclude that the complaint follow-up reports contain substantial factual information available pursuant to the provisions of FOIL. Sections of the report are devoted to such purely factual data as: the names, addresses, and physical descriptions of crime victims, witnesses, and perpetrators; a checklist that indicates whether the victims and witnesses have been interviewed and shown photos, whether crime scenes have been photographed and dusted for fingerprints, and whether neighborhood residents have been canvassed for information; and a blank space denominated

> 'details' in which the officer records the particulars of any action taken in connection with the investigation.
>
> "However, the Police Department argues that any witness statements contained in the reports, in particular, are not 'factual' because there is no assurance of the statements' accuracy and reliability. We decline to read such a reliability requirement into the phrase 'factual data', as the dissent would have us do, and conclude that a witness statement constitutes factual data insofar as it embodies a factual account of the witness's observations. Such a statement, moreover, is far removed from the type of internal government exchange sought to be protected by the intra-agency exemption (see, Matter of Ingram v. Axelrod, 90 AD2d 568, 569 [ambulance records, list of interviews, and reports of interviews available under FOIL as 'factual data']). By contrast, any impressions, recommendations, or opinions recorded in the complaint follow-up report would not constitute factual data and would be exempt from disclosure. The holding herein is only that these reports are not categorically exempt as intra-agency material. Indeed, the Police Department is entitled to withhold complaint follow-up reports, or specific portions thereof, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" [Gould, Scott and DeFelice v. New York City Police Department, 89 NY2d 267, 276-277 (1996); emphasis added by the Court].

Based on the foregoing, the agency could not claim that the complaint reports can be withheld in their entirety on the ground that they constitute intra-agency materials. However, the Court was careful to point out that other grounds for denial might apply in consideration of those records, as well as others that you requested.

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

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

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

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

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

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

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

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

As such, grand jury related records would be outside the scope of rights conferred by the Freedom of Information Law. Any disclosure of those records would be based upon a court order or perhaps a vehicle authorizing or requiring disclosure that is separate and distinct from the Freedom of Information Law.

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

> "...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The

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

The Court in Moore also specified that an agency "is not required to make available for inspection or copying any suppression hearing or trial transcripts of a witness' testimony in its possession, because the transcripts are court records, not agency records" (id. at 680).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: William Tesler, Special Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12534

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

February 5, 2001

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

I have received your letter in which you raised a question concerning "the amount of time the law allows an agency to take to search its files for records requested through FOIL."

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

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

Based on the foregoing, an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date indicating when it can be anticipated that a request will be granted or denied. The acknowledgement by the records access officer did not make reference to such a date.

I note that there is no precise time period within which an agency must grant or deny access to records. The time needed to do so may be dependent upon the volume of a request, the possibility that other requests have been made, the necessity to conduct legal research, the search and retrieval techniques used to locate the records and the like. In short, when an agency acknowledges the receipt of a request because more than five business days may be needed to grant or deny a request,

so long as it provides an approximate date indicating when the request will be granted or denied, and that date is reasonable in view of the attendant circumstances, I believe that the agency would be acting in compliance with law.

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Thomas Berkman, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12535

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

February 5, 2001

Mr. Charles Latterell
98-B-2934
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. Latterell:

I have received your letter and the correspondence attached to it. You have sought assistance in obtaining records, particularly vouchers, time sheets and similar materials, from the Office of the Monroe County Public Defender. You were informed by the Public Defender that no such records are maintained and that his office is not subject to the Freedom of Information Law.

In this regard, first, as I understand the situation, the Office of the Public Defender is required to comply with the Freedom of Information Law. That statute pertains to agency records, and §86(3) of that statute defines the term "agency" to mean:

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

Based on the foregoing, the Freedom of Information Law applies, in general, to records of entities of state and local government in New York. It would not apply to a private organization or a private investigator.

Section 716 of the County Law states in part that the "board of supervisors of any county may create an office of public defender, or may authorize a contract between its county and one or more other such counties to create an office of public defender to serve such counties." Therefore, a county office of public defender in my opinion is an agency subject to the Freedom of Information Law that is required to disclose records to the extent required by that statute. I note, too, that the letterhead of the Office of the Public Defender includes the Monroe County logo and the name of the County Executive.

Second, notwithstanding the foregoing, 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. Therefore, if the Office of the Public Defender does not maintain the records sought, there would be no obligation on its part to prepare records on your behalf. To the extent that records do exist that describe services rendered, such records would, based on the judicial interpretation of the Freedom of Information Law, be available in great measure [see Orange County Publications v. County of Orange, 637 NYS2d 596 (1995)].

Lastly, since the Public Defender referred to §50-b of the Civil Rights Law, I point out that one of the grounds for denial of access, §87(2)(a) of the Freedom of Information Law, pertains to records that "are specifically exempted from state or federal statute." One such statute is §50-b, and in my view, records subject to that statute are exempt from disclosure under the Freedom of Information Law, and any disclosure of records falling within its coverage can be made only pursuant to that statute.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Edward J. Nowak

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12536

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

February 5, 2001

Mr. William A. Evans
92-A-5030
Clinton Correctional Facility Main
Box 2001
Dannemora, NY 12929-2001

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

Dear Mr. Evans:

I have received your letter in which you sought assistance in obtaining the "listing of records" from the Nassau County Police Department.

In this regard, as a general matter, the Freedom of Information Law pertains to existing records, and an agency is not required to create a record in response to a request [see §89(3)]. 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, and you could request a copy of the schedule from the State Archives and Records Administration. To obtain the retention schedule applicable to a county police department, it is suggested that you contact the State Archives and Records Administration, State Education Department, Cultural Education Center, Albany, NY 12230.

Enclosed as requested is copy of the regulations promulgated by the Committee on Open Government.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Records Access Officer, Nassau County Police Department

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12537

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

February 5, 2001

Mr. Randy S. Campney, Sr.
97-B-1214
Greene Correctional Facility
P.O. Box 975
Coxsackie, NY 12051

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

Dear Mr. Campney:

I have received your letter in which you sought assistance in obtaining records relating to a person's arrest from the Town of Hartford Justice Court. The Town Justice indicated that courts are exempt from the Freedom of Information Law.

I agree with the statement offered by the Town Justice. However, other statutes often grant access to court records.

In this regard, by way of background, 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."

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

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

While court records are not subject to the Freedom of Information Law, relevant in this instance is §2019-a of the Uniform Justice Court Act, entitled "Justices' criminal records and docket." That statute states in relevant part that "[t]he records and dockets of the court except as otherwise provided by law shall be at reasonable times open for inspection to the public..."

It is noted that when charges are dismissed in favor of an accused, the records relating to the arrest and charges typically are sealed pursuant to §160.50 of the Criminal Procedure Law.

It is suggested that you resubmit your request to the clerk of the Justice Court, citing the statute referenced above as the basis of your request.

Lastly, enclosed are copies of the opinions that you requested, many of which are quite old and may be out of date.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Hon. John U. Holmes, Town Justice

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12538

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February 5, 2001

Bob and Jenny Petrucci
InfoServices
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.

Dear Mr. and Ms. Petrucci:

As you are aware, I have received a variety of correspondence from you in relation to your efforts to obtain information from Westchester County. From my perspective, it appears that you misunderstand elements of the Freedom of Information Law and the nature of obligations imposed by that statute upon government agencies. In this regard, in an attempt to enhance your understanding of the operation of the Freedom of Information Law, I offer the following comments.

First, it is emphasized that the title of the Freedom of Information Law may be somewhat misleading, for it does not require the disclosure of information *per se*; rather, it is a vehicle under which government agencies may be required to make available existing records. I note, that §89(3) states in relevant part that an agency is not required to create a record in response to a request. Similarly, while agency officials may provide information in response to questions and frequently do so, the Freedom of Information Law does not require that questions be answered.

In several of your requests, you sought information by raising questions. For instance, in correspondence addressed to Mr. Robert DelTorto of the County Parks Department, you referred to your inquiry as "another Freedom of Information Law Request" and wrote that "The question is: Does the County use any list to obtain the opinions, comments, etc. (market research) of any residents? If so, which?" In another recent request to Mr. Pinto, you referred to a certain allegation and, as a request made under the Freedom of Information Law, asked: "Who in the group 'was told it would have to be looked into?'.....Did you or anyone else look into this potentially serious violation of NY State Law?...If you or anyone did, what was the result?" In my view, inquiries of that nature are not valid requests under the Freedom of Information Law. In short, you did not seek records, but answers to questions. Again, agency officials may be required to disclose existing records, but they are not obliged to supply information by answering questions.

In short, the Freedom of Information Law is a vehicle under which agencies may be required to disclose existing records; it is not a vehicle that enables members of the public to cross-examine public officers or employees.

Second, and somewhat related to the foregoing is the contention expressed in several of your letters that the law requires a "full, clear explanation of any denial decision." When a request for records is initially denied, it is the obligation of an agency's records access officer to ensure that the denial "explain in writing the reasons therefor" [21 NYCRR §1401.2(b)(3)(ii)]. There is no requirement that a detailed rationale for a denial of access be given. I note that if an applicant appeals an initial denial of access, and if the agency affirms the denial, the determination of the appeal must "fully explain in writing the reasons for further denial" [see Freedom of Information Law, §89(4)(a)]. As such, the degree of detail given in relation to the denial of an appeal is greater than that required in relation to an initial denial of access to records.

Third, you wrote that the Freedom of Information Law "allows a maximum of 5 days (from receipt of request) to comply by either providing the information or a refusal with a full, clear explanation." That is not so. That statute provides direction concerning the time and manner in which agencies must respond to requests, and §89(3) states in part that:

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

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

You have also contended that when an appeal is denied, the person who determines the appeal must inform the applicant of "the right to appeal to a court." Although many agencies routinely refer to the right to seek judicial review of a determination following an appeal, there is nothing in the Freedom of Information Law that requires that notification to that effect must be given.

Next, as advised in my letter to you of July 5, I believe that a list of names and addresses must, depending on the facts and circumstances, be disclosed. However, you referred frequently to a list that includes names, addresses and telephone numbers. In my view, telephone numbers of members of the public identified on a list would, if disclosed, constitute "unwarranted invasion of

personal privacy" pursuant to §87(2)(b) of the Freedom of Information Law. As such, I believe that telephone numbers may be withheld or deleted.

Lastly, in response to your question, there is no limitation on the number requests that can be made under the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Stacey Dolgin-Kmetz, Acting County Attorney
Robert DelTorto

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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February 6, 2001

Mr. Christopher Shapard
92-A-4434
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. Shapard:

I have received your letter in which you asked how you might compel officials at the Columbia County Jail to respond to requests for records.

In this regard, 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, 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 must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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

February 6, 2001

Ms. Ronda C. Roaring
[redacted]

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

Dear Ms. Roaring:

I have received your letter of January 15, as well as the correspondence attached to it. You have asked whether you have the right to obtain the current address of a former recipient of public assistance from the Cortland County Department of Social Services.

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

Relevant to the matter is the first ground for denial, §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute, as indicated by the County, is §136 of the Social Services Law. As I understand that provision, the County is prohibited from disclosing the name or address of any applicant for or recipient of public assistance, irrespective or when an application was made or assistance was rendered. I note, too, that §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." Even if the Social Services Law did not apply, the current home address could in my view could be withheld under the cited provision of the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Ingrid Olsen-Tjensvold

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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February 12, 2001

Mr. David Pannell
00-A-0500
Attica Correctional Facility
Box 149
Attica, NY 14011

Dear Mr. Pannell:

I have received your letters dated February 6 in which you appealed denials of access to records by the United States Justice Department and the New York City Police Department.

In this regard, the Committee on Open Government is a New York State agency that is authorized to offer advice concerning the New York Freedom of Information Law. Since the Department of Justice is a federal agency subject to the federal Freedom of Information Act, this office has no jurisdiction.

The Police Department is subject to the New York Freedom of Information Law, which is applicable to records of entities of state and local government; it is not subject to the federal Act, which applies only to federal agencies.

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

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

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

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..."

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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

February 14, 2001

Mr. Thomas C. O'Brien
[redacted]

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

Dear Mr. O'Brien:

As you are aware, I have received your letter and the materials attached to it. The matter relates to the Corning-Painted Post School District's "school construction/renovation program" and your requests made under the Freedom of Information Law. Rather than reviewing each of the eight requests, I offer the following comments as a means of offering guidance and describing principles of law, which in many instances involve decisions rendered by the Court of Appeals, the state's highest court.

By way of background, first, the Freedom of Information Law pertains to agency records, and §86(4) of that statute defines the term "record" expansively to mean:

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

In view of the language quoted above, insofar as the District maintains the records that you are seeking, or if records prepared for the District remain in the possession of a consulting firm, for instance, that prepared the documentation, I believe that any such materials would constitute agency records that fall within the coverage of the Law.

In brief, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. It is emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In my view, the phrase

quoted in the preceding sentence evidences a recognition on the part of the Legislature that a single record or report, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld. That being so, I believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

The Court of Appeals expressed its general view of the intent of the Freedom of Information Law 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 certain reports could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g). The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276). The Court then stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, directing that:

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

Second, I point out that the Freedom of Information Law pertains to existing records, and that §89(3) of the Law states in part that an agency is not required to create a record in response to a

request, unless otherwise specified in §87(3). If, for example, information sought does not exist in the form of a record or records, the District would not be obliged to create a new record containing the information requested.

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

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

Third, some of the materials appear to have been obtained from or involve communications with entities outside of government. In this regard, §86(3) of the Freedom of Information Law defines the term "agency" to mean:

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

Based on the foregoing, a provision to be discussed in detail later, §87(2)(g), relates to communications between or among state or local government officials at two or more agencies ("inter-agency materials"), or communications between or among officials at one agency ("intra-agency materials"). Insofar as records of that nature have been requested, they would not constitute inter-agency or intra-agency materials, and the exception typically cited to withhold those materials would not apply, unless the records have been prepared by a consultant retained by an agency.

Although that provision represents an exception to rights of access and potentially serve as a basis for a denial of access, due to its structure, it often requires substantial disclosure. Specifically, §87(2)(g) permits an agency to withhold records that:

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

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

In a discussion of the issue of records prepared by consultants for agencies, the Court of Appeals has held that:

> "Opinions and recommendations prepared by agency personnel may be exempt from disclosure under FOIL as 'predecisional materials, prepared to assist an agency decision maker***in arriving at his decision' (McAulay v. Board of Educ., 61 AD 2d 1048, aff'd 48 NY 2d 659). Such material is exempt 'to protect the deliberative process of government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers (Matter of Sea Crest Const. Corp. v. Stubing, 82 AD 2d 546, 549).
>
> "In connection with their deliberative process, agencies may at times require opinions and recommendations from outside consultants. It would make little sense to protect the deliberative process when such reports are prepared by agency employees yet deny this protection when reports are prepared for the same purpose by outside consultants retained by agencies. Accordingly, we hold that records may be considered 'intra-agency material' even though prepared by an outside consultant at the behest of an agency as part of the agency's deliberative process (see, Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD 2d 546, 549, supra; Matter of 124 Ferry St. Realty Corp. v. Hennessy, 82 AD 2d 981, 983)" [Xerox Corporation v. Town of Webster, 65 NY 2d 131, 132-133 (1985)].

Based upon the foregoing, records prepared by a consultant for an agency may be withheld or must be disclosed based upon the same standards as in cases in which records are prepared by the staff of an agency. It is emphasized that the Court in Xerox specified that the contents of intra-

agency materials determine the extent to which they may be available or withheld, for it was held that:

> "While the reports in principle may be exempt from disclosure, on this record - which contains only the barest description of them - we cannot determine whether the documents in fact fall wholly within the scope of FOIL's exemption for 'intra-agency materials,' as claimed by respondents. To the extent the reports contain 'statistical or factual tabulations or data' (Public Officers Law section 87[2][g][i], or other material subject to production, they should be redacted and made available to the appellant" (id. at 133).

Therefore, a record prepared by a consultant for an agency would be accessible or deniable, in whole or in part, depending on its contents.

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

> "...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][i]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182)" (id., 276-277)..
>
> "Against this backdrop, we conclude that the complaint follow-up reports contain substantial factual information available pursuant to the provisions of FOIL. Sections of the report are devoted to such purely factual data as: the names, addresses, and physical descriptions of crime victims, witnesses, and perpetrators; a checklist that indicates whether the victims and witnesses have been interviewed and shown photos, whether crime scenes have been photographed and dusted for fingerprints, and whether neighborhood residents have been canvassed for information; and a blank space denominated

> 'details' in which the officer records the particulars of any action taken in connection with the investigation" (id., 276-277).

Insofar as studies or other records prepared by consultants retained by the District include opinions or recommendations offered by the consultant, I believe that the records could be withheld. However, other portions of the documentation consisting of statistical or factual information or responses by members of the public must in my view be disclosed. As indicated by the State's highest court, the purpose of §87(2)(g) is to enable government officials and employees, or as in this case, a consultant, to offer opinions freely and without mandatory disclosure. Opinions offered by members of the public who are not government officers or employees or retained as consultants, would not fall within the exception. Those elements of the materials must in my view be disclosed, assuming that no other ground for denial may be asserted.

I point out that 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 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.

Further, the Court in Gould highlighted that the contents of materials falling within the scope of §87(2)(g) represent the factors in determining the extent to which inter-agency or intra-agency materials must be disclosed or may be withheld. The Court cited Ingram v. Axelrod, in which 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)].

Lastly, the other ground for denial of apparent 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" a contracting or bargaining process by diminishing the ability of the government to reach an optimal agreement on behalf of the taxpayers. I believe that consideration of the effects of disclosure is the primary factor in determining the extent to which §87(2)(c) may justifiably be asserted.

As I understand its application, §87(2)(c) generally encompasses situations in which an agency or a party to negotiations maintains records that have not been made available to others. For example, if an agency seeking bids or proposals has received a number of bids, but the deadline for their submission has not been reached, premature disclosure for the bids to another possible submitter might provide that person or firm with an unfair advantage vis a vis those who already submitted bids. Further, disclosure of the identities of bidders or the number of bidders might enable another potential bidder to tailor his bid in a manner that provides him with an unfair advantage in the bidding process. In such a situation, harm or "impairment" would likely be the result, and the records could justifiably be denied. However, after the deadline for submission of bids or proposals are available after a contract has been awarded, and that, in view of the requirements of the Freedom of Information Law, "the successful bidder had no reasonable expectation of not having its bid open to the public" [Contracting Plumbers Cooperative Restoration Corp. v. Ameruso, 105 Misc. 2d 951, 430 NYS 2d 196, 198 (1980)]. Similarly, if an agency is involved in collective bargaining negotiations with a public employee union, and the union requests records reflective of the agency's strategy, the items that it considers to be important or otherwise, its estimates and projections, it is likely that disclosure to the union would place the agency at an unfair disadvantage at the bargaining table and, therefore, that disclosure would "impair" negotiating the process.

I point out that the Court of Appeals has sustained the assertion of §87(2)(c) in a case that did not clearly involve "contract awards" or collective bargaining negotiations. In Murray v. Troy

Urban Renewal Agency [56 NY2d 888 (1982)], the issue pertained to real property transactions where appraisals in possession of an agency were requested prior to the consummation of a transaction. Because premature disclosure would have enabled the public to know the prices the agency sought, thereby potentially precluding the agency from receiving optimal prices, the agency's denial was upheld [see Murray v. Troy Urban Renewal Agency, 56 NY 2d 888 (1982)].

In each of the kinds of the situations described earlier, there is an inequality of knowledge. In the bid situation, the person who seeks bids prior to the deadline for their submission is presumably unaware of the content of the bids that have already been submitted; in the context of collective bargaining, the union would not have all of the agency's records relevant to the negotiations; in the appraisal situation, the person seeking that record is unfamiliar with its contents. As suggested above, premature disclosure of bids would enable a potential bidder to gain knowledge in a manner unfair to other bidders and possibly to the detriment of an agency and, therefore, the public. Disclosure of an records regarding collective bargaining strategy or appraisals would provide knowledge to the recipient that might effectively prevent an agency from engaging in an agreement that is most beneficial to taxpayers.

In a case involving negotiations between a New York City agency and the Trump organization, the court referred to an opinion that I prepared and adopted the reasoning offered therein, stating that:

> "Section 87(2)(c) relates to withholding records whose release could impair contract awards. However, here this was not relevant because there is no bidding process involved where an edge could be unfairly given to one company. Neither is this a situation where the release of confidential information as to the value or appraisals of property could lead to the City receiving less favorable price.
>
> "In other words, since the Trump organization is the only party involved in these negotiations, there is no inequality of knowledge between other entities doing business with the City" [Community Board 7 v. Schaffer, 570 NYS 2d 769, 771 (1991); Aff'd 83 AD 2d 422; reversed on other grounds 84 NY 2d 148 (1994)].

Based on the foregoing, assuming that the records at issue are known to the parties to a transaction and there are no other potential parties, the rationale described above and the judicial decisions rendered to date suggest that §87(2)(c) could not justifiably be asserted to withhold records.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Darleen Morse

From: Robert Freeman
To: Internet:[redacted]
Date: 2/15/01 1:10PM
Subject: Dear Ms. Crance:

Dear Ms. Crance:

I have received your letter, and in fact, received a fax from the Town Justice as well. Materials were sent to him regarding the implementation of the FOIL, and copies of statutes dealing with court records.

It was specified in my response to the Town Justice that FOIL does not apply to the courts or court records. It is suggested that you review §2019-a of the Uniform Justice Court Act. As I understand that statute, it indicates in part that court records may be transferred to the custody of the town clerk after the expiration of the justice's term of office. That, in my view, indicates that the records are not in the custody of the town clerk until then. If you need a copy of that statute or the letter sent to the Town Justice, I can fax either to you.

With respect to the other issue, tape recordings of open meetings are accessible for listening under the Freedom of Information Law. Further, it was held judicially more than twenty years ago that a copy of a tape recording of an open meeting must be prepared (if an agency has the ability to do so) upon payment of the appropriate fee. In that instance, the fee would be based on the actual cost of reproduction (i.e., the cost of a cassette).

I note further that, based on the retention and disposition schedule prepared by the State Archives and Records Administration (SARA), tape recordings must be retained for a minimum of four months before they can be erased or destroyed.

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
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Albany, NY 12231
(518) 474-2518 - Phone
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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February 26, 2001

Ms. Lorraine Q. Knapp
[redacted]

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 in which you raised questions concerning rights of access to certain records relating to the murder of your daughter. You indicated that the person who killed her committed suicide following a chase by the police and an exchange of gunfire. Although an incident report has been made available, you have been denied access to investigative records describing circumstances that preceded and followed your daughter's death.

In this regard, first, the regulations promulgated by the Committee on Open Government (21 NYCRR part 1401) require that each agency designate one or more 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 made to that person. In my view, an agency official in receipt of your request is obliged to respond directly or forward the request to the records access officer. Nevertheless, if you have not received a response to a request, it is suggested that a new request be made 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, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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, the state's highest court, 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 police department could not claim that the records sought 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 may be pertinent in the context of your inquiry.

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

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

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

In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in sub-paragraphs (i) through (iv) of §87(2)(e). If the events which you referred ended with a suicide by the murderer of your daughter, it would appear unlikely that §87 (2)(e) would serve as a basis for a denial of access to much of the information in which you are interested.

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 deals with recordings or transcripts of 911 calls. Section 308(4) of the County Law states that:

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

In my view, "records...of calls" means either a recording or a transcript of the communication between a person making a 911 emergency call, and the employee who receives the call. I do not believe that §308 (4) can validly be construed to mean records regarding or relating to a 911 call. If that were so, innumerable police and fire reports, including arrest reports and police blotter entries, would be exempt from disclosure. In short, I believe that §308(4) pertains to and confers confidentiality only with respect to the recording or transcript of a 911 call.

Lastly, as indicated earlier, if records are withheld following both an initial request and an appeal, 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. In such a proceeding, the agency has the burden of defending secrecy, and the Court of Appeals has held 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)"(Gould v. New York City Police Department, 89 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 agency contended that complaint follow up reports, also known as "DD5's", could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g), an exception separate from those cited in response to your request. The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276). The Court then stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, directing that:

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Charles Brown

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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February 26, 2001

Mr. Albert Deleon
95-R-0576
Fishkill Correctional Facility
P.O. Box 1245
Beacon, NY 12508-0307
Ind. # 3603-93

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. Deleon:

I have received your letter in which you sought assistance in relation to a request made under the Freedom of Information Law for records maintained by the Legal Aid Society.

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

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

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

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

The Legal Aid Society in possession of the records of your interest is in New York City, and I believe that it is a corporate entity separate and distinct from government. If that is so, it is not an

"agency" subject to the Freedom of Information Law and, therefore, the records in which you are interested are outside the scope of that statute.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
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February 27, 2001

Mr. Harvey M. Elentuck
[redacted]

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

Dear Mr. Elentuck:

I have received your note, which appears on your memorandum of January 25 to William H. Thompson, Jr., President of the Board of Education.

One of the issues that you raised concerns the privacy of deceased persons in relation to the Freedom of Information Law. The primary issue in my view involves §87(2)(b), which, as you are aware, authorizes an agency to withhold records insofar as disclosure would result in "an unwarranted invasion of personal privacy." Additionally, §89(2)(b) includes a series of examples of unwarranted invasions of personal privacy. There are no decisions rendered under the Freedom of Information Law of which I am aware that have dealt squarely with the privacy of the deceased. Further, having discussed the issue with national experts, there is no clear consensus on the matter. Some contend that when a person dies, the ability of an agency to withhold records to protect his or her privacy disappears. Others suggest that privacy of a deceased should be protected for a certain, 0arbitrary period of time (i.e., two years, five years, ten years, etc.). Perhaps the greatest degree of agreement involved the point of view that records about a deceased are generally public, but that those portions which if disclosed would "disgrace the memory" of the deceased may be withheld.

From my perspective, the last suggestion is most appropriate. I believe that a great deal of information pertaining to a deceased essentially becomes innocuous by virtue of his or her death and must be disclosed. Depending on their nature, however, disclosure of intimate details of an individual's life might indeed disgrace his or her memory, or be used for purposes of questionable legality (i.e., a social security number may be used to engage in identity theft), and arguably, those kinds of details might justifiably be withheld. In addition, depending upon the nature of the records, there may be privacy considerations relating to the family of the deceased as well.

The other issue involves the interpretation of §87(2)(g) by agencies in New York City. I addressed that issue in an advisory opinion prepared at your request on September 12. In consideration of your complaint, and in an effort to enhance compliance with and understanding of that provision, copies of that opinion will be sent to Mr. Thompson and Mr. LeDonni.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. William H. Thompson, Jr.
Ron LeDonni

STATE OF NEW YORK
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February 27, 2001

Mr. Mark H. Rizzo
[redacted]

The staff of the Committee on Open 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 of January 29 in which you sought an advisory opinion. According to the correspondence, following a request for minutes of a meeting of the Hauppauge Public Library Board of Trustees, you were informed that there would be a "$5.00 processing fee" in addition to the fee of twenty-five cents per photocopy. You were also asked to complete a form for the purpose of requesting the records.

From my perspective, the processing fee cannot legally be charged, and the Library cannot require that you use its form to request records. In this regard, I offer the following comments.

First, 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 Library to do so.

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

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

> only in situations in which an act of the State Legislature, a statute, so specifies."

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

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

> "Each agency shall promulgate rules and regulations in conformance with this article...and pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the availability of records and procedures to be followed, including, but not limited to...
>
> > (iii) the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by statute."

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

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

As such, the Committee's regulations specify that no fee may be charged for personnel time, for inspection of or search for records, except as otherwise prescribed by statute.

Although compliance with the Freedom of Information Law involves the use of public employees' time, the Court of Appeals has found that the Law is not intended to be given effect "on

a cost-accounting basis", but rather that "Meeting the public's legitimate right of access to information concerning government is fulfillment of a governmental obligation, not the gift of, or waste of, public funds" [Doolan v. BOCES, 48 NY 2d 341, 347 (1979)].

Second, I do not believe that an agency can require that a request be made on a prescribed form. The Freedom of Information Law, §89(3), as well as the regulations promulgated by the Committee (§1401.5), require that an agency respond to a request that reasonably describes the record sought within five business days of the receipt of a request. Further, the regulations indicate that "an agency may require that a request be made in writing or may make records available upon oral request" [§1401.5(a)]. As such, neither the Law nor the regulations refer to, require or authorize the use of standard forms. Accordingly, it has consistently been advised that any written request that reasonably describes the records sought should suffice.

It has also been advised that a failure to complete a form prescribed by an agency cannot serve to delay a response or deny a request for records. A delay due to a failure to use a prescribed form might result in an inconsistency with the time limitations imposed by the Freedom of Information Law. For example, assume that an individual requests a record in writing from an agency and that the agency responds by directing that a standard form must be submitted. By the time the individual submits the form, and the agency processes and responds to the request, it is probable that more than five business days would have elapsed, particularly if a form is sent by mail and returned to the agency by mail. Therefore, to the extent that an agency's response granting, denying or acknowledging the receipt of a request is given more than five business days following the initial receipt of the written request, the agency, in my opinion, would have failed to comply with the provisions of the Freedom of Information Law.

While the Law does not preclude an agency from developing a standard form, as suggested earlier, I do not believe that a failure to use such a form can be used to delay a response to a written request for records reasonably described beyond the statutory period. However, a standard form may, in my opinion, be utilized so long as it does not prolong the time limitations discussed above. For instance, a standard form could be completed by a requester while his or her written request is timely processed by the agency. In addition, an individual who appears at a government office and makes an oral request for records could be asked to complete the standard form as his or her written request.

In sum, it is my opinion that the use of standard forms is inappropriate to the extent that is unnecessarily serves to delay a response to or deny a request for records.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Carol Poma, Trustee/Secretary

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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February 27, 2001

Mr. Frederick E. Fitte
[redacted]

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

Dear Mr. Fitte:

I have received your letter of January 27 and the materials attached to it. You have questioned the propriety of fees charged in response to a request made under the Freedom of Information Law for records of the Southern Columbia County Ambulance Service, Inc.

In this regard, the initial issue in my view is whether the entity in question is required to comply with the Freedom of Information Law.

That statute is applicable to agency records, and §86(3) defines the term "agency" to mean:

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

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

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

> "We begin by rejecting respondent's contention that, in applying the Freedom of Information Law, a distinction is to be made between a volunteer organization on which a local government relies for performance of an essential public service, as is true of the fire department here, and on the other hand, an organic arm of government, when that is the channel through which such services are delivered. Key is the Legislature's own unmistakably broad declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues

> and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (emphasis added; Public Officers Law, §84).
>
> "True, the Legislature, in separately delineating the powers and duties of volunteer fire departments, for example, has nowhere included an obligation comparable to that spelled out in the Freedom of Information statute (see Village Law, art 10; see, also, 39 NY Jur, Municipal Corporations, §§560-588). But, absent a provision exempting volunteer fire departments from the reach of article 6-and there is none-we attach no significance to the fact that these or other particular agencies, regular or volunteer, are not expressly included. For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objections cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" (id. at 579].

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

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

> "Section 1402 of the Not-for-Profit Corporation Law is directly applicable to the plaintiffs and pertains to how volunteer fire companies are organized. Section 1402(e) provides:
>
> > '...a fire corporation, hereafter incorporated under this section shall be under the control of the city, village, fire district or town authorities having by law, control over the prevention or extinguishment of fires therein. Such authorities may adopt rules and regulations for the government and control of such corporations.'
>
> "These fire companies are formed by consent of the Colonie Town Board. The Town has control over the membership of the companies, as well as many other aspects of their structure, organization and operation (section 1402). The plaintiffs' contention that their relationship with the Town of Colonie is solely contractual is a mischaracterization. The municipality clearly has, by law, control over these volunteer organizations which reprovide a public function.
>
> "It should be further noted that the Legislature, in enacting FOIL, intended that it apply in the broadest possible terms. '...[I]t is

> incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (Public Officers Law, section 84).
>
> "This court recognizes the long, distinguished history of volunteer fire companies in New York State, and the vital services they provide to many municipalities. But not to be ignored is that their existence is inextricably linked to, dependent on, and under the control of the municipalities for which they provide an essential public service."

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

In the only case of which I am aware on the subject, the Appellate Division, Second Department, held that a volunteer ambulance corporation performing its duties for an ambulance district is subject to the Freedom of Information Law. In so holding, the decision stated that:

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

It is emphasized that the decision cited above pertained to an ambulance company performing its duties for an ambulance district, which is itself a public corporation. I am unaware of the specific nature of the ambulance company whose records you are requesting. If it is analogous to the entity that was the subject of the Ryan decision, I believe that it would be subject to the Freedom of Information Law. However, if it is different, the Freedom of Information Law might not apply. If additional information can be provided concerning the ambulance company, perhaps I could offer a more precise response.

Assuming that the Freedom of Information Law is applicable, 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 Service (if it is subject to the Freedom of Information Law) to do so.

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

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

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

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

> "Each agency shall promulgate rules and regulations in conformance with this article...and pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the availability of records and procedures to be followed, including, but not limited to...
>
> > (iii) the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by statute."

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

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

As such, the Committee's regulations specify that no fee may be charged for personnel time, for inspection of or search for records, except as otherwise prescribed by statute.

Although compliance with the Freedom of Information Law involves the use of public employees' time, the Court of Appeals has found that the Law is not intended to be given effect "on a cost-accounting basis", but rather that "Meeting the public's legitimate right of access to

information concerning government is fulfillment of a governmental obligation, not the gift of, or waste of, public funds" [Doolan v. BOCES, 48 NY 2d 341, 347 (1979)].

Lastly, I note that the Freedom of Information Law is silent with respect to the ability to charge for postage when records made available under that statute are mailed to an applicant. Consequently, it has been advised an entity subject to the Freedom of Information Law may charge for postage.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

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February 27, 2001

Mr. Louis K. Esengard
Mortgage Clerk
Bank Alliance
65 Main Street
Cortland, NY 13045

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

Dear Mr. Esengard:

I have received your letter in which you inquired with respect to records reflective of payment or nonpayment of real property taxes to entities of local government.

In this regard, first, as a general matter, it has been held that records accessible under the Freedom of Information Law should be made equally available to any person, not withstanding one's status or interest [Farbman v. New York City, 62 NY 2d 75 (1984); Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)].

Second, in brief, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, one of the grounds for denial is relevant to an analysis of rights of access. Specifically, §87(2)(b) states that an agency may withhold records to the extent that disclosure would result in "an unwarranted invasion of personal privacy". In addition, §89(2)(b) includes a series of examples of unwarranted invasions of privacy.

Records relating to the assessment and collection of real property taxes have long been a matter of public record not only under the Freedom of Information Law, but also pursuant to laws preceding the enactment of that statute. For instance, the contents of assessment rolls, which identify the owners of real property, the assessed value of the property, and the amount of tax owed or paid, are accessible to the public {see e.g., Szikszay v. Buelow, 436 NYS 2d 558 (1981)]. Therefore, insofar as records identify those owners of real property that have not paid their taxes on time or that have been penalized due to late payment or non-payment are, in my opinion, clearly accessible to the public. Similarly, the imposition of a penalty indicates that a final agency determination has been made, and a record so indicating would be available [see Freedom of Information Law,

§87(2)(g)(iii)]. In short, I believe that records identifying the owners of those parcels of real property againstt whom penalties have been imposed, including their addresses, must ordinarily be disclosed.

Lastly, one of the examples of an unwarranted invasion of personal privacy appearing in §89(2)(b) involves the ability to withhold a list of names and addresses if the list would be used for "commercial or fund-raising purposes". Consequently, if the names and addresses of the property owners would be used for a commercial or fund-raising purpose, I believe that an agency could justifiably deny access. However, if that is not your intent, the names and addresses must in my opinion be disclosed.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

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February 27, 2001

Mr. Lee H. Kirby
[redacted]

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. Kirby:

I have received your letter of January 14 in which you raised a series of issues relating to requests for records made to the Town of Schuyler Falls. In addition, you expressed the view that you have the right to speak at meetings of the Planning Board

In this regard, I offer the following comments.

First, it is emphasized that the Freedom of Information Law is applicable to all records maintained by or for an agency, such as the Town. Section 86 (4) of that statute defines the term "record" expansively to mean:

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

Based on the foregoing, a tape recording of an open meeting constitutes a "record" subject to rights of access. Similarly plans and other documentary materials submitted to the Town by a contractor or developer would in my view constitute Town records, irrespective of whether or the extent to which they have been reviewed by the Planning Board.

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 records to which you referred would be accessible, for none of the grounds for denial would be pertinent. I point out that it was held more than twenty years ago that a tape recording of an open meeting is accessible, for you were present, and none of the grounds for denial would apply. Moreover, there is case law indicating that a tape recording of an open meeting is accessible for listening and/or copying under the Freedom of Information Law [see Zaleski v. Board of Education of Hicksville Union Free School District, Supreme Court, Nassau County, NYLJ, December 27, 1978]. Since a person present at an open meeting of a public body could have tape recorded the proceedings [see Mitchell v. Board of Education of the Garden City Union Free School District, 113 AD 2d 924 (1985)], I do not believe that there would be a valid basis for withholding a tape.

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, while individuals may have the right to express themselves and to speak, I do not believe that they necessarily have the right to do so at meetings of public bodies. It is noted that there is no constitutional right to attend meetings of public bodies. Those rights are conferred by statute, i.e., by legislative action, in laws enacted in each of the fifty states. In the absence of a statutory grant of authority to attend such meetings, I do not believe that the public would have the right to attend.

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board
Hon. Harold Ormsby
Edward Yandow

STATE OF NEW YORK
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February 27, 2001

Mr. Peter Pirnie
[redacted]

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

Dear Mr. Pirnie:

I have received your letter of January 25, as well as the materials attached to it. The correspondence relates to your unsuccessful efforts in obtaining information involving the financial affairs of certain volunteer fire departments. You asked whether those entities are "exempted from the usual budgeting procedures" and asked "[w]hat can be done to find out whether or not these agencies have ever been audited."

In this regard, it is noted at the outset that the functions of the Committee on Open Government relate to public rights of access to government information. Consequently, I am unaware of the responsibilities of volunteer fire departments concerning budget procedures or audits. It is suggested that you raise those issues with the Office of the State Comptroller. With respect to the other issues, I offer the following comments.

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

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

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

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

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

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

The term "record" is defined expansively to include:

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

Therefore, insofar as records are maintained by or for a volunteer fire department, whether they are characterized as "official" or otherwise, they would fall within the coverage of the Freedom of Information Law.

Second, it is emphasized that the Freedom of Information Law pertains to existing records. Therefore, staff would not be require to provide answers to questions or create new records in response to a request for information that does not exist in the form of a record [see Freedom of Information Law, §89(3)].

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.

Fourth, §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, a request must include sufficient detail to enable staff to locate and identify the records. I am unaware of the manner in which the records of your interest are kept. However, rather than seeking records involving "non-firemanic" activities, it is suggested that you seek to review budgets, books of account, ledgers or similar records involving a certain period (i.e., a fiscal year). While department personnel would not be required to answer questions or interpret those records, you could conduct your own analysis. Similarly, you might request the latest audit of a fire department. Those kinds of records would, in my view, clearly be public [see §87(2)(g)(i) and (iv)].

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

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

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

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

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

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

STATE OF NEW YORK
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February 27, 2001

Mr. Darrell Davis
98-R-6826
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. Davis:

I have received your letter in which you asked for assistance in relation to your request for records pertaining to an incident in which another inmate alleged that you sexually assaulted him.

In this regard, I offer the following comments.

First, the facts relating to the incident are unclear. However, in consideration of its nature, §50-b of the Civil Rights Law may be pertinent. Subdivision (1) of §50-b states that:

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

The initial ground for denial in the Freedom of Information Law, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." Section 50-b of the Civil Rights Law exempts records identifiable to a victim of a sex offense from disclosure. Consequently, the Freedom of Information Law in my view provides no rights of access to those records. Any authority to disclose or obtain the records in question would be based on the direction provided by the ensuing provisions of §50-b.

In this regard, the introductory language of subdivision (2) provides that "[t]he provisions of subdivision one of this section shall not be construed to prohibit disclosure of information to: a. Any person charged with the commission of a sex offense..." While the Department of Correctional Services is not forbidden from disclosing records subject to §50-b to a person charged, I do not believe that §50-b creates a right of access on behalf of such person. Further, subdivision (3) states in relevant part that "The court having jurisdiction over the alleged sex offense may order any restrictions upon disclosure authorized in subdivision two of this section..."

In sum, it is my view that issues involving the disclosure of the records in question would be governed by §50-b of the Civil Rights Law, rather than the Freedom of Information Law.

Insofar as §50-b of the Civil Rights Law may not apply, I believe that the Freedom of Information Law would govern rights of access.

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

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

From: Robert Freeman
To: "ecunning@thejournalnews.gannett.com".GWIA.DOS1
Date: 2/28/01 5:22PM
Subject: Re: separation agreement

Dear Ms. Cunningham:

I have received your letter in which you sought assistance in obtaining a "separation agreement" between the Lakeland School District and an architectural firm.

In this regard, in brief, the Freedom of Information Law is based on a presumption of access. Stated differently, all government records are accessible, except to the extent that records or portions thereof may be withheld in accordance with the grounds for denial appearing in paragraphs (a) through (i) of section 87(2) of that statute.

From my perspective, based on your letter and our conversation, none of the grounds described in section 87(2) would be applicable or serve as justification for a denial of access. The separation agreement constitutes a contract between the District and the firm, and there would be no basis, in my view, for withholding a contract between an entity of government and a commercial entity.

I hope that the foregoing will be adequate for your purposes and that I have been of assistance.
>>> "Cunningham, Elizabeth" <ecunning@thejournalnews.gannett.com> 02/28/01 04:48PM >>>
To Bob Freeman:

Per my conversation with the Lakeland School District, I have been informed that my request to obtain the separation agreement between the district and the architect, KG&D, has been denied. I need full disclosure of this second contract in order to disseminate information to readers about the nature of the delays in the original contract and the terms for removal from the construction project. Tomorrow, the school district will make available to me
the original contract and I would very much like to get the separation agreement at the same time.

Lakeland Superintendent Barnett Sturm can be reached via email at bsturm@lakelandschools.org.

Thank you for your kind assistance in this matter.

Best regards, Elizabeth
Cunningham

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

CC: Internet:bsturm@lakelandschools.org

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

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February 29, 2001

Peter Danziger, Esq.
O'Connell and Aronowitz
100 State Street
Albany, NY 12207

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

Dear Mr. Danziger:

I have received your letter of January 26, 2001 in which you sought my comments regarding the disclosure of alcohol and drug test results pertaining to school bus drivers.

You enclosed a copy of a letter from the Warwick Valley Central School District Clerk which denies your request for such test results. In her letter, the district clerk states that "pursuant to the Federal Omnibus Transportation Employee Testing Act of 1991 and its implementing regulations (34 C.F.R. Parts 382, 391) alcohol and drug testing records...are confidential and may only be released to the employee and the employer and certain other parties" (such as the Department of Transportation and the drug testing laboratory). This information "may not be released to other parties without the employee's written consent."

Based on a review of the applicable statute and regulations, and consultation with officials from the U.S. Department of Transportation, Federal Motor Carrier Safety Administration (the agency responsible for administering the commercial motor vehicle drug and alcohol testing program), it appears that the District is prohibited from releasing drug and alcohol test results of bus drivers.

The Omnibus Transportation Employee Testing Act of 1991(OTETA) (P.L. 102-143, Title V) amends the Commercial Motor Vehicle Safety Act of 1986 (P.L. 99-570, Title XII), and mandates the promulgation of regulations requiring motor carriers to establish alcohol and drug testing programs for commercial motor vehicle operators. School buses with a gross vehicle weight rating of at least 26,001 lbs, or designed to transport at least 16 passengers, including the driver, are considered "commercial motor vehicles" for the purpose of this statute (49 U.S.C. §31301(4)). Under this Act (codified at 49 U.S.C. Chapter 313) and the implementing regulations (49 C.F.R. Part 382), school districts must establish and follow programs to test school bus drivers for use of alcohol and illicit drugs.

49 U.S.C. 31306(c)(7) states that, in carrying out the alcohol and drug testing program, the Secretary of Transportation shall:

> "provide for the confidentiality of test results and medical information (except information about alcohol or a controlled substance) of employees, except that this clause does not prevent the use of test results for the orderly imposition of appropriate sanctions under this section."

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §§87(2)(a) through (i) of the Law. The first ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." From my perspective, the passage quoted above serves to exempt the information described therein from disclosure under the Freedom of Information Law through the application of §87(2)(a).

In my view, a finding that records are confidential and cannot be disclosed must be consistent with the specific and unequivocal language of a statute. In *Capital Newspapers v. Burns,* 67 NY2d 562, 567 (1986), the Court noted that there must be "a showing of clear legislative intent to establish and preserve that confidentiality which one resisting a FOIL disclosure claims as protection" (*id.*). Assuming that there is legislative history suggesting an intent to ensure confidentiality, I believe that the information described in the provision in question would be "specifically exempted from disclosure by...statute" and, therefore, beyond the scope of rights conferred by the Freedom of Information Law.

It has been held by several courts, including the Court of Appeals, that an agency's regulations 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 federal regulation cannot confer, require or promise confidentiality. If an agency could, on its own initiative, adopt regulations exempting records from disclosure in a manner inconsistent with a statute enacted by the State Legislature (i.e., the Freedom of Information Law), the statute could be circumvented and its effect nullified.

Again, 49 U.S.C, §31306(c)(7) states that the Department of Transportation shall "provide for the confidentiality of test results and medical information (except information about alcohol or a controlled substance)" except in specified circumstances. On its face, it is unclear whether the parenthetical in the above-quoted provision is intended to apply to both "test results" and "medical information," or only the latter. Michael Faulk, an attorney in the Office of Counsel at the Federal Motor Carrier Safety Administration (FMCSA) explained that his agency interprets the parenthetical to qualify only the term that immediately precedes it: "medical information." He indicated that the parenthetical is designed to clarify that the confidentiality extended to the term "medical information" should not be used to prohibit disclosure of alcohol and drug information to regulatory

authorities, but that test results are confidential in other circumstances. Further, *News Alert,* a publication of the U.S. Department of Transportation, dated March 27, 1998, states that under 49 C.F.R. Part 382.405, "no information pertaining to a drug and/or alcohol test may be released," except as "authorized by the driver, required by the law, or the provisions of this section." Carolyn Temperine, from the New York Division of the FMCSA believes that the underlined portion refers to federal, state or local programs involving regulatory authority of employers or drivers. In short, officials at the FMCSA interpret the federal statute provision as a prohibition regarding the disclosure of test results.

In consideration of the OTETA, the implementing regulations and agency interpretation of the Act, including the enclosed *News Alert,* the federal statute at issue appears to be intended to ensure that alcohol and drug test results of school bus drivers are exempted from public disclosure. If that is so, the law precludes a government official or agency from disclosing those records, except to the individuals specified in the regulations, or upon consent of the bus driver. It is emphasized that there is no judicial decision of which I am aware that focuses on the issue. While officials of the FMCSA may be correct in their interpretation of the intent of the parenthetical phrase, arguably, that phrase may have the opposite meaning.

If you would like to discuss the matter, please feel free to contact me.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Thomas Gustainis

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 1, 2001

E-MAIL

TO: dan[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. Rouette:

I have received your letter in which you raised a question concerning the obligations of an agency to respond in a timely manner to a request made under the Freedom of Information Law. You referred to the acknowledgment of the receipt of your request by an Onondaga County agency indicating that you would be notified of a determination within thirty days "in accordance with standard county practice." If that is indeed standard practice, I believe that it would be inconsistent with law.

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

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

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

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

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

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, (i.e., thirty days) such a practice or policy would be contrary to the thrust of the Freedom of Information Law. If a request

is voluminous and a significant amount of time is needed to locate records and review them to determine rights of access, a delay beyond five business days, in view of those and perhaps the other kinds of factors mentioned earlier, might be reasonable. On the other hand, if a record or report is clearly public and can be found easily, there would appear to be no rational basis for delaying disclosure. In a case in which it was found that an agency's "actions demonstrate an utter disregard for compliance set by FOIL", it was held that "[t]he records finally produced were not so voluminous as to justify any extension of time, much less an extension beyond that allowed by statute, or no response to appeals at all" (Inner City Press/Community on the Move, Inc. v. New York City Department of Housing Preservation and Development, Supreme Court, New York County, November 9, 1993).

In an effort to enhance compliance with an understanding of the Freedom of Information Law, copies of this response will be forwarded to County officials. It is suggested that you share this opinion with the person who responded to your request.

I hope that I have been of assistance.

cc: Martin Farrell
Christina Pezzulo

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 2, 2001

Mr. George Arce
[redacted]

Dear Mr. Arce:

I have received your letter in which you requested the address of the department "in charge of licensing 'Notary Public.'"

In this regard, the Division of Licensing Services at the Department of State licenses notaries public. Its address is 84 Holland Avenue, Albany, NY 12208-3490.

You also asked to whom you write if a county clerk fails to comply with the Freedom of Information Law. In short, any person may contact this office in relation to matter involving that statute. I note, however, that county clerks perform a variety of functions, some of which may include records that fall within the coverage of the Freedom of Information Law, while others may fall outside the scope of that law.

As you may be aware, the Freedom of Information Law is applicable to agency records, and §86(3) defines the term "agency" to include:

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

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

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

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

procedural provisions associated with the Freedom of Information Law (i.e., those involving the designation of a records access officer or the right to appeal a denial) would not ordinarily be applicable.

An area in which the distinction between agency records and court records may be significant involves fees. Under the Freedom of Information Law, an agency may charge up to twenty-five cents per photocopy, "except when a different fee is otherwise prescribed by statute." In the case of fees that may be assessed by county clerks, §§8018 through 8021 of the Civil Practice Law and Rules require that county clerks charge certain fees in their capacities as clerks of court and other than as clerks of court. Since those fees are assessed pursuant to statutes other than the Freedom of Information Law, the fees may exceed those permitted by the Freedom of Information Law. Section 8019 of the Civil Practice Law and Rules provides in part that " The fees of a county clerk specified in this article shall supersede the fees allowed by any other statute for the same services..."

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

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March 2, 2001

Mr. Ronald E. DeShields
99-A-2852
Clinton Correctional Facility
Dannemora, NY 12929-2002

Dear Mr. Shields:

I have received your letter in which you appealed a denial of your request for records by the New York City Department of Investigation.

In this regard, the primary function of the Committee on Open Government involves offering guidance 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.

For your information, the provision dealing with the right to appeal a denial of access to records, §89(4)(a) of the Freedom of Information Law, states in relevant part that:

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

Based on the foregoing, an appeal concerning records withheld by the Department of Investigation should be made to the head of that agency or the person designated by the head of that agency to determine appeals.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3282
FOIL-AO-12558

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March 5, 2001

Mr. Mike Kilian
The 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 facts presented in your correspondence.

Dear Mr. Kilian:

I have received your letter of February 1 and the materials attached to it. You referred to certain actions recently taken in the City of Rome and have sought an advisory opinion concerning their propriety.

The first, an "Official Statement of Executive Policy" ("the Policy") issued by the Mayor, prohibits members of the City's senior staff or department heads from disclosing information discussed at meetings with the Mayor and other City officials. The information that cannot be disclosed involves "statutorily confidential information" and includes a variety of considerations based on a combination of provisions found in the grounds for withholding records listed in §87(2) of the Freedom of Information Law and the grounds for entry into executive session appearing in §105(1) of the Open Meetings Law. Additionally, the policy prohibits the disclosure of:

> "Any sensitive matter or information that if disclosed would disrupt the efficient and effective operations of the City government or would impair the public officer's close working relationship with the Mayor."

A violation of the policy is "considered misconduct and will be cause for discipline."

The second is an ordinance that prohibits City officers or employees from disclosing "by any means" certain information "discussed or deliberated during a properly convened executive session." As in the case of the Policy, this prohibition appears to be based on a combination of exceptions to rights of access in the Freedom of Information Law and the Open Meeting Law's grounds for entry into executive session. Further, a violation " shall be punishable pursuant to the general penalty provision of the Code of Ordinances."

From my perspective, the actions are of questionable legality. I believe, too, that many routine disclosures would constitute violations of the Policy or the Ordinance, and a careful analysis of the matter indicates, in my view, that it is based on an erroneous presumption.

In this regard, I offer the following comments.

First, it appears that the prohibitions adopted by the City of Rome were precipitated by request for an opinion sought by the City's Corporation Counsel from the Attorney General. Corporation Counsel asked "whether a municipality has statutory authority, by local law or in its code of ethics to prohibit members of the city council from disclosing matters discussed in executive session." In an informal opinion (Informal Opinion No. 2000-2) prepared by James D. Cole, Assistant Solicitor General, it was advised that "[a]lthough nothing in the Public Officers Law directly prohibits such disclosure, such a prohibition is entirely consistent with the provisions of the Freedom of Information Law and the Open Meetings Law." The opinion was careful to point out, however, that "[a]ny such restriction on speech would, of course, be subject to state and federal constitutional requirements." It was advised that:

> "Disclosure of matters discussed in executive session would defeat the purpose of the apparent legislative intent of authorizing local legislative bodies to discuss these limited matters in private. Disclosure would be contrary to the public welfare. A locally enacted provision prohibiting disclosure would thus further the statutory purpose of executive sessions and promote the public interest."

The opinion then cited and appears to have relied heavily on a decision rendered by the Appellate Division, Third Department, Kline v. County of Hamilton [235 AD2d 44, 663 NYS 2d 339 (1997)].

Kline involved a request made under the Freedom of Information Law for tape recordings and transcripts of executive sessions, and the Court referred to the first ground for denial, §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute", and concluded that:

> "While the purpose of FOIL is to lift 'the cloak of secrecy or confidentiality' (Public Officers Law, §84) from governmental records which are part of the governmental process, where, as here, confidentiality has been specifically sanctioned by Public Officers Law §§105 and 106, the records at issue fall within the exemption of Public Officers Law § 87(2)(a) and are to be shielded from public disclosure" (id., 341).

Following its reference to Kline, the Attorney General concluded that:

> "...it seems clear seems clear that under the Public Officers Law a governing body of a municipality may withhold any records of discussions properly taking place in executive session. Section 806(1)(a) of the General Municipal Law, authorizing municipal codes

> of ethics that prohibit, inter alia, disclosure of information, is consistent with and reinforces this fact. Accordingly, we conclude that a local legislative body, by local law or in its code of ethics, has statutory authority to prohibit a legislator from disclosing matters discussed in executive session. We emphasize that the decision to go into executive session is discretionary, and that any such prohibition on speech would be subject to state and federal constitutional requirements."

With due respect to the Appellate Division and the Attorney General, the conclusion reached with regard to the notion of "confidentiality" and the scope of §87(2)(a) is inconsistent with more detailed analyses found in judicial decisions rendered in New York and by federal courts in construing the federal Freedom of Information Act (5 USC §552). To be confidential under the Freedom of Information Law, I believe that records must "specifically exempted from disclosure by state or federal statute" in accordance with §87(2)(a). Similarly, §108(3) of the Open Meetings Law refers to matters made confidential by state or federal law as "exempt" from the provisions of that statute.

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)].

In like manner, 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.' *Baldridge 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. Stated differently, there is nothing inherently confidential about records that an agency may choose to withhold or disclose; only when an agency has no discretion and must deny access would records be confidential or "specifically exempted from disclosure by statute" in accordance with §87(2)(a).

The same analysis is applicable in the context of the Open Meetings Law. While that statute 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 the right to do so. The introductory language of §105(1), which prescribes a

procedure that must be accomplished before an executive session may be held, clearly indicates that a public body "may" conduct an executive session only after having completed that procedure. If, for example, a motion is made to conduct an executive session for a valid reason, and the motion is not carried, the public body could either discuss the issue in public or table the matter for discussion in the future.

Since a public body may choose to conduct an executive session or discuss an issue in public, information expressed during an executive session is not "confidential." To be confidential, again, a statute must prohibit disclosure and leave no discretion to an agency or official regarding the ability to disclose.

By means of 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.

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 the context of most of the duties of most municipal boards, councils or similar bodies, there is no statute that *forbids* disclosure or requires confidentiality. Again, the Freedom of Information Law states that an agency *may* withhold records in certain circumstances; it has discretion to grant or deny access. The only instances in which records may be characterized as "confidential" would, based on judicial interpretations, involve those situations in which a statute prohibits disclosure and leaves no discretion to a person or body.

In short, I believe that the presumption that records that *may* be withheld or that information that *may* be discussed in executive session are confidential and, therefore, exempted from disclosure by statute is inaccurate.

In the Mayor's Statement of Executive Policy, the prohibition against disclosure refers to "statutorily confidential information" and then lists a variety of "matters" which if disclosed would violate the Policy. In my opinion, those matters represent areas that, by law *need not* be disclosed; they are not matters that *cannot* be disclosed. The same would be so under the Ordinance, for it refers to matters that *may* but are not required to be considered in executive session.

Second, viewing the issue from a different vantage point, based on a decision rendered by the U.S. Court of Appeals for the Second Circuit [Harman v. City of New York, 140 F.3d 111 (2nd Cir. 1998)], it appears that the Executive Policy and the Ordinance may be unconstitutional. In Harman, the New York City Human Resources Administration (HRA) adopted an executive order that forbade its employees:

> "...from speaking with the media regarding any policies or activities of the agency without first obtaining permission from the agency's media relations department. The City contends that these policies are necessary to meet the agencies' obligations under federal and state law to protect the confidentiality of reports and information relating to children, families and other individuals served by the agencies" (id., 115).

I note that §136 of the Social Services Law prohibits a social services agency from disclosing records identifiable to an applicant for or recipient of public assistance. Additionally, §372 of the Social Services Law prohibits the disclosure of records identifiable to "abandoned, delinquent, destitute, neglected or dependent children..." As such, there is no question that many of HRA's records are exempted from disclosure by statute and are, therefore, confidential. Nevertheless, the proceeding in Harman was precipitated by commentary that was not identifiable to any particular child or family; rather it involved the operation of the agency. As specified by the Court:

> "...neither the Plaintiffs nor the public has any protected interest in releasing **statutorily confidential information**. Given the network of laws **forbidding** the dissemination of such information, Plaintiffs wisely concede this point. Therefore, we evaluate the interests of employees and of the public only in commenting on **non-confidential** agency policies and activities" (emphasis mine) (id., 119).

The Court in that passage highlighted the critical aspect of the point made earlier: that records may be characterized and exempted from disclosure by statute only when a statute forbids disclosure.

In finding that the order prohibiting speech that did not involve information that is exempted from disclosure by statute, the Court stated initially that:

> "Individuals do not relinquish their First Amendment rights by accepting employment with the government. See *Pickering v. Board of Educ.*, 391 U.S. 563, 568, 88 S. Ct. 1731, 1734, 20 L. Ed. 2d 811 (1968). However, the Supreme Court has recognized that the government 'may impose restraints on the job-related speech of public employees that would be plainly unconstitutional if applied to the public at large.' *United States v. National Treasury Employees Union*, 513 U.S. 454, 465, 115 S. Ct. 1003, 1012, 130 L. Ed2d 964 (1995) (NTEU). In evaluating the validity of a restraint on government employee speech, courts must 'arrive at a balance

> between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting efficiency of the public services it performs through its employees. *Pickering*, 391 U.S. at 568, 88 S.Ct. at 1734-35"(id., 117).

In considering the "balancing test", it was held that "where the employee speaks on matters of public concern, the government bears the burden of justifying any adverse employment action" and that:

> "This burden is particularly heavy where, as here, the issue is not an isolated disciplinary action taken in response to one employee's speech, but is, instead, a blanket policy designed to restrict expression by a large number of potential speakers. To justify this kind of prospective regulation, '[t]he Government must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation' of the Government." *NTEU*, 513 U.S. at 468, 115 S. Ct. at 1014 (quoting *Pickering*, 391 U.S. at 571, 88 S.Ct. at 1736)...
>
> > "'[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.') While the government has special authority to proscribe the speech of its employees , '[v]igilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech.' *Rankin*, 483 U.S. at 384, 107 S. Ct. at 2896.
>
> "A restraint on government employee expression 'also imposes a significant burden on the public's right to read and hear what the employees would otherwise have written and said.' *NTEU*, 513 U.S. at 470, 115 S.Ct. at 1015. The Supreme Court has noted that '[g]overnment employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions.' *Waters v. Churchill*, 511 U.S. 661, 674, 114 S.Ct. 1878, 1887, 128 L.Ed.2d 686 (1994)..." (id., 118-119).

The Court found that the Order, by requiring advance approval before an employee could comment, "is generally disfavored under First Amendment law because it 'chills potential speech before it happens', stating that:

> "The press policies allow the agencies to determine in advance what kind of speech will harm agency operations instead of punishing disruptive remarks after their effect has been felt. For this reason, the regulations ran afoul of the general presumption against prior restraints on speech" (id., 119).

It also viewed the matter from the perspective of the reality of the relationship between employers and employees, finding that:

> "Employees who are critical of the agency will naturally hesitate to voice their concerns if they must first ask permission from the very people whose judgments they call into question. Only those who adhere to the party line would view such a requirement without trepidation" (id., 120).

In generally rejecting the possibility that speech may be disruptive, it was stated that:

> "The City contends that employee speech will be permitted as long as it will not interfere with the efficient and effective operations of the agencies. We do not find this standard to be sufficiently definite to limit the possibility for content or viewpoint censorship. Because the press policies allow suppression of speech before it takes place, administrators may prevent speech that would not actually have had a disruptive effect. See e.g., *NTEU*, 513 U.S. at 475 n.21, 115 S.Ct. at 1017 n.21 ('Deferring to the Government's speculation about the pernicious effects of thousands of articles and speeches yet to be written or delivered would encroach unacceptably on the First Amendment's protections.'). Furthermore, the standard inherently disfavors speech that is critical of agency operations, because such comments will necessarily seem more potentially disruptive than comments that 'toe[] the agency line.' *Sanjour*, 56 F3d at 96-97 (striking down regulation that permitted reimbursement for only those speaking engagements consistent with the 'mission of the agency' as a restriction on anti-government speech).
>
> "The challenged regulations thus implicate all of the above concerns. By mandating approval from an employee's superiors, they will discourage speakers with dissenting views from coming forward. They provide no time limit for review to ensure that commentary is not rendered moot by delay. Finally, they lack objective standards to limit the discretion of the agency decision-maker. For these reasons we agree with the district court that 'ACS 101 and HRA 641 clearly restrict the First Amendment rights of City employees..."(id., 121).

It was emphasized by the court that the harm sought to be avoided must be real, and not merely conjectural:

> "...where the government singles out expressive activity for special regulation to address anticipated harms, the government must 'demonstrate that the recited harms are real, not merely conjectural, and that the regulations will in fact alleviate these harms in a direct and material way.' *NTEU* 513 U.S. at 475, 115 S.Ct. at 1017 (quoting *Turner Broad Sys. Inc. v. Federal Communications Comm'n*, 512 U.S. 622, 624, 114 S.Ct. 2445, 2450, 129 L.Ed.2d 497 (1994) (plurality opinion)). Although government predictions of harm are entitled to greater deference when used to justify restrictions on employee speech as opposed to speech by the public, such difference is generally accorded only when the government takes action in response to speech which has already taken place. *NTEU*, 513 U.S. at 475 n.21, 115 S.Ct. at 1017 n.21. Where the predictions of harm are proscriptive, the government cannot rely on assertions, but must show a basis in fact for its concerns" (id., 122).

In a key statement that essentially summarizes its decision, the Court found that:

> "The executive orders reach more broadly to cover all information regarding any agency policy or activity. They thus have the potential to chill substantially more speech than is reasonably necessary to protect the confidential information" (id., 123) (i.e., information that is exempted from disclosure and which, pursuant to statute, cannot be disclosed).

With regard to the Mayor's Official Statement of Executive Policy, little in paragraphs (a) through (g) of subdivision (1) could, based on the preceding analysis, be considered to be "statutorily confidential information." In my opinion, in the context of city business, matters would be "confidential" only on rare occasions. Those situations might involve information that is derived from personnel records used to evaluate continuing employment or promotion of police officers or professional firefighters pursuant to §50-a of the Civil Rights Law; they might involve attorney work product or records subject to the attorney-client privilege. In most instances, however, there would be no prohibition against disclosure based on a statute that forbids release of records or their contents.

Under subdivision (2), again, certain City employees could not discuss or divulge "any sensitive matter or information that if disclosed would disrupt the efficient and effective operation of the City government or would impair the public officer's close working relationship with the Mayor." That aspect of the Policy is in my view contrary to the holding rendered in Harman. It is vague, or in the words of Harman, not "sufficiently definite"; it is prospective and "chills speech before it happens", for it does not focus on any harm that has actually occurred. In short, it stifles free speech in a manner that has been found to be unconstitutional. Further, although a policy can be readily altered or revoked, an ordinance remains in effect until legislative action is taken. Consequently, the Ordinance potentially affects numerous individuals yet to serve as City employees or members of the Common Council.

In the course of the duties carried out by public officers and employees, any number of subjects prohibited from being disclosed under the Executive Policy and the Ordinance are routinely disclosed. For instance, both refer to "[m]atters or information regarding proposed, pending or current litigation." Matters relating to litigation are frequently disclosed, and any person may ordinarily obtain records concerning litigation from a court and in many cases from an agency. "Matters or information regarding the preparation, grading or administration of examinations" are also disclosed. Nevertheless, a disclosure that a new exam for plumbers' licenses is being developed or a disclosure of an eligible list would appear to run afoul of the policy.

What if there is honest disagreement between the Mayor and a department head on an issue of policy and the latter expresses his opinion to the news media or to a friend - would that run afoul of the Policy, particularly if the Mayor believes that the comment impairs his relationship with the Department head? Should the department head face the possibility of a fine or imprisonment, or both?

What if, after an executive session, a member of the City Council believes that the session or a portion of the session was improperly held? Would his or her disclosure of that opinion or the substance of the matter discussed result in a violation of the Ordinance? I note, too, that the Ordinance refers to a "properly convened executive session." Frequently executive sessions are convened for "proper" reasons, but the public body drifts into a new subject. My hope is there will be a member or other person present who is sufficiently knowledgeable regarding the permissible parameters of executive session and sufficiently vigilant to suggest that the executive session should end and that the body should return to an open meeting. But what if that does not happen? What if the public body rejects that person's efforts to return to the open meeting? What if there is simply an oversight and a realization after the executive session that the body should have engaged in a discussion in public? Would disclosure of a matter that should have been discussed in public but which was considered during a "properly convened" executive session constitute a violation of law?

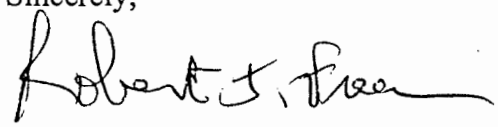
I recognize that many of the questions are rhetorical. Nevertheless, in consideration of the possibility that violation of the Policy or the Ordinance could result in the imposition of a fine and/or imprisonment, as well as the Harman decision and the analysis that preceded my discussion of that holding, it is my view that those enactments are inconsistent with law and would likely be found, as in Harman, to be unconstitutional.

Lastly, while there may be no prohibition against disclosure of most of the information that is the subject of the Policy and the Ordinance, the foregoing is not intended to suggest that such disclosures would be uniformly appropriate or ethical. Obviously, the purpose of an executive session is to enable members of public bodies to deliberate, to speak freely and to develop strategies in situations in which some degree of secrecy is permitted. Similarly, the grounds for withholding records under the Freedom of Information Law relate in most instances to the ability to prevent some sort of harm. In both cases, inappropriate disclosures could work against the interests of a public body as a whole and the public generally. Further, a unilateral disclosure by a member of a public body might serve to defeat or circumvent the principles under which those bodies are intended to operate.

Historically, I believe that public bodies were created in 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 those bodies should not in my opinion be unanimous in every instance; on the contrary, they should represent disparate points of view which, when conveyed as part of a deliberative process, lead to fair and representative decision making. Notwithstanding distinctions in points of view, the decision or consensus by the majority of a public body should in my opinion be recognized and honored by those members who may dissent. Disclosures made contrary to or in the absence of consent by the majority 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, and disclosures should in my view be cautious, thoughtful and based on an exercise of reasonable discretion.

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: Hon. Joseph Griffo
Common Council
James D. Cole
Andrew Brick

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March 6, 2001

Ms. Samara Swanston
The Watchperson Project, Inc.
113 Berry Street
Brooklyn, NY 11211

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

Dear Ms. Swanston:

I have received your correspondence and apologize for the delay in response. You have questioned the propriety of a request for a database maintained by the New York City Department of Environmental Protection (DEP).

By way of background, the organization that you represent, the Watchperson Project, Inc., is a not-for-profit corporation created as part of a settlement between the DEP and the State Department of Environmental Conservation requiring that certain violations of the Clean Water Act be remedied. Part of the mission of your organization involves the development of a "clearinghouse of environmental information", and it has acquired numerous databases than include information reported by businesses and their use of hazardous and toxic materials. You wrote that:

> "In order to effectively develop a comprehensive analysis of all of this data, Watchperson has compiled all of this data in a Geographical Information System ('GIS'). It is for this reason that the Watchperson requires its databases to be in some sort of digital format, an Excel spreadsheet, a dBase database, an ascii comma-delimited file, or any other format which can be saved to a floppy or zip disk and read into a computer, upon which our GIS system resides."

Although you wrote that the New York City Administrative Code requires that the database of your interest, the Citywide Facility Inventory Database (CFID), be maintained and made available by DEP, that agency has, according to your letter, adopted "a policy of distributing information from the CFID only when it receives a written request for information pertaining to a specific business."

In consideration of DEP's denial of your request for the database in "electronic format", you have sought an opinion in response to the following questions:

"1. Can the DEP invoke the privacy exception for a public record such as the CFID, which was created to inform the public about local businesses using hazardous chemicals, given the fact that if individual requests were made for individual companies, the names and addresses of these businesses would be included in the information printed out by the DEP?

2. From past conversations we have had with DEP employees, the DEP contracted with a private software company to develop software for the DEP to access the CFID from their computers. Evidently through Watchperson is not interested in these codes, nor is it interested in economically competing with this software company, may the DEP invoke the trade secret and computer access code exceptions?

3. Is there any reasonable argument that can be made for any of the other statutory grounds for denial that the DEP has made, including the use of the law enforcement, the contract awards exception, or taking the position that commercial uses of FOILed information is inappropriate?"

In this regard, I offer the following comments.

With respect to the first question, the "privacy exception", §87(2)(b) of the Freedom of Information Law, is, in my view, inapplicable. Based on the language of the law and its judicial interpretation, that provision is intended to pertain to natural persons, not entities or persons acting in business capacities. In a decision rendered by the Court of Appeals that focuses upon the privacy provisions, the court referred to the authority to withhold "certain personal information about private citizens" [see Matter of Federation of New York State Rifle and Pistol Clubs, Inc. v. The New York City Police Department, 73 NY 2d 92 (1989)]. In another decision, the opinion of this office was cited and confirmed, and the court held that "the names and business addresses of individuals or entities engaged in animal farming for profit do not constitute information of a private nature, and this conclusion is not changed by the fact that a person's business address may also be the address of his or her residence" [American Society for the Prevention of Cruelty to Animals v. New York State Department of Agriculture and Markets, Supreme Court, Albany County, May 10, 1989). Similarly, in a case concerning records pertaining to the performance of individual cardiac surgeons, the court granted access and cited an opinion prepared by this office in which it was advised that the information should be disclosed since it concerned professional activity licensed by the state (Newsday Inc. v. New York State Department of Health, Supreme Court, Albany County, October 15, 1991).

In short, I do not believe that the provisions in the Freedom of Information Law pertaining to the protection of personal privacy may be asserted to withhold records pertaining to entities other than natural persons. On the contrary, since the records sought relate to commercial entities, I do not believe that any of the grounds for denial would be applicable.

With regard to the second, based on the provision of the Administrative Code to which you referred, §24-707, the DEP is obligated to "maintain and update, the citywide facility inventory database, and shall, on an annual basis produce the data from such database in printed form." From my perspective, if the DEP is required to print the entire content of its database, the equivalent information must also be made available in electronic format.

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

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

Based upon the language quoted above, if information is maintained 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. Again, based on the terms of the Administrative Code, DEP is required to make the database "in printed form". That being so, I believe that the same data must be made available in a format usable to you, if it has the ability to do so, and if you are willing to pay the actual cost of reproduction [see Freedom of Information Law, §87(1)(b)(iii)]. Further, in view of the clear obligation imposed by the City Administrative Code to disclose the data in printed form, I do not believe that the DEP can evade that requirement based on its contention regarding the disclosure of codes. I note, too, that it is my understanding that the exception involving computer access codes in §87(2)(i) of the Freedom of Information Law is intended to preclude disclosure of codes that would permit unauthorized access to information stored electronically. That issue does not appear to be pertinent in the context of your request.

Lastly, I do not believe that any of the grounds for denial would enable the DEP to withhold the database. Its contents consist merely of a collection of facts. With respect to the possibility of commercial use of the data, as a general matter, the reasons for which a request is made and an applicant's potential use of records are irrelevant, and it has been held that if records are accessible, they should be made equally available to any person, without regard to status or interest [see e.g., M. Farbman & Sons v. New York City, 62 NYS 2d 75 (1984) and Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Therefore, if the records are available by law, the intended use of the records would have no effect on your rights of access.

I am mindful that §89(2)(b)(iii) of the Freedom of Information Law permits an agency to withhold "lists of names and addresses if such list would be used for commercial or fund-raising purposes" on the ground that disclosure would constitute an unwarranted invasion of personal privacy. However, as indicated earlier, the provisions pertaining to the protection of personal privacy involve items relating to natural persons. In this instance, the data relates to business entities. Consequently, the provision concerning the ability to withhold a list of names addresses on the ground that the list would be used for a commercial purpose would not be applicable.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer

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March 8, 2001

Mr. Martin C. Julius
Attorney At Law
200 Willis Avenue
Mineola, NY 11501

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

Dear Mr. Julius:

I have received your letter of January 29 relating to your unsuccessful efforts in obtaining records from the New York City Department of Corrections.

The records sought relate to an incident that occurred at the Rikers Island Correctional Facility in 1995, and you represent a former inmate who sustained personal injuries while incarcerated at Rikers. They include:

> "1. the overall directive on search procedures of inmates at the Rikers' Island Facility;
>
> 2. the specially designed program for the North Infirmary Command at the Rikers' Island Facility;
>
> 3. directions governing those persons designated 'assaultive' prisoners; and
>
> 4. the multi-paged institutional orders devised to govern the movements of inmates Tyree Garland and Benjamin Serrano for recreation, visits, court appearances, searching out of their cell, etc. which were generated by the security deputy warden and posted where the inmates were housed and given to each tour commander."

In this regard, first , in view of the delay that you have encountered, it is noted at the outset that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

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

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

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

Second, the Freedom of Information law pertains to existing records and §89 (3) states in part that an agency is not required to create a record in response to a request. Therefore, insofar as the information sought does not exist in the form of a record or records, the Department would not be obliged to prepare new records to satisfy your request.

Third, to the extent that 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. In consideration of your request, several of the grounds for denial may be pertinent to an analysis of rights of access. It is emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In my view, the phrase quoted in the preceding sentence evidences a recognition on the part of the Legislature that a single record or report, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld. That being so, I believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

The Court of Appeals expressed its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department [87 NY 2d 267 (1996)], stating that:

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

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the agency contended that 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.).

It is unclear whether you represent of either the inmate named. If one or both are not your clients, §87 (2)(b) may be relevant, for it authorizes an agency to withhold records insofar as disclosure would constitute an "unwarranted invasion of personal privacy." I am unaware of the contents of the records pertaining to those individuals. However, those portions containing intimate personal information could likely be withheld pursuant to §87(2)(b). Others, such as reference to court appearances, would likely be accessible.

There is no question but that the records sought constitute intra-agency materials that fall within the scope of §87(2)(g). However, due to its structure, that provision frequently requires substantial disclosure. Specifically, §87(2)(g) states that an agency may withhold records that:

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

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

A third 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."

Perhaps most relevant in the context of your request would be §87(2)(e)(iv). The leading decision concerning that provision is Fink v. Lefkowitz, which involved access to a manual prepared by a special prosecutor that investigated nursing homes in which the Court of Appeals held that:

> "The purpose of this exemption is obvious. Effective law enforcement demands that violators of the law not be apprised the nonroutine procedures by which an agency obtains its information (see Frankel v. Securities & Exch. Comm., 460 F2d 813, 817, cert den 409 US 889). However beneficial its thrust, the purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution.
>
> "To be distinguished from agency records compiled for law enforcement purposes which illustrate investigative techniques, are those which articulate the agency's understanding of the rules and regulations it is empowered to enforce. Records drafted by the body charged with enforcement of a statute which merely clarify procedural or substantive law must be disclosed. Such information in the hands of the public does not impede effective law enforcement. On the contrary, such knowledge actually encourages voluntary compliance with the law by detailing the standards with which a person is expected to comply, thus allowing him to conform his conduct to those requirements (see Stokes v. Brennan, 476 F2d 699, 702; Hawkes v. Internal Revenue Serv., 467 F2d 787, 794-795; Davis, Administrative Law [1970 Supp], section 3A, p 114).
>
> "Indicative, but not necessarily dispositive of whether investigative techniques are nonroutine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel (see Cox v. United States Dept. of Justice, 576 F2d 1302, 1307-1308; City of Concord v. Ambrose, 333 F Supp 958)."

In applying those criteria to specific portions of the manual, which was compiled for law enforcement purposes, the Court found that:

> "Chapter V of the Special Prosecutor's Manual provides a graphic illustration of the confidential techniques used in a successful nursing home prosecution. None of those procedures are 'routine' in the sense of fingerprinting or ballistic tests (see Senate Report No. 93-1200, 93 Cong 2d Sess [1974]). Rather, they constitute detailed, specialized methods of conducting an investigation into the activities of a specialized industry in which voluntary compliance with the law has been less then exemplary.

> "Disclosure of the techniques enumerated in those pages would enable an operator to tailor his activities in such a way as to significantly diminish the likelihood of a successful prosecution. The information detailed on pages 481 and 482 of the manual, on the other hand, is merely a recitation of the obvious: that auditors should pay particular attention to requests by nursing homes for Medicaid reimbursement rate increases based upon projected increase in cost. As this is simply a routine technique that would be used in any audit, there is no reason why these pages should not be disclosed" (id. at 573).

As the Court of Appeals has suggested, to the extent that the records in question include descriptions of investigative techniques which if disclosed would enable potential lawbreakers to evade detection or endanger the lives or safety of law enforcement personnel or others [see also, Freedom of Information Law, §87(2)(f)], a denial of access would be appropriate. I would conjecture, however, that not all of the techniques or procedures contained in the records sought 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 of possible significance as a basis for denial is §87(2)(f). Again, that provision permits an agency to withhold records insofar as disclosure "would endanger the life or safety of any person." As suggested with respect to the other exceptions, I believe that the Department is required to review the documentation at issue to determine which portions fall within this or the other exceptions.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Thomas Antenen, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12562

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March 12, 2001

Mr. Jesus DeArmas
82-A-5404
Oneida Correctional Facility
P.O. Box 4580
Rome, NY 13442-4580

Dear Mr. DeArmas:

I have received your letter in which you appealed what you characterized as a denial of your request for records by the Special Housing Office of the Department of Correctional Services.

In this regard, the primary function of the Committee on Open Government involves offering 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 a denial of access to records, section 89(4)(a) of the Freedom of Information Law, states in relevant part that:

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

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

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March 13, 2001

E-Mail

TO: Nina Guenste [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. Guenste:

I have received your letter in which you questioned a requirement that you complete the Town of Wallkill's form before you may request records under the Freedom of Information Law or appeal a denial of access.

In this regard, I do not believe that an agency can require that a request be made on a prescribed form. The Freedom of Information Law, §89(3), as well as the regulations promulgated by the Committee (§1401.5), require that an agency respond to a request that reasonably describes the record sought within five business days of the receipt of a request. Further, the regulations indicate that "an agency may require that a request be made in writing or may make records available upon oral request" [§1401.5(a)]. As such, neither the Law nor the regulations refer to, require or authorize the use of standard forms. Accordingly, it has consistently been advised that any written request that reasonably describes the records sought should suffice.

It has also been advised that a failure to complete a form prescribed by an agency cannot serve to delay a response or deny a request for records. A delay due to a failure to use a prescribed form might result in an inconsistency with the time limitations imposed by the Freedom of Information Law. For example, assume that an individual requests a record in writing from an agency and that the agency responds by directing that a standard form must be submitted. By the time the individual submits the form, and the agency processes and responds to the request, it is probable that more than five business days would have elapsed, particularly if a form is sent by mail and returned to the agency by mail. Therefore, to the extent that an agency's response granting, denying or acknowledging the receipt of a request is given more than five business days following the initial receipt of the written request, the agency, in my opinion, would have failed to comply with the provisions of the Freedom of Information Law.

While the Law does not preclude an agency from developing a standard form, as suggested earlier, I do not believe that a failure to use such a form can be used to delay a response to a written request for records reasonably described beyond the statutory period. However, a standard form may, in my opinion, be utilized so long as it does not prolong the time limitations discussed above. For instance, a standard form could be completed by a requester while his or her written request is timely processed by the agency. In addition, an individual who appears at a government office and makes an oral request for records could be asked to complete the standard form as his or her written request.

In sum, it is my opinion that the use of standard forms is inappropriate to the extent that is unnecessarily serves to delay a response to or deny a request for records.

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 Town Board.

I hope that I have been of assistance.

RJF:jm

cc: Town Board

FOIL-AO-12564

From: Robert Freeman
To: "[redacted].GWIA.DOS1
Date: 3/13/01 2:04PM
Subject: Re: FOIL and home addresses of residents of a special improvementdistrict

Dear Mr. Prior:

First, please send my best regards to Gary. You made me feel just a little ancient when you referred to the '70's. I guess reality hurts, but only a bit.

With respect to your question, based on judicial decisions, it is likely in my view that a district-wide list of names and addresses would be accessible, unless the list is sought for a commercial or fund-raising purpose. In that latter instance, the Freedom of Information Law indicates that disclosure would constitute "an unwarranted invasion of personal privacy."

I believe that the rationale for the provision in FOIL that indicates that home addresses of public employees need not be disclosed is that home addresses have nothing to do with the performance of their duties. If their names and addresses appear on some other list that does not identify them as anything but residents, that kind of list often is public (i.e., voter registration lists and assessment rolls).

Lastly, I note that there is case law stating that the preference of the subject of a record in terms of disclosure is irrelevant; the consideration involves the application of the law and whether there is a basis for a denial of access. I would conjecture that the Legislature may some day provide individuals with a choice to authorize or bar disclosure.

If you would like to discuss the matter, please feel free contact me.

I hope that I have been of assistance.
>>> "Christopher J. Prior" [redacted]> 03/13/01 01:41PM >>>
Dear Bob:

Before I state my question, I pass along regards from Gary Levi, with the Secretary of State back in the 1970's when (he told me last night) you also were there. Gary is a Village Trustee in Port Washington North, in nassau county.

Now, my question: I know that a governmental body can elect not to divulge personal residence information about its employees, based I assume upon privacy and safety concerns. If a special district maintains a record with the names and residences of each of its resident members, must it divulge such list in response to a FOIL request, or may it withhold the home addresses of those residents on the same basis, i.e., privacy/safety? Would the answer change if the application for membership, which constitutes the record of name and address, contained a request by the applicant that his/her name and address be withheld if sought by a third party under FOIL? I'm envisioning a manual note from the resident, or perhaps a "check the box" section for applicants to preserve their privacy. It seems to me that a citizen ought to have that right, and that a governmental body ought to honor it. I would greatly appreciate your views.

Thank you. Christopher J. Prior, Esq.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12565

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March 13, 2001

Scott A. Forsyth, Esq.
Forsyth & Forsyth
30 West Broad Street
403 Irving Place
Rochester, NY 14614-2111

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

Dear Mr. Forsyth:

I have received your letter in which, in your capacity as counsel to the Genesee Valley Chapter of the New York Civil Liberties Union, you sought an advisory opinion concerning "the public's right of access to certain information collected by the Rochester Police Department about what it calls 'non-custodial police interviews and observations,' i.e., stops of individuals that do not result in an arrest."

You indicated that information is collected relating to stops that do not result in arrests in Field Interview Forms (FIF's), and that the Police Department, through General Order 570, describes the policy and procedure to be followed in completing the forms. The Order also indicates that the FIF's are scanned into the Department's Report Image System and entered into a database. The FIF, a copy which you enclosed, includes some 37 "boxes", and 36 involve purely factual information relating to the person stopped. Box 37, according to the Order, involves a narrative in which an officer may include "any information related to the person interviewed or the premises observed, any information leading up to or causing the interview and any information the member feels is pertinent to the interview or observation that is not already recorded in other areas of the FIF." Your interest is in boxes 10 and 17, which respectively contain information regarding race and ethnicity, and in box 37. You specified in correspondence that you do not want or expect to receive any information contained in the forms that could identify a person stopped.

The City denied your request, and the Mayor wrote that:

> "The determination that the records should not be released is based on the information contained in these records and the sheer number of these records, which would make any necessary review and redaction of these records by members of the Rochester Police

> Department impossible to conduct. For the year 1999 there were 26,141 filed interview forms completed by members of the Rochester Police Department. There were also over 5,700 crime reports involving disorderly conduct, harassment and obstruction of governmental administration. There are several legal concerns related to the release of such records in an unredacted form. Many of the crime reports involving the stated offenses will be sealed pursuant to the Criminal Procedure Law. All of these records contain names, addresses, dates of birth, telephone numbers, and other information of a personal nature, release of which would result in an unwarranted invasion of personal privacy. This is especially true for field interview forms which often contain information which has not warranted criminal charges but which would reflect negatively upon a person if released. These forms also often contain information of an intelligence nature that proves very useful in criminal investigations. This information is maintained in a confidential manner and release could impede a law enforcement investigation. The records would have to be reviewed for each of these concerns and redactions made as needed prior to any release. The review clearly would not be feasible for the number of records that would be involved in a request like the one you have made."

In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. 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. The highlighted phrase clearly indicates that there may be situations in which a single record may include both accessible and deniable information, and that an agency is required to review records in their entirety to determine which portions, if any, may be justifiably withheld.

Second, since you wrote that you do not want those portions of the records that identify individuals, the concerns expressed by Mayor Johnson concerning the protection of personal privacy or interference with an investigation would not, in my view, be pertinent. In short, absent personally identifying details or other data collected and included in the FIF's, I believe that the boxes indicating race and ethnicity would be accessible, for none of the grounds for denial would be applicable.

Box 37, the narrative that may be added by an officer, may apparently consist of a variety of information. Relevant to that entry is §87(2)(g) of the Freedom of Information Law, which enables an agency to withhold records that:

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

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those 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 dealing with "complaint follow-up reports" prepared by New York City police officers [Gould v. New York City Police Department, 89 NY2d 267 (1996)], the Court of Appeals rejected the Department's contention that the reports could be withheld in their entirety under §87(2)(g). Specifically, 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 the content of records.

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

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

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

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

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

I am unaware of the frequency of narrative comments being added to FIF's in Box 37 or of the nature of the comments. Nevertheless, the analysis in Gould may be pertinent in determining rights of access to those entries.

Third, based on judicial decisions, the volume of a request is largely irrelevant. Assuming that a request "reasonably describes" the records as required by §89(3) of the Freedom of Information Law, i.e., that an agency can locate and identify the records sought, it has been held that a request cannot be rejected due to its breadth [Konigsberg v. Coughlin, 68 NY2d 245 (1986)]. As stated by the Court of Appeals:

> "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.

The Mayor indicated that thousands of FIF's are prepared annually. Nevertheless, according to General Order 570, the Crime Analysis Section of the Department is required to "[m]aintain a central file of FIF information" and "enter information into the CLUES database for access..." Based on the foregoing, it appears that paper copies of FIF's are kept in a single location, and that the contents of the FIF's are stored electronically in a database. That being so, again, I believe that your request, despite the volume of material, has met the requirement of "reasonably describing" the records and could not be rejected due to its breadth. I note that it has been held that denials of access to records based on an agency's contention that it had insufficient staff cannot be sustained, for a denial on that basis would "thwart the very purpose of the Freedom of Information Law [United Federation of Teachers v. New York City Health and Hospitals Corporation, 428 NYS2d 823 (1980)]. Moreover, the Court of Appeals, recognizing that implementation of the Freedom of Information Law may be burdensome, has stated that "Meeting the public's legitimate rights of access concerning government is fulfillment of a governmental obligation, not the gift of, or waste of, public funds" [Doolan v. BOCES, 48 NY2d 341, 347 (1979)].

Next, having reviewed the FIF, boxes 10 and 17 always include information regarding race and ethnicity. Absent personally identifying details, again, I believe that boxes 10 and 17 must be disclosed. If a disclosure made on paper, i.e., via inspection or photocopying, it has been suggested in similar circumstances that a stencil be developed that covers the form, with the exception of areas cut out enabling an applicant to view or obtain copies of boxes 10 and 17.

With respect to box 37, as suggested earlier, the contents of the narrative determine the extent to which it would be available or deniable. In view of time and effort needed to review box 37 on thousands of FIF's, it is suggested that you might consider its value and perhaps amend the request.

When a request is made for information stored electronically, others issues are pertinent. 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, 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.

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 City 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 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 inquiry, if the City has the ability to generate the data of your interest regarding race and ethnicity, 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.

If the contents of boxes 10 and 17 cannot be generated electronically, I believe that the City would have two options. First, it could engage in the laborious task of either deleting information by hand from the FIF's, leaving as available only the items sought. Or second, it might develop a means of electronically segregating those items from the remainder of the form in order to make them available to you. Although the City would not be required to follow that course of action (see Guerrier, supra), it may be less burdensome and less costly than making manual deletions.

In an effort to encourage a mutually satisfactory accommodation, copies of this response will be sent to Mayor Johnson, Chief Duffy, and to Linda Kingsley, Corporation Counsel.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. William A. Johnson, Jr., Mayor
Robert J. Duffy, Chief of Police
Linda S. Kingsley, Corporation Counsel
Hon. Wade S. Norwood

FOIL-AO-12566

From: Robert Freeman
To: Internet:[redacted]
Date: 3/14/01 9:39AM
Subject: Hi Herb:

Hi Herb:

As you may be aware, the courts and court records are not subject to the FOIL. That is not to suggest, however, that court records are not generally available under other statutes. In this instance, section 2019-a of the Uniform Justice Court Act would, in my view, require disclosure, except to the extent that there may be reference, for example to the names of juveniles, persons adjudicated as youthful offenders, or persons against whom charges have been dismissed (see Criminal Procedure Law, sections 160.50 and 160.55).

Further, once the reports come into the possession of the Department of Audit and Control, which clearly is subject to the FOIL, they would be subject to rights of access conferred by that statute.

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-AO - 12567

From: Robert Freeman
To: Internet:sromeo@irondequoit.org
Date: 3/14/01 9:32AM
Subject: Dear Ms. Romeo:

Dear Ms. Romeo:

I have received your email in which you asked whether a municipality may require more specific information before answering an FOI request if the request is "very broad."

In this regard, §89(3) of the FOI requires that an applicant "reasonably describe" the records sought. Under that standard, the request must include sufficient detail to enable the staff of the agency to locate and identify the records. In some instances, if indeed a request is so broad or vague that agency staff cannot ascertain the scope or nature of the records, the agency may, in my view, so indicate prior to granting or denying the request.

By means of example, if an applicant asked for all records relating to 210 Main Street in Irondequoit, such a request would not likely meet the standard of reasonably describing the records. A request of that nature might involve police or fire department records, real property, health, zoning, public works or numerous other kinds of records. Further, there would be no limitation in terms of time in the case of a request of that nature.

To obtain more information on the subject, it is suggested that you review opinions available on our website. If you choose to do so, go to the index to advisory opinions rendered under the FOIL, click on to "R" and scroll down to "records reasonably described". The higher the number, the more recent is the opinion, and those prepared within the past 9 years are available in full text.

If you need additional guidance, 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-12568

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

March 16, 2001

Mr. Brian Congelosi
97-B-0099
Eastern Correctional Facility
Box 338
Napanoch, NY 12458-0338

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

Dear Mr. Congelosi:

I have received your letters in which you sought assistance concerning your efforts in obtaining records from the Office of the Monroe County District Attorney, the County's Public Safety Laboratory and the Rochester General Hospital.

Based on your description of the matter, I offer the following comments.

First, 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.

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, if Rochester Hospital is a governmental entity, its records would be subject to the Freedom of Information Law. If it is private, that statute would not be applicable.

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

With regard to medical records pertaining to yourself, the Freedom of Information Law, in my view, likely permits that some of those records may be withheld in whole or in part, depending upon their contents. For instance, medical records prepared by Hospital personnel could be characterized as "intra-agency materials" that fall within the scope of §87(2)(g) of the Freedom of

Information Law. To the extent that such materials consist of advice, opinion, recommendation and the like, I believe that the Freedom of Information Law would permit a denial.

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

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

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

If you are seeking medical records pertaining to a person other than yourself, §18 of the Public Health Law would in most instances prohibit disclosure. Further, when medical records are maintained by an agency subject to the Freedom of Information Law, §89(2)(b) indicates that they may be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Richard F. Mackey

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12569

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

March 16, 2001

Mr. Mark Shervington
87-T-0520
Fishkill Correctional Facility
Box 1245
Beacon, NY 12508

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

Dear Mr. Shervington:

I have received your letter in which you sought assistance concerning your efforts to have alleged by erroneous information in your prison records corrected or expunged.

In this regard, the Freedom of Information Law, the statute within the advisory jurisdiction of the Committee on Open Government, deals with rights of access to records and an agency's authority to withhold records. It is silent with respect to amendment, correction or expunged of records.

Nevertheless, as you may be aware, the regulations promulgated by the Department of Correctional Services authorize inmates to "challenge the accuracy" of "personnel history or correctional supervision history portion of an inmate's record..." (see 7 NYCRR §5.50).

"Personal history" is defined in §5.5 of the regulations to mean:

> "...records constituting disciplinary charges and dispositions, good behavior allowance reports, warrants and cancellations, legal papers, court orders, transportation orders, records of institutional transfers and changes in program assignments, reports of injury to inmates and records relating to inmate property including the personal property lists and postage account card."

"Correctional supervisor history" is defined to include:

> "...records consisting of inmate name, age, birthdate, birthplace, city of previous residence, physical description, occupation, correctional facilities in which the inmate has been incarcerated, commitment information and departmental actions regarding confinement and release."

It is suggested that you review the pertinent provisions of the Department's regulations.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12570

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

March 16, 2001

Mr. Thomas Lonetto
95-A-7877
Fishkill Correctional Facility
Box 1245
Beacon, NY 12508

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

Dear Mr. Lonetto:

I have received your letter in which you sought assistance concerning your efforts to have alleged by erroneous information in your prison records corrected or expunged.

In this regard, the Freedom of Information Law, the statute within the advisory jurisdiction of the Committee on Open Government, deals with rights of access to records and an agency's authority to withhold records. It is silent with respect to amendment, correction or expunged of records.

Nevertheless, as you may be aware, the regulations promulgated by the Department of Correctional Services authorize inmates to "challenge the accuracy" of "personnel history or correctional supervision history portion of an inmate's record..." (see 7 NYCRR §5.50).

"Personal history" is defined in §5.5 of the regulations to mean:

> "...records constituting disciplinary charges and dispositions, good behavior allowance reports, warrants and cancellations, legal papers, court orders, transportation orders, records of institutional transfers and changes in program assignments, reports of injury to inmates and records relating to inmate property including the personal property lists and postage account card."

"Correctional supervisor history" is defined to include:

> "...records consisting of inmate name, age, birthdate, birthplace, city of previous residence, physical description, occupation, correctional facilities in which the inmate has been incarcerated, commitment information and departmental actions regarding confinement and release."

It is suggested that you review the pertinent provisions of the Department's regulations.

I note that the regulations referenced above pertain only to records maintained by the Department of Correctional Services; they do not apply to the Division of Parole.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1257

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

March 16, 2001

Mr. George Warwick
94-A-4504
Shawangunk Correctional Facility
P.O. Box 700
Wallkill, NY 12589

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

Dear Mr. Warwick:

I have received your letter in which you sought assistance concerning requests made under the Freedom of Information Law to the Division of Parole and the Department of Correctional Service.

You enclosed a memorandum in which a parole officer wrote that:

> "The New York State Division of Parole Policy is to honor 'F.O.I.L. Requests' when someone meets the following criteria:
>
> 1) Within (2) two months of a scheduled Parole Board Appearance.
>
> 2) Having appeared before the Parole Board within the last (2) two months.
>
> 3) Having a pending appeal with the N.Y. S. Division of Parole.
>
> As you do not meet the above criteria, your F.O.I.L. request is denied."

In my view, if the foregoing represents the policy of the Division, the policy is inconsistent with law. Under the Freedom of Information Law, any person may request records any time, and it has been held that one's status or interest are generally irrelevant when seeking records under that

statute [M. Farbman & Sons v. New York City Health and Hosps. Corp., 62 NY 2d 75 (1984), Burke v. Yudelson, 368 NYS 2d 779 aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)].

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)].

The persons designated to determine appeals by the Division of Parole and the Department of Correctional Services are, respectively, Terrence X. Tracy and Anthony J. Annucci, both of whom serve as Counsel to their agencies.

Lastly, in the event of a failure to comply with the Freedom of Information Law, you asked that I "contact the Attorney General's Office on [your] behalf and have [the facility's records coordinator] arrested..." In short, this office does not carry out a function of that nature.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Terrence X. Tracy
Anthony J. Annucci
Parole Officer Schwarz

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2572

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

March 16, 2001

Mr. Thomas P. Walsh
96-A-5765
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 facts presented in your correspondence.

Dear Mr. Walsh:

I have received your letter in which you complained that the Suffolk County Police Department and the Office of the District Attorney have failed to respond in a timely manner to your requests 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 and appeals. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

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

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12573

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

March 16, 2001

Mr. Terrell Storey
96-A-1535
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. Storey:

I have received your letter in which you complained that an appeal made under the Freedom of Information Law had not been determined in a timely manner.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12574

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

March 16, 2001

Mr. Reynaldo Cartagena
96-A-0517
Upstate Correctional Facility
P.O. Box 2001
Malone, NY 12953

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

Dear Mr. Cartagena:

I have received your letter in which you complained that the Suffolk County Police Department had not responded to your request for records.

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

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

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

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

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

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

For your information, I believe that the County Attorney has been designated to determine appeals.

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-12575

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

March 16, 2001

Mr. James A. Sheffield
83-A-1896
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 facts presented in your correspondence.

Dear Mr. Sheffield:

I have received your letter in which you sought a variety of information from the Office of the Rockland County District Attorney relating to the testimony offered in your trial by " an expert witness in the field of serology." Specifically, you wrote that you are interested in obtaining:

> "1). The certified lab notes of Dr. Robert Shaler that pertains to the scientific tests he performed on various articles of clothing that was used as evidence against me.
>
> 2). The methodology that he employed.
>
> 3). His use of appropriate controls and the general quality assurance proceedures that he employed,
>
> 4). The appropriate chain of custody procedures employed by both the police departments involved and the lab. That must be followed in the handling of the items of clothing so that tampering of evidence did not occur.
>
> 5). Dr. Shaler's reports and photographs of his results as well as any other doctor who should have performed the same tests on the same articles of clothing."

In this regard, first, I noted that the title of the Freedom of Information Law may be somewhat misleading, for it is a statute dealing with existing records rather than information *per se*.

Further, §89(3) of that statute states that an agency is not required to create a record in response to a request. I am unaware of the extent to which the information sought exists or may have been prepared by or for the Office of the District Attorney. Insofar as records do not exist or are not maintained by or for that agency, the Freedom of Information Law would not apply.

I point out, however, that the Freedom of Information Law is applicable to records maintained by or for an agency. Section 86(4) defines the term "record" to include:

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

Second, if records were made available to you or your attorney previously, i.e., before or during a criminal proceeding, the same records need not be disclosed again, unless it can be demonstrated that neither you nor your attorney continues to possess the records [Moore v. Santucci, 151 AD 2d 677 (1989)].

Third, to the extent that records prepared by or for the Office of the District Attorney exist and have not previously been made available as described above, the records would be 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. From my perspective, several of the grounds for denial would be pertinent to an analysis of rights of access.

Section 87(2)(a) pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute, §3101(d) of the Civil Practice Law and Rules, exempts material prepared solely for litigation from disclosure. Notes and similar records prepared solely for litigation would appear to fall within that exception. Section 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 fo the other party's representative (including and attorney, consultant, surety, idemnitor, 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."

I believe that that provision is intended to shield from an adversary records that would result in a strategic advantage or disadvantage, as the case may be.

Also potentially relevant is §87(2)(g) of the Freedom of Information, which states that an agency may withhold records that:

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

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

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."

Perhaps most relevant in the context of your inquiry 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)."

In applying those criteria to specific portions of the manual, which was compiled for law enforcement purposes, the Court found that:

> "Chapter V of the Special Prosecutor's Manual provides a graphic illustration of the confidential techniques used in a successful nursing home prosecution. None of those procedures are 'routine' in the sense of fingerprinting or ballistic tests (see Senate Report No. 93-1200, 93 Cong 2d Sess [1974]). Rather, they constitute detailed, specialized methods of conducting an investigation into the activities of a

> specialized industry in which voluntary compliance with the law has been less then exemplary.
>
> "Disclosure of the techniques enumerated in those pages would enable an operator to tailor his activities in such a way as to significantly diminish the likelihood of a successful prosecution. The information detailed on pages 481 and 482 of the manual, on the other hand, is merely a recitation of the obvious: that auditors should pay particular attention to requests by nursing homes for Medicaid reimbursement rate increases based upon projected increase in cost. As this is simply a routine technique that would be used in any audit, there is no reason why these pages should not be disclosed" (id. at 573).

As the Court of Appeals has suggested, to the extent that the records in question include descriptions of investigative techniques which if disclosed would enable potential lawbreakers to evade detection or endanger the lives or safety of law enforcement personnel or others [see also, Freedom of Information Law, §87(2)(f)], a denial of access would be appropriate. I would conjecture, however, that not all of the investigative techniques or procedures contained in the records sought incident and the ensuing investigation could be characterized as "non-routine", and that it is unlikely that disclosure of each aspect of the records would result in the harmful effects of disclosure described above.

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-12576

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

March 16, 2001

Mr. Gillian Torres
93-A-2711
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. Torres:

I have received your letter in which you asked whether you have the right to obtain vouchers from the Office of the New York City Comptroller indicating expenses incurred with respect to "all civilian witnesses and Detectives or Police officers who testified at [your] 1993 trial." Additionally, you asked whether you may obtain medical records relating to your wife, who died in 1995.

In this regard, first, it is noted at the outset that the Freedom of Information Law pertains to existing records. If, for example, the vouchers no longer exist (i.e., if they have been destroyed due to the passage of time), the Freedom of Information Law would no longer apply.

Second, assuming that such records continue to exist, 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, two of the grounds for denial may be pertinent in considering access to expense vouchers. Section 87 (2)(b) authorizes an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." That provision might be cited to withhold home addresses other personal information. Also relevant may be §87 (2)(f), which permits an agency to withhold records insofar as disclosure "would endanger the life or safety of any person."

Lastly, with respect medical records of a hospital or other medical facility that is a governmental entity, its records would be subject to the Freedom of Information Law. I would conjecture, however, that in consideration of its name, the facility is not governmental.

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

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

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

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

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

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12577

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

March 16, 2001

Mr. Vinson McNeil
95-A-6922
Adirondack Correctional Facility
P.O. Box 110

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. McNeil:

I have received your letter in which you sought assistance in relation to your request made under the Freedom of Information Law to a parole officer in which you asked that "erroneous information in [your] inmate parole file be corrected."

In this regard, the Freedom of Information Law provides direction concerning rights of access to records, and concurrently, an agency's authority to withhold records or portions of records. There is nothing in that statute, however, that provides a right to attempt to amend or correct records.

In short, while parole officials may correct the contents of records, there is nothing in the Freedom of Information Law that requires that they do so.

I hope that the foregoing serves to clarify your understanding of the Freedom of Information Law.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: W. Sackett

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 16, 2001

Mr. Frederick A. Jones
88-A-0439 [HV118-2-18]
Otisville Correctional Facility
P.O. Box 8
Otisville, NY 10963-0008

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 in which you sought assistance concerning a denial of a request by the New York City Police Department based on its contention that a request was reflective of "interrogatories." You did not describe the information sought other than as "data contained in the requested records."

In this regard, it is emphasized that the Freedom of Information Law pertains to existing records and that §89 (3) provides in relevant part that an agency is not required to create or prepare a record in response to a request for "information." Similarly, an agency is not required by the Freedom of Information Law to answer questions or provide information in response to questions.

In short, insofar as information sought does not exist in the form of a record or records, an agency would not be obliged by the Freedom of Information law to create or prepare new records containing the information sought to accommodate the applicant.

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: William Tesler

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 16, 2001

Ms. Claudia Rowe
[redacted]

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

Dear Ms. Rowe:

I have received your letter and the materials attached to it. You have sought assistance in relation to a denial of access to records pertaining to the Kendall Francois murder investigation by the Office of the Dutchess County District Attorney

The records sought, which were apparently withheld in their entirety, include crime scene reports and photographs, investigators' interviews with the defendant and his family, and school and psychological records. It is your view that analogous records are, in many instances, routinely disclosed. Further, due to the publicity associated with the crimes committed and the ensuing proceedings, as well as the nature of the disclosures that have already been made, you contend that the denial of access is overly broad.

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

The Court of Appeals expressed its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department [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, the Department contended that DD5's could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g), an exception separate from those cited in response to your requests. The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276), and stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, stating that:

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

In the context of your request, rather than citing a single exception as a basis for a blanket denial of access to the records sought as in Gould, the Office of the District Attorney has engaged in a blanket denial citing different provisions in a manner which, in my view, is equally inconsistent with the language of the law and judicial interpretations. 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).

Several provisions were cited to justify the denial of your request. Section 87(2)(b), which enables an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy", was cited with respect to each category of the records sought. From my perspective, as the nature and amount of information disclosed to the public relating to a criminal investigation or proceeding increases, the extent to which the exception concerning privacy decreases.

By means of example, 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, records introduced into evidence or disclosed during a public judicial proceeding must be disclosed. If, for instance, certain crime scene photos have been disclosed, as evidence or otherwise, it is questionable or perhaps unlikely that others involving the same locations or persons would reveal more, in terms of an invasion of personal privacy, than those previously disclosed; the magnitude of any additional invasion of privacy would not likely be significant in view of the disclosures already made. Although there was no trial in the Francois case, the events surrounding the case generated a great deal of attention in both print and broadcast media, not only in Poughkeepsie, but, due the nature of the crimes, nationally as well. In short, substantial disclosures about the defendant, his family, the victims and the community were made and disseminated over a lengthy period of time. Again, in view of those disclosures, I believe that it would be difficult to justify a denial of access to significant portions of the records sought based on a claim that disclosure would result in an unwarranted invasion of privacy.

I would agree that the Office of the District Attorney *may* without records in accordance with the grounds for denial. However, the Court of Appeals has pointed out that the Freedom of Information Law is permissive; an agency may choose to disclose, notwithstanding its ability to deny access to records [Capital Newspapers v. Burns, 109 AD2d 92, aff'd 67 NY2d 562 (1986)].

Although it has been found that the details regarding one's education may be withheld as an unwarranted invasion of personal privacy, it has been held that one's general educational background should be disclosed [Ruberti, Girvin & Ferlazzo v. NYS Division of State Police, 641 NYS2d411, 218 AD2d 494 (1996)]. Similarly, psychological records held by the District Attorney may, in my view, be withheld under §§87(2)(b) and 89(2)(b). Nevertheless, in recognition of the growing need to attempt to stop crimes analogous to those committed by Francois before they occur, it may be in the public interest, as well as a positive law enforcement function, to disclose details concerning Francois' life. Consideration of patterns of behavior and the development of data about behavior may enable school and law enforcement officials to recognize an inclination or proclivity to commit violent or antisocial acts, and preventive measures might be taken to prevent those acts from occurring.

In short, while there may be a basis for withholding information of a personal nature, in consideration of the publicity generated by the case and the associated disclosures, as well as the potentially beneficial aspects of disclosure, the Office of District Attorney could choose to disclose records in the public interest, even though the authority to deny access may exist.

Other provisions cited in the denial are subparagraphs (iii) and (iv) of §87(2)(e). They indicate that an agency may withhold records "compiled for law enforcement purposes" to the extent that disclosure would:

> "iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

Although I am unaware of the contents of the records withheld under the provisions quoted above, as is so in conjunction with other exceptions to rights of access, they, too have been construed in a manner that would maximize disclosure while enabling agencies to deny access to prevent some sort of harm or impediment to law enforcement functions.

For example, to qualify as a confidential source, it has been held that an individual must have been given a promise of confidentiality. In a case involving records maintained by the New York City Police Department relating to a sexual assault, it was held that:

> "NYPD has failed to meet its burden to establish that the material sought is exempt from disclosure. While NYPD has invoked a number of exemptions with might justify its failure to supply the requested information, it has failed to specify with particularity the basis for its refusal...
>
> "As to the concern for the privacy of the witnesses to the assault, NYPD has not alleged that anyone was promised confidentiality in exchange for his cooperation in the investigation so as to qualify as a 'confidential source' within the meaning of the statute (Public Officers Law §87[2][e][iii]" [Cornell University v. City of New York Police Department, 153 AD 2d 515, 517 (1989); motion for leave to appeal denied, 72 NY 2d 707 (1990).

The leading decision concerning §87(2)(e)(iv), Fink v. Lefkowitz, involved access to a manual prepared by a special prosecutor that investigated nursing homes, in which the Court of Appeals held that:

> "The purpose of this exemption is obvious. Effective law enforcement demands that violators of the law not be apprised the nonroutine procedures by which an agency obtains its information (see Frankel v. Securities & Exch. Comm., 460 F2d 813, 817, cert den 409 US 889). However beneficial its thrust, the purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution.

> "To be distinguished from agency records compiled for law enforcement purposes which illustrate investigative techniques, are those which articulate the agency's understanding of the rules and regulations it is empowered to enforce. Records drafted by the body charged with enforcement of a statute which merely clarify procedural or substantive law must be disclosed. Such information in the hands of the public does not impede effective law enforcement. On the contrary, such knowledge actually encourages voluntary compliance with the law by detailing the standards with which a person is expected to comply, thus allowing him to conform his conduct to those requirements (see Stokes v. Brennan, 476 F2d 699, 702; Hawkes v. Internal Revenue Serv., 467 F2d 787, 794-795; Davis, Administrative Law [1970 Supp], section 3A, p 114).
>
> "Indicative, but not necessarily dispositive of whether investigative techniques are nonroutine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel (see Cox v. United States Dept. of Justice, 576 F2d 1302, 1307-1308; City of Concord v. Ambrose, 333 F Supp 958)."

In applying those criteria to specific portions of the manual, which was compiled for law enforcement purposes, the Court found that:

> "Chapter V of the Special Prosecutor's Manual provides a graphic illustration of the confidential techniques used in a successful nursing home prosecution. None of those procedures are 'routine' in the sense of fingerprinting or ballistic tests (see Senate Report No. 93-1200, 93 Cong 2d Sess [1974]). Rather, they constitute detailed, specialized methods of conducting an investigation into the activities of a specialized industry in which voluntary compliance with the law has been less then exemplary.
>
> "Disclosure of the techniques enumerated in those pages would enable an operator to tailor his activities in such a way as to significantly diminish the likelihood of a successful prosecution. The information detailed on pages 481 and 482 of the manual, on the other hand, is merely a recitation of the obvious: that auditors should pay particular attention to requests by nursing homes for Medicaid reimbursement rate increases based upon projected increase in cost. As this is simply a routine technique that would be used in any audit, there is no reason why these pages should not be disclosed" (id. at 573).

From my perspective, as the Court of Appeals has suggested, to the extent that the records in question include descriptions of investigative techniques which if disclosed would enable potential lawbreakers to evade detection or endanger the lives or safety of law enforcement personnel or others [see also, Freedom of Information Law, §87(2)(f)], a denial of access would be appropriate. However, insofar as those potentially harmful effects would not arise by means of disclosure, §87(2)(e)(iv) would not serve as a basis for a denial or access.

The remaining ground for denial cited by the Office of the District Attorney, §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.

The Court of Appeals in Gould, supra, analyzed the provision quoted above and found 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.

In sum, in consideration of the preceding commentary, I believe that the denial of your request was overbroad and that various aspects of the records sought must be disclosed. Further, it is reiterated that the Office of the District Attorney may disclose records, even though there may be authority to deny access.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. William V. Grady
William J. O'Neill

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12580

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March 16, 2001

Mr. Ronald Logan
87-A-9529
Midstate Correctional Facility
P.O. Box 2500
Marcy, NY 13403

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

Dear Mr. Logan:

I have received your letter and the correspondence associated with it. You asked that I review your requests made to the Division of Parole under the Freedom of Information Law and "inform [you] as to whether the information sought is exempt from "FOIL." The request involves a variety of "statistical data" concerning the release of inmates during specified years in relation to certain characteristics.

In this regard, the issue from my perspective involves the extent to which the data that you requested exists. 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.

In short, insofar as the statistical data that you requested does not exist in the form of a record, the Division would not be obliged to create or prepare the data on your behalf in an effort to satisfy your request. On the other hand, to the extent that the data of your interest exists, I believe that it would be accessible [see Freedom of Information Law, §87(2)(g)(i)].

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: Terrence X. Tracy
Ann C. Crowell

From: Robert Freeman
To: Internet[redacted]
Date: 3/16/01 4:49PM
Subject: Dear Mr. Blitzk:

Dear Mr. Blitzk:

I have received your letter in which you asked whether the NYPIRG budget is subject to FOIL. Since FOIL pertains to governmental entities, I do not believe that NYPIRG would be subject to that statute or that it would be obliged to disclose its budget. Nevertheless, SUNY and its student government body are subject to FOIL, and if either has possession of the budget, SUNY would, in my view, be required to disclose.

Additionally, it is my understanding that entities that raise monies through solicitations for charitable contributions must file detailed reports with the Attorney General if the contributions are above a certain amount. It might be worthwhile to contact the Charities Bureau of that agency to ascertain whether a report has been filed. The phone number is 486-9797.

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-1258?

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

March 16, 2001

Mr. Richard Bittleman
99-R-7211
P.O. Box 599
Cape Vincent, NY 13618

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

Dear Mr. Bittleman:

I have received your letter in which you sought assistance relating to an unanswered request made to the New Hartford Police Department for:

> "...all the property seized in my arrest of June 9, 1999, more specifically all the documents, letters, computer disks, computers, electronic equipment, vehicles, letters, faxes, legal documents and copies of all the written evidence seized and or letters, faxes, power of attorney, computer discs, seized in my arrest and the present location of same."

The request was made on the basis of the federal Freedom of Information Act and the New York Freedom of Information Law.

In this regard, I offer the following comments.

First, the federal Freedom of Information Act (5 U.S.C. §552) pertains only to federal agencies and, therefore, is inapplicable to a local police department. The statute dealing with access to records of state and local government in New York is the New York Freedom of Information law. I point out, too, that unlike the federal Act, the New York counterpart does not include provisions concerning the waiver of fees. Further, it has been held that agencies subject to the New York law may charge their established fees for copies, even if an applicant is an indigent inmate [see Whitehead v. Morgenthau, 552 NYS2d 518 (1990)].

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,

and requests should ordinarily be sent to that person. In my view, the person in receipt of your request should have responded directly in accordance with the Freedom of Information Law or forwarded the request to the records access officer. I believe that the records access officer for the Town of New Hartford is the Town Clerk.

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

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

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

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

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

Next, it is emphasized that the Freedom of Information Law pertains to records and that §86(4) defines the term "record" to mean:

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

It has been held that the provision quoted above does not include evidentiary material (i.e., electronic equipment, vehicles, etc.) [Allen v. Strojnowkski, 129 AD2d 700; motion for leave to appeal denied, 70 NY2d 871 (1989)]. Further, §89(3) states in relevant part that an agency is not required to create a record in response to a request. Therefore, if, for example, there is no "list of all property seized in [your] arrest", the agency would not be obliged to create a list on your behalf.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12583

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

March 19, 2001

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 correspondence concerning an apparent failure on the part of the Department of Correctional Services to respond to a request for certain regulations promulgated by that agency.

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

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

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Mark Shepard

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12584

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

March 19, 2001

Mr. Timothy King
97-R-5733 C-2-34B
Orleans Correctional Facility
3531 Gaines Basin Road
Albion, NY 14411-9199

Dear Mr. King:

I have received your letter of March12 and the materials relating to it. You have requested from this office copies of your pre-sentence report and a "criminal history rap sheet."

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 possess records generally, and it is not empowered to compel an agency to grant or deny access to records. In short, I cannot provide the records of your interest, because this agency does not possess them. Nevertheless, in an effort to offer guidance, I offer the following comments.

With regard to access to pre-sentence reports and related materials, 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.

Next, with respect to criminal history records, the general repository of those records is the Division of Criminal Justice Services. While you may obtain you criminal history record may obtain record from the Division or your facility, it has been held that criminal history records maintained by that agency pertaining to others are exempted from public disclosure pursuant to §87(2)(a) of the Freedom of Information Law [Capital Newspapers v. Poklemba, Supreme Court, Albany County, April 6, 1989]. Nevertheless, if, for example, criminal conviction records were used in conjunction with a criminal proceeding by a district attorney, it has been held that the district attorney must disclose those records [see Thompson v. Weinstein, 150 AD 2d 782 (1989)].

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12585

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

March 19, 2001

Mr. George W. White
94-B-0605
P.O. Box 340
Collins, NY 14034-0340

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

Dear Mr. White:

I have received your letter in which you sought assistance concerning a request made under the Freedom of Information Law to the Jefferson County District Attorney. Having reviewed the correspondence attached to your letter, I offer the following comments.

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

Since you referred to grand jury related records, it is my view that those records may be withheld if requested under the Freedom of Information Law. The first ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute". One such statute, §190.25(4) of the CPL, states in relevant part that:

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

Further, "subdivision three" of §190.25 includes specific reference to the district attorney. As such, grand jury minutes and related records would be outside the scope of rights conferred by the

Freedom of Information Law. Any disclosure of those records would be based upon a court order or perhaps a vehicle authorizing or requiring disclosure that is separate and distinct from the Freedom of Information Law.

With respect to criminal history records, the general repository of those records is the Division of Criminal Justice Services. While the subject of a criminal history record may obtain such record from the Division, it has been held that criminal history records maintained by that agency are exempted from public disclosure pursuant to §87(2)(a) of the Freedom of Information Law [Capital Newspapers v. Poklemba, Supreme Court, Albany County, April 6, 1989]. Nevertheless, if, for example, criminal conviction records were used in conjunction with a criminal proceeding by a district attorney, it has been held that the district attorney must disclose those records [see Thompson v. Weinstein, 150 AD 2d 782 (1989)].

It is noted that in a recent decision rendered by the Appellate Division, Second Department, the Court reconfirmed its position that criminal history records are, in general, exempt from disclosure [Woods v. Kings County District Attorney's Office, 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.

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

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

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;

> iii" identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

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

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

The remaining ground for denial of likely significance is §87(2)(g). The cited provision permits an agency to withhold records that:

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

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

Records prepared by employees of an agency and communicated within the agency or to another agency would in my view fall within the scope of §87(2)(g). Those records might include opinions or recommendations, for example, that could be withheld.

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

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

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

Hon. Cindy F. Intschert

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12586

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

March 19, 2001

Mr. Benny Carter
96-A-0064
Upstate Correctional Facility
P.O. Box 2000
Malone, NY 12953

Dear Mr. Carter:

I have received your letter of March 11 in which it appears that you requested a copy of a "master index" from this office.

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning the state's Freedom of Information Law. The Committee does not maintain records generally, and it does not have possession of correctional facilities' master indexes. Nevertheless, to aid in your understanding of the matter, I offer the following comments.

First, since you referred to 5 USC 552 and 552a, which are, respectively, the federal Freedom of Information and Privacy Acts, I point out that those statutes apply only to records maintained by federal agencies. They do not apply to entities of state or local government. The applicable statute in this instance is the New York Freedom of Information Law.

Second, reference to the master index appears in a section of the regulations promulgated by the Department of Correctional Services that is based upon §87(3)(c) of the Freedom of Information Law. That provision requires that each agency maintain:

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

The subject matter list is not, in my opinion, required to identify each and every record of an agency; rather I believe that it must refer, by category and in reasonable detail, to the kinds of records maintained by an agency. Further, although a subject matter list is not prepared with respect to records pertaining to a single individual, such a list should be sufficiently detailed to enable an individual to identify a file category of the record or records in which that person may be interested.

I direct your attention to the regulations promulgated by the Department of Correctional Services, which in §5.13 state that:

> "(a) Every custodian of records under these regulations shall maintain an up-to-date subject matter list, reasonably detailed, of all records in their possession. The records access officer shall maintain a master index, reasonably detailed, of all records maintained by the department. The master index shall include the lists kept by all custodians as well as a list of records maintained at the department's central office.
>
> (b) Each subject matter list and the master index shall be sufficiently detailed to permit identification of the file category of the record sought.
>
> (c) The master index shall be updated not less than twice per year. The most recent update shall appear on the first page of the subject matter list. Each custodian of records and the records access officer shall make available the index kept by him for inspection and copying. Any person desiring a copy of such list may request in writing a copy and upon payment of the appropriate fee, unless waived, a copy of such list shall be mailed or delivered."

Based on the foregoing, it is clear in my view that a master list must be maintained and made available for inspection at each facility.

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

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12587

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

March 19, 2001

Mr. Kelly Gibson
98-R-6689
Gouverneur Correctional Facility
P.O. Box 480
Gouverneur, NY 13642-0370

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

Dear Mr. Gibson:

I have received a variety of correspondence dealing with your attempts to obtain records. Having reviewed their contents, I offer the following comments.

First, you referred to the "FOIL", and the "FOIA and PA", as well as a failure on the part of an agency to provide "an itemization and index of the documents claimed to be exempt." In this regard, the FOIA and PA are, respectively, the federal Freedom of Information and Privacy Acts, and they apply only to records of federal agencies. The statute that deals with records of agencies of state and local government in New York is the New York Freedom of Information Law.

With respect to the index of documents withheld, there is nothing in the Freedom of Information Law or judicial decision construing that statute 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)].

Second, it appears that one aspect of your correspondence deals with court records. That being so, I point out that the Freedom of Information Law pertains to agency records, and §86(3) of that statute defines the term "agency" to include:

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

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

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

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

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

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-12588

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

March 19, 2001

Mr. Steven J. Romer
92-A-0519/9-2-16
Tappan Correctional Facility
354 Hunter Street
Ossining, NY 10562-5442

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

Dear Mr. Romer:

I have received your letter in which you contended that certain redactions made by the Office of the District Attorney were inconsistent with law. The redactions were made in a memorandum sent by the Office of the District Attorney to the Division of Parole concerning the possibility of your parole.

In this regard, I offer the following comments.

As indicated in my letter to you of nearly two years ago, the applicable provision in analyzing rights of access is §87(2)(g). That provision states that an agency may withhold records that:

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

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

determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. Since the redactions appear to involve opinions or recommendations offered by the District Attorney, it appears that those deletions were made in a manner consistent with law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12589

41 State Street, Albany, New York 12231
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March 19, 2001

Mr. Ricardo A. DiRose
85-C-0773
Attica Correctional Facility
P.O. Box 149
Attica, NY 14011

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

Dear Mr. DiRose:

I have received your letter in which you described a series of difficulties relating to your request for "911 police radio dispatch tapes" concerning an event that occurred in 1988.

First, as you may be aware, agencies of local government are not required to maintain most records permanently, and it is unlikely in my view that the tapes of your interest would continue to exist. In that vein, I believe that an agency has essentially three options when responding to a request for records: that the applicant may gain access to the record; that the agency is denying access to the record; or that the agency does not maintain the record.

Second, §89(3) of the Freedom of Information Law requires that a request "reasonably describe" the records sought. Therefore, a request should contain sufficient detail to enable agency staff to locate and identify the records. In the case of a small police department in which dispatches are received and transmitted in one location, I would conjecture that a request citing a certain date likely would meet the standard of reasonably describing the records. On the other hand, if 911 calls are received in different locations, due, for example, to the size or population of the county, a request of that nature might not meet the standard of reasonably describing the records. It is suggested that you resubmit a request for the records of interest, offering as much detail as possible concerning the time of an emergency call, the location and any other detail that may enable agency staff to locate the records. Again, if the records no longer exist, the agency would, in my view, be required to so indicate.

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)].

Next, I believe that there is a distinction in the application of the Freedom of Information Law between "enhanced" 911 records and other 911 records. The former are subject to section 308(4) of the County Law and cannot be disclosed. The latter, those that are not "enhanced," are not subject to that statute, and rights of access to those records would in my view be subject to the Freedom of Information Law. As you are aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, the contents of the records in question would determine the extent to which they may be available. For instance, if there was a medical emergency, a denial of access based on a contention that disclosure would constitute "an unwarranted invasion personal privacy [§§87(2)(b) and 89(2)(b)] may be proper. If reference is made to a witness or informant, the record might be withheld based on §87(2)(f), which authorizes an agency to withhold records when disclosure "would endanger the life or safety of any person."

Lastly, it is reiterated that it is unlikely that the records of your interest continue to exist.

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-2590

41 State Street, Albany, New York 12231
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March 19, 2001

Mr. Lewis Carpentier
99-A-6776
Wende Correctional Facility
3622 Wende Road, P.O. Box 1187
Alden, NY 14004-1187

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

Dear Mr. Carpentier:

I have received your correspondence concerning your requests addressed to the New York City "Commissioner of Police" and the "Commissioner of Corrections" for records pertaining to yourself while you were using an alias.

In this regard, 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, and requests should ordinarily be made to that person. If you have not yet received responses to your requests, it is suggested that new requests be made to Thomas Antenen, Records Access Officer at the Department of Corrections, and to Sgt. Richard Evangelista at the Police Department. The addresses on your correspondence are correct; the zip code for the Police Department is 10038.

Second, since your requests involve medical records that could be withheld from the general public on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)], it is suggested that you provide proof that your name and the name used as an alias in fact relate to the same person. If you can demonstrate that you used the alias, the records could not be withheld to protect personal privacy, for you could not invade your own privacy.

Lastly, when a proper request is made, 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:

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

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12591

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March 19, 2001

Mr. D. Duamutef
84-A-1026
Fishkill Correctional Facility
Box 1245
Beacon, NY 12508

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

Dear Mr. Duamutef:

I have received your letter in which you complained that the Freedom of Information Officer at your facility consistently fails to comply with law.

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

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

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

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

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

You referred to a "preferential letter" prepared on your behalf concerning your effort to gain a clerical position in the facility library. If the letter was prepared by a staff person at the facility and sent to another member of staff, §87(2)(g) would be pertinent. That provision permits an agency to withhold records that:

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: JoAnn Walsh

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 20, 2001

Ms. Marilyn Petersen
[redacted]

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. Petersen:

I have received your letter of February 6 and the letter attached to it addressed to the Municipal Service Division of the Department of Civil Service. You described a series of events relating to your efforts to obtain a position with Nassau County.

In this regard, the Committee on Open Government, a unit of the Department of State, is authorized to offer advice and opinions concerning public access to government records under the State's Freedom of Information and Personal Privacy Protection Laws. I note that the former applies to entities of state and local government; the latter applies only to state agencies. As I understand your comments, you have attempted without success to obtain "the results of the deposition" relating to your complaint to the Division of Human Rights, and the case file concerning the matter. In an effort to provide guidance, I offer the following comments.

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

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

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

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

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

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

Second, since the records of your interest would appear to be maintained by the Division of Human Rights, the Personal Privacy Protection Law is pertinent to an analysis of rights of access. In general, that statute requires that state agencies disclose records about data subjects to those persons. A "data subject" is "any natural person about whom personal information has been collected by an agency" [Personal Privacy Protection Law, §92(3)]. "Personal information" is defined to mean "any information concerning a data subject which, because of name, number, symbol, mark or other identifier, can be used to identify that data subject" [§92(7)]. For purposes of the Personal Privacy Protection Law, the term "record" is defined to mean "any item, collection or grouping of personal information about a data subject which is maintained and is retrievable by use of the name or other identifier of the data subject" [§92(9)].

Under §95 of the Personal Privacy Protection Law, a data subject, a person such as yourself in the context of your request, has the right to obtain from a state agency records pertaining to him or her, unless the records sought fall within the scope of exceptions appearing in subdivisions (5), (6) or (7) of that section or §96, which would deal with the privacy of others.

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

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

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

While I am unaware of the specific nature of the records sought, §3101 pertains disclosure in a context related to litigation, and subdivision (a) reflects the general principle that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action..." The Advisory Committee Notes pertaining to §3101 state that the intent is "to facilitate disclosure before trial of the facts bearing on a case while limiting the possibilities of abuse." The prevention of "abuse" is considered in the remaining provisions of §3101, which describe narrow limitations on disclosure. It is also noted that it has been determined judicially that if records are prepared for multiple purposes, one of which includes eventual use in litigation, §3101(d) does not serve as a basis for withholding records; only when records are prepared solely for litigation can §3101(d) be properly asserted to deny access to records [see e.g., Westchester-Rockland Newspapers v. Mosczydlowski, 58 AD 2d 234 (1977)].

As suggested earlier, as a "data subject", I believe that you generally enjoy rights of access to records about yourself. However, insofar as the records pertain to or identify others, there may be privacy considerations applicable to them. To the extent that the records identify others, §96(1) of the Personal Privacy Protection Law states that "No agency may disclose any record or personal

information", except in conjunction with a series of exceptions that follow. One of those exceptions, §96(1)(c), involves a case in which a record is "subject to article six of this chapter [the Freedom of Information Law], unless disclosure of such information would constitute an unwarranted invasion of personal privacy as defined in paragraph (a) of subdivision two of section eighty-nine of this chapter". Section 89(2-a) of the Freedom of Information Law states that "Nothing in this article shall permit disclosure which constitutes an unwarranted invasion of personal privacy as defined in subdivision two of this section if such disclosure is prohibited under section ninety-six of this chapter". Consequently, if a state agency cannot disclose records pursuant to §96 of the Personal Protection Law, it is precluded from disclosing under the Freedom of Information Law; alternatively, if disclosure of a record would not constitute an unwarranted invasion of personal privacy and if the record is available under the Freedom of Information Law, it may be disclosed under §96(1)(c).

Again, I am unaware of the contents of the records your interest. However, in conjunction with the preceding commentary, I believe that they may be withheld to the extent that they identify persons other than yourself and disclosure would result in an unwarranted invasion of their privacy. In addition, I believe that they may be withheld in accordance with the principles set forth in §3101 of the Civil Practice Law and Rules. The remaining aspects of the records pertaining you would, in my view, appear to be accessible to you from the Division of Human Rights.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt
cc: Records Access Officer, Division of Human Rights

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 20, 2001

Ms. Deborah Raynor
Pachman & Pachman, P.C.
366 Veterans Memorial Highway
Commack, NY 11725

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

Dear Ms. Raynor:

I have received your letter of February 9 in which you sought an opinion concerning several issues raised relating to the Freedom of Information Law.

First, you asked whether the Long Island Power Authority (LIPA) is subject to the Freedom of Information Law. In this regard, that statute is applicable to agencies, and §86(3) defines the term "agency" to mean:

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

Since public authorities are included within the definition, I believe that LIPA clearly falls within the requirements of the Freedom of Information Law.

Second, you indicated that you are attempting to ascertain whether more than one party lived at a particular address during the late 1940's and early 1950's. To locate that information, you contacted LIPA to learn how many electric or gas accounts were active at that address during that time. You specified that you were not interested in the names of the parties, their payment histories or any other personal information. During our discussion of the matter, I sugested that LIPA's predecessor, LILCO, was not subject to the Freedom of Information Law, but that any records transferred by LILCO to LIPA would fall within the coverage of that statute. I believe that to be so in consideration of the broad application of the Freedom of Information Law to all agency records. Section 86(4) of that statute defines "record" expansively to include:

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

Based on the foregoing, if LIPA acquired custody of LILCO's records, including those that are the subject of your interest, they would, in my opinion, fall with the coverage of the Freedom of Information Law.

Third, as you may be aware, the Freedom of Information Law pertains to existing records. If the records in question no longer exist or are not maintained by LIPA, the Freedom of Information Law would not apply. In a related vein, §89(3) states in part that an applicant must "reasonably describe" the records sought. Assuming that LIPA maintains the records and that they can be found based upon an address, I believe that a request based upon an address would meet the requirement that the request reasonably described the records. On the other hand, if, for instance, they can be located only on the basis of a name or names, and if you are unaware of the names, a request made on the basis of an address would not, in my opinion, reasonably describe the records.

Lastly, assuming that the records are maintained by LIPA and can be found, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. While the disclosure of records nearly fifty years old or older likely would not constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)], if the records contain intimate or personal information, those details could be deleted to protect privacy prior to the disclosure of the remainder.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Record Access Officer, LIPA

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AL -
PPPL-AO -
FOIL-AO - 12594

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March 20, 2001

Ms. Kathy A. Ahearn
Counsel
The State Education Department
Albany, NY 12234

Mr. Chad Vignola
Counsel to Chancellor
NYC Board of Education
110 Livingston Street
Brooklyn, NY 11201

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

Dear Ms. Ahearn and Mr. Vignola:

I have received your letter and the correspondence relating to it. You have jointly sought an opinion concerning the ability of the State Education Department to disclose certain teacher test scores to the New York City Board of Education in an effort to assess the connection between those scores and student performance.

In a letter addressed to Mr. Vignola by Charles C. Mackey, Jr., Executive Coordinator of the State Education Department's Office of Teaching, Mr. Mackey wrote that the request involved applicants for teaching positions in the New York City School District and "the actual scaled scores for each of 2,500 individuals matched to the individuals' names, social security numbers, and New York City file numbers." If disclosed, the data would be used, according to Mr. Vignola, "solely for purposes of statistical analysis in aid of our efforts to hire the most qualified and certified candidates available to teach in SURR and other often high-needs schools." Mr. Mackey contends that disclosure of the test scores would constitute an unwarranted invasion of personal privacy, and that the Personal Privacy Protection Law prohibits the Department from disclosing the information sought absent the consent of the persons identified in the data. Mr. Vignola, on the other hand, contends that several provisions in that statute permit the Department to disclose.

In this regard, I offer the following comments.

First, as you are aware, the Freedom of Information Law is applicable to agencies of state and local government [see definition of "agency", §86(3)]. The Personal Privacy Protection Law, however, applies only to state agencies. For the 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."

Consequently, while the Board of Education is subject to the Freedom of Information Law, the State Education Department is subject to that statute, as well as the Personal Privacy Protection Law.

Under the latter, a "data subject" is "any natural person about whom personal information has been collected by an agency" [§92(3)]; "personal information" is defined to mean "any information concerning a data subject which, because of name, number, symbol, mark or other identifier, can be used to identify that data subject" [§92(7)]; and 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)].

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

It has been consistently advised that a license, a permit, or in the context of the issues present here, a certification indicating that an individual is qualified to teach in certain areas, must be disclosed. In each instance, disclosure indicates that an individual is qualified to engage in a certain activity over which the state has oversight. While release of those records identifies individuals, disclosure would constitute a permissible rather than an unwarranted invasion of personal privacy. Although I know of no judicial decision that deals specifically with the disclosure of individual scores in certification examinations, it has been held that transcripts indicating grades in certain courses taken by teachers may be withheld to protect their privacy (Steinmetz v. Board of Education, Supreme Court, Suffolk County, NYLJ, October 30, 1980). In my view, that an individual has met the requirements to gain certification is clearly public. However, the score on the certification exam,

like the grades in Steinmetz, in my opinion would, if disclosed, constitute an unwarranted invasion of personal privacy.

That being so, I believe that the State Education Department must withhold the personally identifying data sought to comply with the Personal Privacy Protection Law, unless it exercises its discretionary authority to disclose in accordance with §96(1). It is emphasized that the ability to disclose under that provision does not give the entity seeking personal information a right of access to the information. Even if an exception authorizes the Department to disclose, it would not be obliged to do so.

Several of the exceptions appearing in §96(1) might arguably permit the Department to disclose. However, most authorize disclosure in situations in which personal information is "necessary" for the receiving agency to carry out its official duties or to comply with statutory requirements. As I understand the matter, disclosure to the Board of Education would enhance its ability to carry out its duties; as stated by Mr. Vignola, the data would be used "in aid of" the Board's efforts in hiring the most qualified candidates. While the data would be helpful to the Board, it is apparently not "necessary", for the Board has functioned to date without the data. If my view is accurate, the Department would not have the authority to disclose.

Lastly, unlike a state agency which is required to comply with the Personal Privacy Protection Law and which, therefore, would be prohibited from disclosing or disseminating information the disclosure of which would constitute an unwarranted invasion of personal privacy, a municipal entity, which is not subject to that statute, would not be prohibited from disclosing. In Seelig v. Sielaff [200 AD2d 298], the lower court enjoined a New York City agency from releasing the social security numbers of correction officers without their written consent. While the Appellate Division agreed that disclosure of social security numbers would result in an unwarranted invasion of correction officers' privacy and could be withheld under §87(2)(b) of the Freedom of Information Law, the Court unanimously reversed and vacated the judgment because the agency involved is an entity of local government. Specifically, it was found that:

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

Further, the Court of Appeals had held that the Freedom of Information Law permits but does not require that an agency withhold when disclosure would result in an unwarranted invasion of personal privacy. Specifically, it was found that:

> "...while an agency is permitted to restrict access to those records falling within the statutory exemptions, the language of the exemption provision contains permissive rather than mandatory language, and it is within the agency's discretion to disclose such

records, with or without identifying details, if it so chooses" [Capital Newspapers v. Burns, 67 NY2d 562, 567 (1986)].

In short a local government may opt to disclose personal information, even when disclosure would result in an unwarranted invasion of personal privacy.

In consideration of the foregoing and the restrictions imposed upon the State Education Department by the Personal Privacy Protection Law, it is suggested that it may be possible for the Board to transmit data to the Department in order that the Department might conduct the kind of match that would provide the information desired without making a disclosure that may be in contravention of law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12595

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March 21, 2001

Mr. Harvey M. Elentuck
[redacted]

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

Dear Mr. Elentuck:

I have received your note in which you indicated that you paid the New York City Board of Education for copies of records sought under the Freedom of Information Law, but that you had not received the copies.

From my perspective, once a request has been approved and the applicant has paid for copies, the agency is obliged to make the copies available promptly and without delay. The acceptance of monies for the duplication of records by an agency following an applicant's request for copies is, in my view, essentially reflective of a contract. You, as the applicant, must pay to have copies; the Board, in turn, upon payment, is required to make the copies available.

With respect to the limitation of the time to review 168,000 re- elentuck.ha law must be implemented in a manner that gives reasonable effec 'ou would not have the right to review the records in a manner that . 'y to carry out its duties. Conversely, I believe that an agency mus ? opportunity to review records. If one-hundred hours is unreasor should be enlarged.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Thomas A. Liese
Chad A. Vignola

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 21, 2001

Mr. Terrance D. Tomsic
[redacted]

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

Dear Mr. Tomsic:

As you are aware, I have received your correspondence relating to a request for resolutions adopted by the Village of Earlville, as well as other records.

In my view, it is clear that resolutions adopted by a village board of trustees must be disclosed. Nevertheless, in an effort to provide guidance, I offer the following comments.

First, if the resolutions to which you referred were adopted recently, they may be easy to locate. On the other hand, if they were adopted over the course of years, a key issue involves the extent to which the request "reasonably describes" the records as required by §89(3) of the Freedom of Information Law. I point out that it has been held by the Court of Appeals that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

The Court in Konigsberg found that the agency could not reject the request due to its breadth, but 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, it is emphasized 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. If, for example, there is no single record that indicates the cost of supplying power in the park, the Village would not be obliged to prepare a new record containing a figure representing the overall cost. As in other situations, the Village may receive monthly bills. If that is so, it would not be required to review the bills and prepare a total on your behalf. However, you could request and review each bill in order to arrive at a total on your own.

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: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12597

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

March 21, 2001

Bob and Jenny Petrucci
[redacted]

The staff of the Committee on Open 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. Petrucci:

I have received your inquiry concerning the propriety of a denial of access by Westchester County to results of a survey of golfers on the ground that the records consist of "inter-agency and intra-agency materials."

If the records sought consist of responses offered by golfers, I do not believe that the exception cited by the County Attorney would be applicable.

Section 86(3) of the Freedom of Information Law defines the term "agency" to mean:

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

Based on the foregoing, 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 completed by citizens, 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, those persons are not officers or employees of an agency.

If the responses were submitted anonymously, it is likely that they would be available in their entirety. If, however, they include personally identifiable details, those details could, in my opinion, be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [Freedom of Information Law, §87(2)(b)].

On the other hand, if the record of your interest was prepared by the County, the provision cited by the County Attorney would be applicable. However, as you are aware, the contents of inter-agency and intra-agency materials determine the extent to which they may be withheld, or conversely, must be disclosed. In short, to the extent that such a record consists of "statistical or factual or tabulations or data" or reflects final agency policy or determinations, I believe that it would be accessible [see §87(2)(g)(i) and (iii)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Charlene Indelicato, County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12598

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

March 23, 2001

Ms. Susan Kalberer
[redacted]

Dear Ms. Kalberer:

I have received your letter in which you asked that this office send information to you that you had sought from East Meadow High School. You indicated that you received no response to the request, which involved "information on the number of monitors we have guarding our doors at the high school" and "how much we spend yearly on these so called monitors."

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

First, the regulations promulgated by the Committee (21 NYCRR Part 1401) require that each agency designate one or more persons as "records access officer." The records access officer has the duty of coordinating the 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 records access officer, it is suggested that you resubmit a request to the records access officer. To do so, it is also suggested that you telephone the District Clerk or the Superintendent to ascertain the name of the records access officer, the person to whom requests made under the Freedom of Information Law should be made.

Second, it is emphasized that the title of the Freedom of Information Law may be somewhat misleading, for it is not a vehicle that requires that agency officials provide information *per se* or answer questions. Rather, that statute pertains to existing records, and §89(3) states in part that an agency is not required to create a record in response to a request for information. Therefore, instead of seeking "information" regarding monitors or "how much" is spent on a particular function, it is suggested that you seek records containing the information sought. For instance, you might seek records indicating the names or numbers of monitors working at the high school, and records indicating amounts expended during a certain period to carry out a certain function.

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

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

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Superintendent
Records Access Officer

FOIL-AO-12599

From: Robert Freeman
To: [redacted]".GWIA.DOS1
Date: 3/26/01 8:13AM
Subject: Re: RF Letter 3/21/01

Good morning - -

To reiterate briefly: Insofar as records consist of communications from or comments made by members of the public, I believe that they would be available, but without personally identifying details. If a report was prepared by a County official analyzing or tabulating the survey results, it would constitute intra-agency material. Advice, opinion, recommendation and the like offered in such a report by a County official could be withheld. However, other aspects of the report consisting of statistical or factual information or the views expressed by members of the public (again, without identifying details) would be available.

I hope that the foregoing serves to clarify your understanding.

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

>>> "Bob and Jenny Petrucci" [redacted]> 03/24/01 02:53PM >>>
Hi, Bob. First of all, we really can't adequately express our appreciation for all your help, guidance, assistance in these FOIL matters. You're a good guy.

We thank you too for your extremely prompt response re the survey FOIL.
We are a little confused though as to the bottom line. May we restate the situation.

This was a market research "survey", done on the actual golf courses (during play), where golfers were stopped by Parks Dept employees (not market research specialists, which we could have provided) and asked questions as to the golfers opinions re the courses and county golf (writing their responses on a questionnaire. I remember that we all commented on the apparent bias of values assigned to responses.) As I recall, golfers were not identified by name, as we said they should not be. However, we did, even at the time, ask for copies of the results.

We seem to understand page 1 of your letter pretty well. We're confused about page 2. You say, "On the other hand, if the record of your interest was prepared by the County, the provision cited by the County Attorney would be applicable." Does that mean that if the County, using public funds, "prepared" (how defined?) the survey, we're not entitled to anything?

1) Let's say, if a memo (sent from a staff assistant to another) exists somewhere saying, "Man, the golfers said they really hated the courses", are we entitled to it?
2) If we want copies of all the completed surveys, are we entitled to them?
3) If they had any remote indirect statistical record from staff to staff) saying, "About 3/4 of the golfers really hated the product value", are we entitled to it?

Thanks again for your patience and your guidance. This is a heck of a learning process for us.
Bob and Jenny Petrucci
[redacted]

From: Robert Freeman
To: Internet[redacted]

Dear Ankletz:

Once records have been made available, you may use them as you see fit. I note, however, that the Freedom of Information Law includes provisions that enable government to withhold records when disclosure would constitute "an unwarranted invasion of personal privacy." Further, the Law provides examples of unwarranted invasions of privacy, one of which pertains to the "sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes." Therefore, if a request is made for list of names and addresses of holders of recently issued residential building permits (or the equivalent) for a commercial purpose, I believe that a municipality could deny the request.

To obtain a more expansive explanation of the issue, you can go to our website, then to advisory opinions rendered under the Freedom of Information Law, click on to "B" and scroll down to "building permits". The only opinion appearing next to that heading is available online in full text.

I hope that I have been of assistance.

12601

From: Robert Freeman
To: Internet:[redacted]

Dear Ms. McCullough:

As indicated during our phone conversation, I am unaware of the contents of records containing "the specifications and conditions for the permit of individual operations" in relation to discharges pertaining to "concentrated animal feeding operations. Nevertheless, as a general matter, the Freedom of Information Law is based on a presumption of access. Stated differently, records must be disclosed, except to the extent that one or more exceptions appearing in §87(2) of that statute may justifiably be asserted.

Based on our conversation, it appears that portions of the records in question might be withheld in accordance with two exceptions to rights of access. First, if, for example, the records include personal financial information, it is likely that those portions may be deleted on the ground that disclosure would result in "an unwarranted invasion of personal privacy" [§87(2)(b)]. Second, depending on the nature of the information, §87(2)(d) may also be pertinent. That provision permits an agency to withhold portions of records consisting of trade secrets or which if disclosed would "cause substantial injury to the competitive position" of a commercial enterprise. To the extent that either of those exceptions may be properly be asserted, an agency could deny access. However, other aspects of the records would appear to be available following appropriate deletions.

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12602

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

March 26, 2001

Mr. Albert R. McEvoy
President
ARM Associates, Inc.
P.O. Box 147
Yonkers, NY 10703

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. McEvoy:

I have received your letter addressed to Alexander F. Treadwell, formerly Secretary of State and a member of the Committee on Open Government. As indicated above, the staff of the Committee is authorized to respond on its behalf.

You have sought assistance in relation to your requests for records of the City of Yonkers Police Department. As I understand the matter, the receipt of your requests was acknowledged, and you were informed they would be granted or denied within thirty days of the date of acknowledgment. Nevertheless, despite your attempts to gain a response, you had not received any further communication from the City 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, two of the requests involve a "premises history", records indicating "calls for service" that may have occurred at certain addresses. One of those requests would deal with incidents occurring in 1999 and 2000; the other specifies no time period during which calls for service might have been made. An issue of potential significance relating to those requests concerns whether or the extent to which they "reasonably described" the records as required by §89(3) of the Freedom of Information Law. Insofar as the records are maintained in a manner in which they can be located with reasonable effort, i.e., if they are maintained by address, I believe that the requests would meet the requirement that the records be reasonably described. On the other hand, if the records indicating calls for service are kept or can be retrieved only by means of a different kind of recordkeeping system, i.e., chronologically or by name, a search for records falling within the scope of the requests would likely involve a review of thousands of records or entries. If that is so, the request would not, in my view, meet the standard that a request reasonably describe the records [see Konigsberg v. Coughlin, 68 NY2d 245 (1986)].

Third, the other request involves records relating a particular "burglary/robbery incident." With respect to those records and those sought in the other requests that can be found with reasonable effort, I note as a general matter that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Since I am unaware of the contents of the records in which you are interested, or the effects of their disclosure, I cannot offer specific guidance. Nevertheless, the following paragraphs will review the provisions that may be significant in determining rights of access to the records in question.

Of potential significance is §87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". That provision might be applicable relative to the deletion of identifying details

in a variety of situations, i.e., where a record identifies a confidential source or a witness, for example.

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

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

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

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

Also potentially relevant is §87(2)(g). The cited provision permits an agency to withhold records that:

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial

applies. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

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.
cc: Matthew S. Greenberg, Records Access Appeals Officer

Lastly, if persons were arrested or charges in relation to any incident described in the records sought, and if charges were dismissed in favor of an accused, it is likely that the records would be sealed pursuant to §160.50 of the Criminal Procedure Law. To that extent, the records would be exempted from disclosure by statute in accordance with §87(2)(a) of the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Kevin D. Crozier

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 1263

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

March 26, 2001

Mr. Andrew Ivchenko
Attorney and Counselor at Law
9120 Brecksville Road
Brecksville, Ohio 44141

The staff of the Committee 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. Ivchenko:

As you are aware, I have received your letter and the correspondence attached to it. Having requested records from the New York State Technology Enterprise Corporation (NYSTEC) under the Freedom of Information Law, you were informed that it is not subject to that statute. You have sought my views on the matter.

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

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

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

Judicial decisions indicate that not-for-profit corporations may be subject to the Freedom of Information Law if the government maintains substantial control over their operations [see e.g., Buffalo News, Inc. v. Buffalo Enterprise Development Corp., 84 NY2d 488 (1994); Eisenberg v. Goldstein, Supreme Court, Kings County, February 26, 1988]. I have obtained NYSTEC's certificate of incorporation and related records and have spoken with several of its staff. Based on a review of the materials and our conversations, it appears that NYSTEC is independent of government. No government agency or official has any control over the Corporation or the authority to designate any person to NYSTEC's Board of Directors. That being so, I do not believe that NYSTEC is an "agency" or that it is required to comply with 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: Kenneth K. Morse
Edward Schreiner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12604

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

March 26, 2001

Mr. Andrew S. Ratzkin
Arnold & Porter
399 Park Avenue
New York, NY 10022-4690

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. Ratzkin:

I have received your letter, as well as a variety of related materials. You have sought an advisory opinion concerning the propriety of a denial of your request made under the Freedom of Information for a record in possession of the New York City Economic Development Corporation ("EDC").

The matter involves a request for "the letter of Intent signed by the New York Stock Exchange on or about December 20, 2000 regarding the proposed project to provide a new building for the New York Stock Exchange on the block bounded by Wall, Broad, and William Streets and Exchange Place in Manhattan, New York." EDC's Records Access Officer denied the request pursuant to section 87(2)(c) of the Freedom of Information Law, which authorizes an agency to withhold records to the extent that disclosure "would impair present or imminent contract awards or collective bargaining negotiations." Judy E. Fensterman, EDC's FOIL Appeals Officer, affirmed the denial of access following your appeal.

It is your contention, based on opinions previously rendered by this office and judicial decisions, that the Letter of Intent must be disclosed. Notwithstanding the thrust of those opinions, in consideration of the circumstances extant in this situation, it appears that the denial of your request was consistent with law. Key is Ms. Fensterman's description of the nature, scope and significance of the Letter of Intent in her determination of your appeal in which she wrote as follows:

> "The letter of intent merely establishes the framework for the NYSE project and subsequent negotiations, but, with the exception of certain limited provisions, does not, in and of itself, create any legally binding obligations or liabilities. Since the agreements for the project

> have not been finalized, it is my determination that disclosure of the letter of intent is premature and would unduly impair and compromised the City's ability to negotiate the final project documents with the NYSE. Additionally, to the extent that any terms of the letter of intent can be construed as a binding obligation, consideration of the 'effects of disclosure' on the city's ongoing negotiations with respect to the project is paramount. Although negotiation of the letter of intent only involves one private party, as you point out, the NYSE project, in its entirety, involves negotiations with multiple parties with various property interests. Disclosure of the letter of intent could have the effect of undermining the City's negotiations, causing it to lose leverage in its negotiations with property owners and tenants on the site of the proposed NYSE project, and compromising its ability to negotiate the best possible deal for the City."

In an effort to obtain further clarification from Ms. Fensterman, I contacted her by phone. In addition to reiterating that the Letter of Agreement represents one among many in a series of negotiations with a variety of parties, she specified that the Letter of Agreement includes reference to certain deadlines, which, if disclosed, would, in her view, damage New York City's bargaining position with any number of those parties. In short, she indicated that if those dates became known to you, or any person, including a party to the negotiations, a party or parties would have the ability to develop a negotiation or bargaining strategy that would place the City and EDC at a clear disadvantage.

I am mindful of the opinions and judicial decision involving the contention that records that are known to both parties to negotiations must be disclosed, for in those situations, there is no "inequality of knowledge" [see Community Board 7 of Borough of Manhattan v. Schaeffer, 570 NYS 2d 769; affirmed, 83 AD 2d 422, reversed on other grounds, 84 NY 2d 148 (1994)]. Those opinions and the case law pertained to situations in which there were only two parties involved in a negotiation process. While the contents of the Letter of Intent are known by and in the possession of the New York Stock Exchange and the EDC, its contents are not known to the other parties involved or potentially involved in negotiations regarding the project. That being so, it appears that disclosure would "impair" present or imminent contract awards" and that the denial of your request was consistent with law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt
cc: Judy E. Fensterman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12605

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

March 27, 2001

Mr. Thomas P. Murphy
The Syracuse Newspapers
P.O. Box 298
Chittenango, NY 13037

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

Dear Mr. Murphy:

I have received your correspondence pertaining to a denial of your request for records concerning an arrest by the Village of Cazenovia Police Department.

You sought "[r]ecords related to the Dec. 13 assault arrest entry in the Cazenovia blotter. This includes, but is not limited to, the defendant's name, date of birth, address, charges, any victim names and any reports on the circumstances surrounding the request." The Village initially denied access to the records, including the name of the person arrested, citing §87(2)(e)(i) and (iii) of the Freedom of Information Law. The Village Board of Trustees sustained the denial of your request following your appeal.

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

The state's highest court, the Court of Appeals, expressed its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department [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, 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 Village has engaged in a blanket denial of access in a manner which, in my view, is equally inappropriate. I am not suggesting that the records sought must necessarily be disclosed in full. Rather, based on the direction given by the Court of Appeals in several decisions, the records must be reviewed for the purpose of identifying those portions of the records that might fall within the scope of one or more of the grounds for denial of access. As the Court stated later in the decision: "Indeed, the Police Department is entitled to withhold complaint follow-up reports, *or specific portions thereof*, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" (id., 277; emphasis added).

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.

Second, from my perspective, unless an arrest or booking record has been sealed pursuant to §160.50 of the Criminal Procedure Law, it must be disclosed. Under that statute, when criminal charges have been dismissed in favor of an accused, the records relating to the arrest ordinarily are sealed. In those instances, the records would be exempted from disclosure by statute [see Freedom of Information Law, §87(2)(a)].

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

With respect to the names of complainants or victims, rights of access, or conversely, the ability to deny access, would in opinion be dependent on attendant facts. It is emphasized, however, that whether a complainant prefers to authorize or preclude disclosure is irrelevant. In a case in which a law enforcement agency permitted persons reporting incidents to indicate on a form their preference concerning the agency's disclosure of the incident to the news media, the Appellate Division found that, as a matter of law, the agency could not withhold the record based upon the "preference" of the person who reported the offense. Specifically, in Johnson Newspaper Corporation v. Call, Genesee County Sheriff, 115 AD 2d 335 (1985), it was found that:

> "There is no question that the 'releasable copies' of reports of offenses prepared and maintained by the Genesee County Sheriff's office on the forms currently in use are governmental records under the provisions of the Freedom of Information Law (Public Officers Law art 6) subject, however, to the provisions establishing exemptions (see, Public Officers Law section 87[2]). We reject the contrary contention of respondents and declare that disclosure of a 'releasable copy' of an offense report may not be denied, as a matter of law, pursuant to Public Officers Law section 87(2)(b) as constituting an 'unwarranted invasion of personal privacy' solely because the person reporting the offense initials a box on the form indicating his preference that 'the incident not be released to the media, except for police investigative purposes or following arrest'."

Moreover, although the issue did not involve law enforcement, the Court of Appeals has held that a request for or a promise of confidentiality is all but meaningless; unless one or more of the grounds for denial appearing in the Freedom of Information Law may appropriately be asserted, the record sought must be made available [see Washington Post v. New York State Insurance Department, 61 NY 2d 557, 567 (1984)]. This is not to suggest that records or portions of records might not justifiably be withheld, but rather that a claim or promise of confidentiality in my opinion is irrelevant to an analysis of rights of access to records.

In some situations, a denial of access to the name of a complainant or victim may be appropriate. Under §50-b of the Civil Rights Law, police and other public officers are prohibited from disclosing the identity of the victim of a sex offense. If a complainant is in some way associated with organized crime or is a confidential source, that person's identity could likely be withheld under §87(2)(f). That provision permits an agency to withhold records to the extent that disclosure would "endanger the life or safety of any person." The same provision might apply when the victim of a crime is a senior citizen who lives alone. However, in many instances, the name of a complainant involved in a crime must be disclosed, and a general policy of withholding names of complainants or victims would, in my opinion, be inconsistent with law.

Third, the provision upon which the Village relied in denying access, §87(2)(e), permits an agency to withhold records that are:

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

The ability to deny access to records is dependent on the effects of disclosure. Only to the extent that the harmful effects described in subparagraphs (i) through (iv) would arise may §87(2)(e) be asserted.

In the context of criminal proceedings, a variety of information is routinely disclosed. An arraignment, for example, occurs during a public judicial proceeding, and information equivalent to that disclosed during an arraignment must, in my view, be disclosed by a police department or prosecutor. It has been held that once information has been disclosed during a public judicial proceeding, the grounds for denying access under the Freedom of Information Law no longer apply [see Moore v. Santucci, 151 AD2d 677 (1989)]. Further, when a person is arrested, taken into custody and is committed to a county jail, a record must be maintained at the jail that includes numerous details, all of which must be disclosed. Specifically, §500-f of the Correction Law, which pertains to county jails, states that:

> "Each keeper shall keep a daily record, to be provided at the expense of the county, of the commitments and discharges of all prisoners delivered to his charge, which shall contain the date of entrance, name, offense, term of sentence, fine, age, sex, place of birth, color, social relations, education, secular and religious, for what any by

> whom committed, how and when discharged, trade or occupation, whether so employed when arrested, number of previous convictions. The daily record shall be a public record, and shall be kept permanently in the office of the keeper."

In sum, I believe that the blanket denial of your request was inconsistent with law and that the identity of a person arrested, as well as other details, must be disclosed.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12606

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March 27, 2001

Mr. Ron Summers
96-A-3363
P.O. Box 618
Auburn, NY 13024

Dear Mr. Summers:

I have received your letter in which you requested certain records from this office or information concerning where you may seek them.

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 or control of records generally, and it is not empowered to compel an agency to grant or deny access to records.

As a means of offering guidance, I point out that each agency is required to designate one or more persons as "records access officer" (21 NYCRR Part 1401). The records access officer has the duty of coordinating an agency's response to requests, and requests should ordinarily be directed to that person.

Since your inquiry deals with records that may be in possession of the New York City Police Department, it is suggested that a request for records be made to Sgt. Richard Evangelista, Records Officer, New York City Police Department, Room 110C, One Police Plaza, New York, NY 10038.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3284
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March 27, 2001

Hon. Steven Otis
Mayor
City of Rye
City hall
Rye, NY 10580

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 Mayor Otis:

As you are aware, I have received a variety of material concerning access to "draft unapproved minutes" of meetings of the Rye City Council, and you have sought an advisory opinion on the matter.

From my perspective, the draft minutes should be disclosed, on request, as soon as they exist. In this regard, I offer the following comments.

First, that a document is characterized as a draft is not determinative of rights of access, for the Freedom of Information Law is applicable to all agency records. 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, computer1 tapes or discs, rules, regulations or codes."

Based on the foregoing, once information exists in some physical form, i.e., a draft, it constitutes a "record" subject to rights conferred by the Freedom of Information Law.

Second, §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, again, 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.

Third, returning to the Freedom of Information Law, as you 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. In my view, minutes of open meetings are clearly available; any person could have been present at the meetings to which the minutes relate, and none of the grounds for denial would apply.

Although draft minutes might be characterized as "intra-agency materials" that fall within the scope of §87(2)(g), an analysis of that provision and its judicial interpretation indicates that they must be disclosed. Section 87(2)(g) permits an agency to withhold records that:

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

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

I point out that one of the contentions offered by the New York City Police Department in a case decided by the Court of Appeals was that certain reports could be withheld because they are not final and because they relate to incidents for which no final determination had been made. The Court rejected that finding and stated that:

> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][iii)]. However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)..." [Gould et al. v. New York City Police Department, 87 NY2d 267, 276 (1996)].

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

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

> "...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][i]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182)" (id., 276-277).

Minutes of a meeting open to the public do not involve "internal government consultations or deliberations"; on the contrary, information contained in those records has effectively been disclosed to the public already.

Lastly, in consideration of the preceding commentary, I do not believe that there would be any valid reason for delaying disclosure of the records in question. In my view, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore,

if records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a lengthy delay in disclosure. As the Court of Appeals has asserted:

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

If a request is voluminous and a significant amount of time is needed to locate records and review them to determine rights of access, a delay in disclosure 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.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 28, 2001

Mr. Brad Heath
Press & Sun Bulleting
P.O. Box 1270
Binghamton, NY 13902-1270

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

Dear Mr. Heath:

I have received your letter of February 27 in which you sought an advisory opinion concerning "the legality of withholding portions of emergency dispatch records for fear of an unwarranted invasion of privacy."

By way of background, you indicated that you have requested records of "police, fire and medical dispatches" in the form of "data copies" of dispatch records and daily summaries that would be used to supplement the Press & Sun Bulletin's publication of police blotter entries. Broome County has determined to withhold portions of the records indicating the addresses to which emergency units were dispatched. The County has also contended that records kept by a 911 employee "relating to the incoming emergency call" are exempt from disclosure under §308(4) of the County Law. It is your view that the information sought is analogous to police blotter entries, which are routinely disclosed. Further, you wrote that other emergency services organizations regularly disclose the information in question.

From my perspective, the addresses 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. Further, the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the grounds for denial that follow. The phrase quoted in the preceding sentence indicates that a single record or report may contain both accessible and deniable information. Moreover, that phrase in my opinion imposes an obligation upon agencies to review requested records in their entirety to determine which portions, if any, may justifiably be withheld.

Second, of 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 my view, a record of a medical emergency call consists in great measure of what might be characterized as a medical record or history relating to the person needing care or service (see Hanig v. NYS Department of Motor Vehicles, 79 NY 2d 106 (1992)].

Portions of records identifying those to whom medical services were rendered, their ages, and descriptions of their medical problems or conditions could in my opinion be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy, for disclosure of a name coupled with those details in my view represents a personal and somewhat intimate event in the individual's life.

However, I believe that other aspects of the records, such as the locations of calls or addresses, should be disclosed. In my view, an emergency call, particularly when sirens or flashing lights are used, is an event of a public nature. When a fire truck or ambulance travels to its destination, that destination is or can be known to those in the vicinity of the event. In essence, I believe that event is of a public nature and that disclosure of an address or a brief description of an event would not likely constitute an unwarranted invasion of personal privacy. Further, the presence of an emergency vehicle does not necessarily indicate that there is a medical problem; those vehicles are dispatched for any number of reasons, many of which do not relate to a medical event. Again, the personally identifiable details described earlier could in my view be withheld.

Lastly, §308(4) of the County Law states that:

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

In my view, "records...of calls" means either a recording or a transcript of the communication between a person making a 911 emergency call, and the employee who receives the call. I do not believe that §308(4) can validly be construed to mean records regarding or relating to a 911 call. If that were so, innumerable police and fire reports, including arrest reports and police blotter entries, would be exempt from disclosure. In short, §308(4) could not justifiably be construed to pertain to all such records. Rather, again, I believe that it pertains to the recording or transcript of a 911 call.

In an effort to assist you, a copy of this opinion will be forwarded to Colleen F. Colby, Assistant County Attorney.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Colleen F. Colby

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 28, 2001

Ms. Joan Gronowski
[redacted]

Dear Ms. Gronowski:

I have received you letter in which you wrote that the City of Yonkers has failed to comply with or respond to your requests made under the Freedom of Information Law. You have asked how you may initiate "a formal complaint" against the City.

In this regard, although there is no state agency that is empowered to enforce the Freedom of Information Law, this office is authorized to prepare advisory opinions concerning that statute. While the opinions are not binding, it is our hope that they are educational and persuasive, and that they serve to enhance compliance with law. If you have specific questions relating to the Freedom of Information Law, i.e., concerning rights of access to records or the propriety of an agency's denial of access, you can write to this office and seek an opinion. Further, when it is known which agency is involved, a copy of the opinion is sent to that agency.

Since you indicated that requests have been ignored, 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)].

Enclosed for your consideration is "Your Right to Know", which summarizes the Freedom of Information and Open Meetings Laws.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Kevin Crozier, Office of Corporation Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 28, 2001

Mr. Seth Kaufman
[redacted]

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

Dear Mr. Kaufman:

I have received your letter of February 23, as well as the materials attached to it. You have sought guidance concerning your unsuccessful efforts in obtaining records from the New York City Police Department indicating a correlation between arrest activity by police officers and civilian complaints. Having reviewed the correspondence, I offer the following comments.

First, as you are aware, §89(4)(a) of the Freedom of Information Law requires that an agency determine an appeal within ten business days of the receipt of an appeal. If an agency fails to do so, it has been held that the appeal has been constructively denied, that the appellant has exhausted his or her administrative remedies, and that he or she may seek judicial review of the denial under Article 78 of the Civil Practice Law and Rules [see Floyd v. McGuire, 87 AD388, appeal dismissed, 57 NY2d 774 (1982)].

Second, 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 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 reprogramming, the Department would not, in my opinion, be obliged to develop new programs or modify its existing programs in an effort to generate the data of your interest.

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: William Tesler, Special Counsel
Sgt. Richard Evangelista

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

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March 29, 2001

Mr. Stuart Desser
[redacted]

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

Dear Mr. Desser:

I have received your letter of February 22, as well as the materials attached to it. You have sought an advisory opinion concerning a request made under the Freedom of Information Law to the New York City Police Department.

Although some aspects of your request were granted, others were denied. They include "witness statements given to the police for all bicyclist fatalities [consequent to incidents involving motor vehicles in NYC]" during a certain period, and analyses and related records "from which and in which the NYPD determined whether and the extent to which, cyclist error was the primary contributing factor in fatal cycling accidents..." With respect to the witness statements, you specified in your appeal personally identifying details pertaining to witness could be deleted, and that the analyses related to news articles citing statistical data offered by officials of the Police Department.

In this regard, I offer the following comments.

First, 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.

Second, §89(6) states that if records are available under some other provision of law or by means of judicial interpretation, the grounds for denial appearing in §87(2) cannot be asserted. Insofar as the witness statements are part of motor vehicle accident reports, it is likely that they must be disclosed in their entirety in most instances.

Of potential relevance to the matter is §66-a of the Public Officers Law, which 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.

If the witness statements are separate from accident reports, I believe that the Freedom of Information Law would govern rights of access. If the only basis for withholding the statements involves a finding that disclosure would constitute "an unwarranted invasion of personal privacy" [see §87(2)(b)], personally identifying details could be deleted, and the remainder of those records would be accessible [see §89(2)(b)]. Insofar as the statements relate to an ongoing criminal investigation, §87(2)(e) may be pertinent, for that provision authorizes an agency to withhold records that:

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

From my perspective, only those portions of the statements which if disclosed would result in the harmful effects described in subparagraphs (i) through (iv) would the Department have the authority to deny access; the remainder of the records would be accessible.

Lastly, with regard to the analyses and related records that you requested, it appears that the only ground for denial of significance would be §87(2)(g). Although that provision potentially serves as a means of withholding records, due to its structure, it may require substantial disclosure. Specifically, §87(2)(g) enables an agency to withhold records that:

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

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

One of the contentions offered by the New York City Police Department in a decision involving that provision 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 state's highest court, the Court of Appeals, rejected that finding and stated that:

> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)..."

> [Gould et al. v. New York City Police Department, 87 NY2d 267, 276 (1996)].

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 note, too, 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)].

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)(b) or (e)] could properly be asserted.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: William Tesler

STATE OF NEW YORK
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March 29, 2001

Mr. Robert F. Reninger
[redacted]

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

Dear Mr. Reninger:

I have received your letter of February 23. You referred to a meeting held by the Town of Greenburgh Planning Board "in a small conference room adjacent to the larger Town Meeting room" and wrote that "[n]umerous interested parties could not get access to the conference room, stood outside and were unable to hear the proceedings." Additionally, you alleged that the Town "has refused" to make available "approved minutes" of the meeting, "draft minutes" of the meeting, and notes taken by the Board's secretary that serve "as the basis of preparing the minutes of the meeting."

In this regard, I offer the following comments.

First, although the Open Meetings Law does not specify where meetings must be held, §103(a) of the Law states in part that "Every meeting of a public body shall be open to the general public..." Further, the intent of the Open Meetings Law is clearly stated in §100 as follows:

> "It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of an able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it."

As such, the Open Meetings Law confers a right upon the public to attend and listen to the deliberations of public bodies and to observe the performance of public officials who serve on such bodies.

From my perspective, and based on a judicial decision involving a similar issue, every provision of law, including the Open Meetings Law, should be implemented in a manner that gives reasonable effect to its intent. In my opinion, if a larger crowd attends than the usual meeting location will accommodate, and if a larger facility is available, it would be reasonable and consistent with the intent of the Law to hold the meeting in the larger facility. Conversely, assuming the same facts, I believe that it would be unreasonable to hold a meeting in a facility that would not accommodate those interested in attending (see Crain v. Reynolds, Supreme Court, New York County, August 12, 1998).

Second, with respect to minutes, it is noted at the outset that the characterization of a document as a draft is not determinative of rights of access, for the Freedom of Information Law is applicable to all agency records. 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, once information exists in some physical form, i.e., a draft, it constitutes a "record" subject to rights conferred by the Freedom of Information Law.

Section 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, again, 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.

Returning to the Freedom of Information Law, as you 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. In my view, minutes of open meetings are clearly available; any person could have been present at the meetings to which the minutes relate, and none of the grounds for denial would apply.

Although draft minutes might be characterized as "intra-agency materials" that fall within the scope of §87(2)(g), an analysis of that provision and its judicial interpretation indicates that they must be disclosed. Section 87(2)(g) permits an agency to withhold records that:

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

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

I point out that one of the contentions offered by the New York City Police Department in a case decided by the Court of Appeals was that certain reports could be withheld because they are not final and because they relate to incidents for which no final determination had been made. The Court rejected that finding and stated that:

> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][iii)]. However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)..." [Gould et al. v. New York City Police Department, 87 NY2d 267, 276 (1996)].

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

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

> "...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][i]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182)" (id., 276-277).

Minutes of a meeting open to the public do not involve "internal government consultations or deliberations"; on the contrary, information contained in those records has effectively been disclosed to the public already.

Lastly, it was held more than twenty years ago that notes of a meeting consisting of factual information were required to be disclosed [Warder v. Board of Regents, 410 NYS2d 742 (1978)]. I point out that if, for example, notes are taken in shorthand, there may be an obligation to disclose them, but there would be no obligation, in my view, to decipher or interpret them.

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.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Planning Board

STATE OF NEW YORK
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March 29, 2001

Ms. Eleanor Kapsiak
[redacted]

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. Kapsiak:

I have received your letters of February 22 and March 16, as well as correspondence sent by the Kenmore-Town of Tonawanda Union Free School District. Based on the receipt of the correspondence, I believe that your request has been granted. Nevertheless, in an effort to offer guidance concerning what may be a misinterpretation of the Freedom of Information Law, I offer the following comments.

By way of brief background, the focus of your request involved a record that was initially withheld based on its characterization as a "draft" and a "non-final, intra-agency working document." In granting access, the Superintendent wrote that his decision to do so "is not based on the conclusion that the District could not withhold the document....Rather, it is my belief that the draft will not be significantly revised at this point and therefore, is appropriate for release."

In this regard, first, that a document is characterized as a draft, non-final or preliminary is not determinative of rights of access, for the Freedom of Information Law is applicable to all agency records. 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, once information exists in some physical form, i.e., a draft, it constitutes a "record" subject to rights conferred by the Freedom of Information Law.

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

Although a draft report might be characterized as "intra-agency material" that falls within the scope of §87(2)(g), an analysis of that provision and its judicial interpretation indicates that the contents of intra-agency materials determine the extent to which they may be withheld. Section 87 (2)(g) permits an agency to withhold records that:

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

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

I point out that one of the contentions offered by the New York City Police Department in a case decided by the Court of Appeals was that certain reports could be withheld because they are not final and because they relate to incidents for which no final determination had been made. The Court rejected that finding and stated that:

> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][iii)]. However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or

> factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)..." [Gould et al. v. New York City Police Department, 87 NY2d 267, 276 (1996)].

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

The Court also dealt with the issue of what constitutes statistical or 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, even though the document might be a draft, non-final or preliminary, I believe that it would be available insofar as it consists of statistical or factual information, unless a basis for denial other than §87(2)(g) could properly be asserted.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: David Paciencia
Karen Oliver

STATE OF NEW YORK
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April 2, 2001

Ms. Kathryn P. White
[redacted]

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

Dear Ms. White:

I have received your letter of February 28 in which you asked whether a denial of your request for a letter sent by the Department of Audit and Control to the Village of Valatie was proper.

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

While I am unfamiliar with the letter in question, I believe that it would fall within the coverage of the provision cited by the Village, §87(2)(g). Nevertheless, I point out that that provision, due to its structure, often requires substantial disclosure.

Specifically, §87(2)(g) permits an agency to withhold records that:

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

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

determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees
Hon. Nancy Bryant

STATE OF NEW YORK
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April 2, 2001

Mr. Charles Barone, Jr.
[redacted]

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

Dear Mr. Baron:

I have received your letter of February 26 and the correspondence relating to it. You wrote that you "do not understand why" you must request a record in writing that is not "private or privileged." The matter involves a request to "view the payroll records of the Lackawanna Municipal Housing Authority."

In this regard, first, 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."

Because the language quoted above includes reference to public authorities, the Lackawanna Municipal Housing Authority is in my view subject to and required to comply with the Freedom of Information Law.

Second, an agency may choose to honor an oral request. However, pursuant to §89 (3) of the Freedom of Information Law, an agency may require that a request be made in writing.

Lastly, one of the few instances in which the Freedom of Information Law requires that an agency prepare a particular record involves payroll information. Specifically, §87 (3)(b) states that "Each agency shall maintain...a record setting forth the name, public office address, title and salary of every officer or employee of the agency." If the payroll record is indeed the record sought, I believe that the Authority is required to maintain and make available such a record.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Executive Director, Lackawanna Municipal Housing Authority

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1216

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

April 2, 2001

Mr. Joseph Wilson Plater
95-B-2336
Cayuga Correctional Facility
P.O. Box 1186
Moravia, NY 13118

Dear Mr. Plater:

I have received your letter in which you appealed a denial of access to records by Cortland Memorial Hospital. The request involves records indicating the admittance and discharge times of certain individuals.

In this regard, first, the Committee on Open Government is not empowered to determine appeals or otherwise compel an agency to grant or deny access to records. The provision dealing with the right to appeal, §89(4)(a) of the Freedom of Information Law, states in relevant part that:

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

Second, it is questionable whether Cortland Memorial Hospital 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, the Freedom of Information Law is generally applicable to entities of state and local government. If the hospital in question is private, the Freedom of Information Law would not apply.

Lastly, whether or not the hospital is subject to the Freedom of Information Law, I believe that the records sought would be beyond the scope of public rights of access. The records at issue would, in my view, be exempt from disclosure to the public pursuant to §18 of the Public Health Law. Further, even if the Freedom of Information Law applies, §89(2)(b) would permit the hospital to deny access on the ground that disclosure would constitute "an unwarranted invasion of personal privacy."

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3291
FOIL-AO-12617

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

April 2, 2001

Mr. James C. Bugenhagen
[redacted]

The staff of the Committee on Open 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 February 20 in which you sought assistance relative to requests for records of the Town of Royalton.

In this regard, first, since you referred to minutes of Town Board meetings, I note that §106 of the Open Meetings Law deals with the contents of minutes and the time within which they must be prepared. 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."

In view of the foregoing, it is clear that minutes of open meetings must be prepared and made available "within two weeks of the date of such meeting."

I note that there is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. Nevertheless, as a matter of practice or policy, many public bodies approve minutes of their meetings. In the event that minutes have not been approved, to comply with the Open Meetings Law, it has consistently been advised that minutes be prepared and made available within two weeks, and that if the minutes have not been approved, they may be marked "unapproved", "draft" or "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, with respect to requests for records generally, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Carol Genet, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1268

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

April 2, 2001

Ms. Joann Barthel
[redacted]

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. Barthel:

I have received your letters of February 26 and March 19, as well as a variety of related materials. They deal with difficulties that you have encountered in your attempts to gain access to records of the Town of Greenburgh.

Based on a review of the correspondence, I offer the following comments.

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

Since you asked in your request for "a list of any refused documents", I point out that an agency may but is not required to prepare such a list. However, an agency must indicate the reason for denial in its initial response to a request (see regulations promulgated by the Committee on Open Government, 21 NYCRR Part 1401), and again, if an appeal is denied, it must "fully explain" in writing the reasons for further denial.

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

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

Third, the Freedom of Information Law does not require that an agency provide " a certified stamped, embossed or sealed" copy of a record. However, pursuant to §89 (3), an agency must, on request, certify that a copy of a record that it made is a true copy.

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

Insofar as the kinds of records that you requested emanate from outside the Town or other government agency, i.e., survey or similar records, I believe that they would be available. In short, in that circumstance, it is doubtful that any of the grounds for denial would be pertinent.

With respect to an inspector's reports notes and similar documents, §87 (2)(g) is relevant to an analysis of rights of access. Although that provision potentially serves as a basis for denial of

access, due to its structure, it often requires substantial disclosure. 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.

Insofar as an inspector's reports or notes consist of factual information, they would be accessible under §87 (2)(g)(i). Further, a summons or other record reflective of a violation or failure to comply with law would, in my view, constitute a final agency determination that must be disclosed.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Alfreda Williams, Records Access Officer
Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1269

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

April 3, 2001

Ms. Elaine Austin
[redacted]

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

Dear Ms. Austin:

As you are aware, I have received your letter of February 26 in which you sought a "reconsideration" of a "denial" of your request by the State Insurance Department for records relating to a settlement of a case in which you were involved more than twenty years ago.

In order to learn more of the matter, I contacted the Department on your behalf and was informed that it does not maintain the records in which you are interested, and that the kinds of records that you requested do not ordinarily come into the possession of the Department. Since the Freedom of Information Law pertains to maintained by an agency, and since the Department does not maintain the records sought, the Freedom of Information Law does not apply. Further, from my perspective, an agency may deny access to records only when records are within its custody and control. In this instance, I do not believe that your request involves a denial of access to records; again, the Department simply does not maintain the records of your interest.

Based on my conversation with an attorney for the Department, it is my understanding that you believe that there may be a transcript of the proceeding that led to a settlement. If that is so, and if the transcript or other records relating to the litigation are maintained by a court, I believe that any such records would be available. While the Freedom of Information Law does not apply to the courts or court records, other statutes generally grant access to those records (see e.g., Judiciary Law, §255). If you believe that the court in which the proceeding was conducted may possess records of your interest, it is suggested that a request be made to the clerk of the court, citing an applicable provision of law as the basis for the request. I note, too, that transcripts of judicial proceedings might not be prepared unless they are needed in an appeal. As such, it is possible and perhaps likely that no transcript was prepared.

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-12620

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

April 4, 2001

Richard W. Waldron, Chairman
Town of Deerfield Planning Board
6329 Walker Road
Deerfield, NY 13502-7019

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

Dear Chairman Waldron:

I have received your letter of February 27. You indicated that the Town of Deerfield's zoning ordinance includes provisions regulating the parking and storage of vehicles, and that in the event of a possible violation, the code enforcement officer needs to obtain information concerning the ownership of the vehicle, registration, inspection and insurance status. You asked whether that officer "may have access to such DMV's records" in the performance of his duties.

In this regard, although the Freedom of Information Law generally governs rights of access to agency records in New York, in this instance, I believe that a federal law, the Drivers Privacy Protection Act (18 USC §2721) is the governing statute. In brief, the Act is applicable to all state departments of motor vehicles in the United States, and it limits the authority of those agencies to disclose personal information contained in license records. Pertinent to your question is subdivision (b)(1), which authorizes disclosure:

> "For use by any government agency, including any court or law enforcement agency, in carrying out its functions, or any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions."

Based on the foregoing, it appears that the code enforcement officer for a town seeking the records in question in the performance of his or her official duties may ordinarily obtain those records from the Department of Motor Vehicles. If a licensee has asked that his or her license record be shielded from disclosure, a subpoena may be needed to obtain the record.

If there are questions relating to the foregoing or if there is a need to request records, the Department of Motor Vehicles may be contacted at (518)473-5595 or 1-800-225-5368.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12621

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

April 9, 2001

Mr. Jeffrey Shankman
J.M.J. Associates, Inc.
P.O. Box 338
New York, NY 10163

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

Dear Mr. Shankman:

I have received your note in which you sought advice concerning rights of access to recommendations offered by a hearing officer to the Public Service Commission. The recommendations involve an analysis of a settlement agreement between New York Telephone and thirty-five information service providers.

In this regard, I am unaware of the extent which the transcript of the Commission's meeting essentially involved a disclosure of the recommendations. To the extent that the public discussion of the matter resulted in a disclosure of the written analysis, I believe that those portions of the analysis must be disclosed. It appears, however, that the remainder could be withheld.

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

Pertinent to the issue is §87(2)(g), which enables an agency, such as the Public Service Commission (or the Department of Public Service) to withhold records that:

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

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

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

Also potentially relevant is §87(2)(a) concerning records that "are specifically exempted from disclosure by state or federal statute." Two such statutes likely would exempt the recommendations from disclosure. Section 3101(c) of the Civil Practice Law and Rules (CPLR) exempts the work product of an attorney from disclosure; similarly, §4503 of the CPLR serves as the codification of the attorney-client privilege. Unless the privilege has been waived or attorney work product has been disclosed to a third party, I believe that the record at issue may be withheld under those statutes.

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: Steve Blow
Janet Deixler

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12622

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

April 13, 2001

Mrs. Theresa Denny
[redacted]

Dear Mrs. Denny:

As you are aware, Senator William J. Larkin has forwarded correspondence to this office concerning your efforts in obtaining certain records from the Newburgh Society for the Prevention of Cruelty to Animals (NSPCA). The Committee on Open Government, a unit of the Department of State, is authorized to provide advice and opinions pertaining to the New York Freedom of Information Law.

While I do not believe that the Freedom of Information Law is directly applicable, in an effort to assist you, I offer the following comments and suggestions.

First, 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 applies to entities of state and local government; it would not apply to a private or not-for-profit corporation, such as the NSPCA.

Second, however, when a private entity has a relationship with a government agency, the records maintained by the agency that relate to that private entity fall within the coverage of the Freedom of Information Law. That law deals with all agency records, and §86(4) defines the term "record" expansively to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations,

including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

If, for example, the NSPCA contracts with or performs services for the City or Town of Newburgh or perhaps Orange County, any records maintained by the City, the Town or the County concerning any such contract or service would be subject to rights of access conferred by the Freedom of Information Law. In that event, even though the NSPCA would not fall within the scope of that law, government agency records pertaining to NSPCA clearly would fall within its coverage and could be requested from an agency.

Lastly, I believe that copies of the records to which you referred would be maintained by the Internal Revenue Service (IRS). As a federal agency, the IRS is subject to the federal Freedom of Information Act. Consequently, you may seek records from that agency under the federal Act by writing to Thomas Marusin, Director, Freedom of Information, Office of Disclosure, 1111 Constitution Avenue, NW, Washington, DC 20224. You might also want to notify the IRS concerning the absence of a response to your requests by the NSPCA.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. William J. Larkin, Jr.

From: Robert Freeman
To: Internet[redacted]
Date: 4/13/01 11:34AM
Subject: Dear Mr./Ms. Butler:

Dear Mr./Ms. Butler:

I have received your letter in which you raised questions concerning your right to obtain records from an OTB under the Freedom of Information Law.

In this regard, OTB's are public corporations and, therefore, are agencies required to comply with the Freedom of Information Law. I note, too, that one of the few instances in which an agency is required to prepare a record involves payroll information. Section 87(3)(b) of the Law specifies that each agency "shall maintain....a record setting forth the name, public office address, title and salary of every officer or employee of the agency..." As such, a record indicating names and salaries of OTB employees must be maintained and made available.

Records identifying paid consultants retained by OTB would also be accessible. However, since there may be no "list" of consultants, it is suggested that you seek "records" that identify the consultants.

I point out that our website includes a variety of information, including "Your Right to Know" (under "publications"), which summarizes the Freedom of Information Law and contains a sample letter of request.

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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Website - www.dos.state.ny.us/coog/coogwww.html

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12624

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

April 16, 2001

Mr. Geoffrey K. Resnick
Private Investigator/Independent Adjuster
144 Village Landing #298
Fairport, NY 14450

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

Dear Mr. Resnick:

I have received your letter of March 1, as well as the materials attached to it. You have sought a "determination" relating to a denial of access to records by the City of Geneva. You sought a "list of police calls for service to B-19 Courtyard Apartments and copies of corresponding reports from January 01, 1999 to January 30, 2000." The City denied access on the ground that the records were compiled for law enforcement purposes, and disclosure "would interfere with law enforcement investigations or judicial proceedings."

In this regard, it is emphasized at the outset that the Committee on Open Government is not empowered to a render a determination that is binding or otherwise compel an agency to grant or deny access. The Committee is, however, authorized to offer advisory opinions, and I offer the following comments.

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

The Court of Appeals 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 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.).

It appears that the records of police calls may be analogous to police blotter entries. 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.

If a police blotter, incident reports or other associated 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. 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 (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.

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), the provision cited by the City, which permits an agency to withhold records that:

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

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

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

In sum, I believe that the City is obliged to review the records sought in their entirety 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: Margaret A. Cass
A. Clark Cannon

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

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April 16, 2001

Mr. Michael Kampany
[redacted]

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

Dear Mr. Kampany:

I have received your letter of March 8. You contend that the Village of Carthage has "stonewalled" your efforts to gain access to records and that the Village Clerk informed you that there is no "time frame" within which the Village must respond to requests.

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

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

Based on the foregoing, an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date indicating when it can be anticipated that a request will be granted or denied. The acknowledgement by the records access officer did not make reference to such a date.

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

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

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees
Linda M. Weir, Clerk/Treasurer

STATE OF NEW YORK
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April 16, 2001

Ms. Marilyn McDougall
[redacted]

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

Dear Ms. McDougall:

I have received your note of March 5 and the materials attached to it. You referred to efforts by the Perry Central School District to "thwart" your ability to gain access to information. Having reviewed the materials, I offer the following comments.

First, it is emphasized that the Freedom of Information Law pertains to existing records, and that §89(3) of that statute states in part that an agency is not required to create a record in response to a request for information. Similarly, while agency officials may choose to supply information by answering questions, there is no obligation to do so imposed by the Freedom of Information Law. For instance, if there is no record specifying "the number of students on psychotropic medications", the District would not be required to prepare a record containing a total on your behalf. Rather than seeking a total or asking questions, it is suggested that you seek records. For example, you might request records that include the District's protocol or policy concerning referring children for medication, or its procedure for referring children on medication.

Second, when the Freedom of Information Law was initially enacted, an applicant was required to seek "identifiable" records. Since 1978, however, §89(3) has merely required that an applicant "reasonably describe" the records sought. Therefore, a request must include sufficient detail to enable agency staff to locate and identify the records sought.

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

I am unaware of the relationship between the District and the entity cited as "Christa." It appears that Christa is a construction contractor hired by the District. If that is so, I do not believe that the correspondence between the District and Christa could be characterized as "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, an "agency" is, in general, an entity of state or local government. If Christa is a contractor, it would not be an agency, and the communications between the District and Christa would not fall within §87(2)(g), the exception pertaining to "inter-agency or intra-agency materials."

When §87(2)(g) is applicable, although it 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.

If a private person or entity is retained by an agency as a consultant, it has been held that the consultant acts essentially as an extension of the agency, that the records prepared by the consultant for the agency should be treated as if they were prepared by agency staff, and that, therefore, such records would constitute "intra-agency materials." In a discussion of the issue of records prepared by consultants for agencies, the Court of Appeals, the State's highest court, stated that:

> "Opinions and recommendations prepared by agency personnel may be exempt from disclosure under FOIL as 'predecisional materials, prepared to assist an agency decision maker***in arriving at his decision' (McAulay v. Board of Educ., 61 AD 2d 1048, aff'd 48 NY 2d 659). Such material is exempt 'to protect the deliberative process of government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers (Matter of Sea Crest Const. Corp. v. Stubing, 82 AD 2d 546, 549).

> "In connection with their deliberative process, agencies may at times require opinions and recommendations from outside consultants. It would make little sense to protect the deliberative process when such reports are prepared by agency employees yet deny this protection when reports are prepared for the same purpose by outside consultants retained by agencies. Accordingly, we hold that records may be considered 'intra-agency material' even though prepared by an outside consultant at the behest of an agency as part of the agency's deliberative process (see, Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD 2d 546, 549, supra; Matter of 124 Ferry St. Realty Corp. v. Hennessy, 82 AD 2d 981, 983)" [Xerox Corporation v. Town of Webster, 65 NY 2d 131, 132-133 (1985)].

Based upon the foregoing, records prepared by a consultant for an agency may be withheld or must be disclosed based upon the same standards as in cases in which records are prepared by the staff of an agency. It is emphasized that the Court in Xerox specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

> "While the reports in principle may be exempt from disclosure, on this record - which contains only the barest description of them - we cannot determine whether the documents in fact fall wholly within the scope of FOIL's exemption for 'intra-agency materials,' as claimed by respondents. To the extent the reports contain 'statistical or factual tabulations or data' (Public Officers Law section 87[2][g][i], or other material subject to production, they should be redacted and made available to the appellant" (id. at 133).

Therefore, a record prepared by a consultant for an agency would be accessible or deniable, in whole or in part, depending on its contents.

Next, I note that in a recent case that reached the Court of Appeals, one of the contentions was that certain reports could be withheld because they were not final and because they related to incidents for which no final determination had been made. The Court rejected that finding and stated that:

> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or

> not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)..." [Gould et al. v. New York City Police Department, 87 NY2d 267, 276 (1996)].

In short, that the records are "draft" or "non-final" would not represent an end of an analysis of rights of access or an agency's obligation to review the entirety of their contents to determine rights of access..

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

> "...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][i]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182).
>
> "Against this backdrop, we conclude that the complaint follow-up reports contain substantial factual information available pursuant to the provisions of FOIL. Sections of the report are devoted to such purely factual data as: the names, addresses, and physical descriptions of crime victims, witnesses, and perpetrators; a checklist that indicates whether the victims and witnesses have been interviewed and shown photos, whether crime scenes have been photographed and dusted for fingerprints, and whether neighborhood residents have been canvassed for information; and a blank space denominated 'details' in which the officer records the particulars of any action taken in connection with the investigation" (id., 276-277)."

In sum, if Christa is not a consultant, I do not believe that the exception concerning "intra-agency" materials would be applicable as a basis for a denial of access. Even if it is a consultant,

those portions of the records consisting of statistical or factual information, whether final or otherwise, would, in my view, be available.

Lastly, since you inquired as to "penalties" that might be imposed under the Freedom of Information Law, the only penalty *per se* would involve the situation in which a lawsuit challenging an agency's denial of access to records is initiated. If certain conditions are met, the court may award attorneys' fees payable to the applicant for records by the agency.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Eileen McAvoy, Superintendent
Michelle Widdel, School Business Administrator

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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April 16, 2001

Mr. Roland Ivers
[redacted]

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. Ivers:

I have received your letter of March 7. Having requested records under the Freedom of Information Law from a unit of local government, you were informed that "the government official was deferring an answer to a third party." You later returned mail sent to you from "an unknown source" to the sender and asked the local government that its response be made on its "official government stationary." You have asked whether "the public [has] the right to receive FOIL request information on official government stationary including envelope regardless of who responds to the Request."

In this regard, there is nothing in the Freedom of Information Law that requires that a response be made on an agency's official stationery or sent in its printed envelope. Further, there are many instances in which responses to requests are made on behalf of agencies on stationery other than that printed by or for the agency and sent in envelopes that do not bear the agency's name or address. For instance, responses to requests are frequently made by agencies' attorneys, who may respond from private offices that are located separate and apart from agencies' offices. Similarly, in some instances, records are prepared and maintained by a consultant retained by an agency. In that circumstance, the agency may direct the consultant to respond to a request from the consultant's workplace.

I note that the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) require that each agency (i.e., each unit of government) designate one or more persons as "records access officer." The records access officer has the duty of coordinating the agency's response to requests. The person so designated often responds directly to requests. However, in carrying out his or her duty to "coordinate" the agency's response to requests, the records access officer may direct a different person, such as an attorney or consultant, to respond on behalf of the agency.

In short, in my view, so long as a response to a request is properly made, there is not necessarily an obligation to do so "on official government stationery."

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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April 16, 2001

Mr. John T. D'Amore
[redacted]

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. D'Amore:

I have received your letter of March 8 and the correspondence attached to it. You indicated that you requested certain records from the attorney for the Town of Whitestown, particularly those indicating that prevailing wages had been paid on a certain project, as well as records of fees paid to attorneys and engineers in relation to the project.

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 duty of coordinating an agency's response to requests for records, and requests should ordinarily be made to that person. In most towns, the records access officer is the town clerk. While I believe that the person in receipt of your request should have responded in a manner consistent with the Freedom of Information Law or forwarded the request to the records access officer, it is suggested that you contact the town clerk, ascertain the identity of the records access officer, and resubmit the request to that person.

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

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

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

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

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

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.

Insofar as the records sought include a contractor's employees' names, addresses, social security numbers and their wages, I believe that portions of those records could properly be withheld pursuant to §87(2)(b). That provision permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy." Section 89(2)(a) authorizes an agency to delete identifying details to protect against an unwarranted invasion of personal privacy when it makes records available. In addition, §89(2)(b) includes a series of examples of unwarranted invasions of personal privacy, one of which pertains to:

> "disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintained it...[§89(2)(b)(iv)].

In my opinion, what is relevant to an agency is whether the employees are being paid in accordance with prevailing wage standards; their names, addresses and social security numbers are largely irrelevant to that issue and may in my view be deleted to protect against an unwarranted invasion of personal privacy.

It is noted that an Appellate Division decisions affirmed the findings of the Supreme Court in a case involving a situation in which a union sought home addresses of an agency's contractors' employees for the purpose of "monitoring and prosecution of prevailing wage law violations." The

court found that the employees' home addresses could be withheld, stating that the applicant's "entitlement to access does not necessarily entitle it to the reports in their entirety. Indeed portions of the report made available to petitioner should be expunged to protect (the) privacy of the employees" [Joint Industry Board of the Electrical Industry v. Nolan, Supreme Court, New York County, May 1, 1989; affirmed 159 AD 2d 241 (1990)].

In sum, while I believe that portions of the records reflective of the titles, duties, wages, hours worked and similar data must be disclosed, disclosure of personally identifiable details pertaining to a contractor's employees may in my view be deleted or redacted from the records prior to disclosure.

With respect to bills regarding payments made to engineers, I believe that those kinds of records must be disclosed, for none of the grounds for denial would apply.

With regard to payments made to or bills submitted by attorneys, pertinent is Orange County Publications v. County of Orange [637 NYS2d 596 (1995)], which involved a request for the amount of money paid in 1994 to a particular law firm for legal services rendered in representing the County in a landfill expansion suit, as well as "copies of invoices, bills, vouchers submitted to the county from the law firm justifying and itemizing the expenses for 1994" (id., 599). Although monthly bills indicating amounts charged by the firm were disclosed, the agency redacted "'the daily descriptions of the specific tasks' (the description material) 'including descriptions of issues researched, meetings and conversations between attorney and client'" (id.). The County offered several rationales for the redactions; nevertheless, the court rejected all of them, in some instances fully, in others in part.

The first contention was that the descriptive material is specifically exempted from disclosure by statute in conjunction with §87(2)(a) of the Freedom of Information Law and the assertion of the attorney-client privilege pursuant to §4503 of the Civil Practice Law and Rules (CPLR). The court found that the mere communication between the law firm and the County as its client does not necessarily involve a privileged communication; rather, the court stressed that it is the content of the communications that determine the extent to which the privilege applies. Further, the court distinguished between actual communications between attorney and client and descriptions of the legal services provided, stating that:

> "Thus, respondent's position can be sustained only if such descriptions rise to the level of protected communications.
>
> "In this regard, the Court recognizes that not all communications between attorney and client are privileged. Matter of Priest v. Hennessy, supra, 51 N.Y.2d 68, 69, 409 N.E.2d 983, 431, N.Y.S.2d 511. In particular, 'fee arrangements between attorney and client do not ordinarily constitute a confidential communication and, thus, are not privileged in the usual case' (Ibid.). Indeed, '[a] communication concerning the fee to be paid has no direct relevance to the legal advice to be given', but rather "[i]s a collateral matter which, unlike communications which relate to the subject matter of the attorney's

> professional employment, is not privileged' Matter of Priest v. Hennessy, supra, 51 N.Y.2d at 69, 409 N.E.2d 983, 431 N.Y.S.2d 511.
>
> "Consequently, while billing statements which 'are detailed in showing services, conversations, and conferences between counsel and others' are protected by the attorney-client privilege (Licensing Corporation of America v. National Hockey League Players Association, 153 Misc.2d 126, 127-128, 580 N.Y.S.2d 128 [Sup. Ct. N.Y.Co. 1992]; see, De La Roche v. De La Roche, 209 A.D.2d 157, 158-159 [1st Dept. 1994]), no such privilege attaches to fee statements which do not provide 'detailed accounts' of the legal services provided by counsel..." (id., 602).

It was also contended that the records could be withheld on the ground that they constituted attorney work product or material prepared for litigation that are exempted from disclosure by statute [see CPLR, §3101(c) and (d)]. In dealing with that claim, it was stated by the court that:

> "Respondent's denial of the FOIL request cannot be upheld unless the descriptive material is uniquely the product of the professional skills of respondent's outside counsel. The preparation and submission of a bill for fees due and owing, not at all dependent on legal expertise, education or training, cannot be 'attribute[d]...to the unique skills of an attorney' (Brandman v. Cross & Brown Co., 125 Misc.2d 185, 188 479 N.Y.S.2d 435 [Sup. Ct. Kings Ct. 1984]). Therefore, the attorney work product privilege does not serve as an absolute bar to disclosure of the descriptive material. (See, id.).
>
> "Nevertheless, depending upon how much information is set forth in the descriptive material, a limited portion of that information may be protected from disclosure, either under the work product privilege, or the privilege for materials prepared for litigation, as codified in CPLR 3101(d)...
>
> "While the Court has not been presented with any of the billing records sought, the Court understands that they may contain specific references to: legal issues researched, which bears upon the law firm's theories of the landfill action; conferences with witnesses not yet identified and interviewed by respondent's adversary in that lawsuit; and other legal services which were provided as part of counsel's representation of respondent in that ongoing legal action...Certainly, any such references to interviews, conversations or correspondence with particular individuals, prospective pleadings or motions, legal theories, or similar matters, may be protected either as

> work product or material prepared for litigation, or both" (emphasis added by the court) (id., 604).

Finally, it was contended that the records consisted of intra-agency materials that could be withheld under §87(2)(g) of the Freedom of Information Law. That provision permits an agency to withhold records that:

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

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

The court found that much of the information would likely consist of factual information available under §87(2)(g)(i) and stated that:

> "...the Court concludes that respondent has failed to establish that petitioner should be denied access to the descriptive material as a whole. While it is possible that some of the descriptive material may fall within the exempted category of expressions of opinion, respondent has failed to identify with any particularity those portions which are not subject to disclosure under Public Officers Law §87(2)(g). See, Matter of Dunlea v. Goldmark, supra, 54 A.D.2d 449, 389 N.Y.S.2d 423. Certainly, any information which merely reports an event or factual occurrence, such as a conference, telephone call, research, court appearance, or similar description of legal work, and which does not disclose opinions, recommendations or statements of legal strategy will not be barred from disclosure under this exemption. See, Ingram v. Axelrod, supra" (id., 605-606).

In short, although it was found that some aspects of the records in question might properly be withheld based on their specific contents, a blanket denial of access was clearly inconsistent with law, and substantial portions of the records were found to be accessible.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board
Town Clerk
William P. Schmitt
Daniel S. Cohen

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12629

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

April 16, 2001

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 facts presented in your correspondence.

Dear Mr. Kaskel:

I have received your letter of March 6 concerning a response to a request for records by the Center for Animal Care and Control (CACC). In short, on the copies of records that CACC has made available to you, it has stamped the copies "X VOID." You have asked whether the CACC may "alter FOIL documents as such."

In this regard, the Executive Director of the CACC wrote that all of the records sought were made available and that they are "exact copies." Therefore, I do not believe that they were "altered." She added, however, that the copies were stamped "VOID" for the purpose of preventing their unauthorized use. From my perspective, there is nothing in the Freedom of Information Law that would preclude the CACC from stamping the records as it did. However, I believe that it is obliged to provide readable copies, irrespective of the form or format in which the records are made available. If the stamp rendered certain information unreadable, the CACC should, in my view, make a second readable copy available free of charge.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt
cc: Marilyn Haggerty-Blohm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12630

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

April 17, 2001

E-MAIL

TO: John [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. Smead:

I have received your letter in which you described delays by the Town of West Seneca in responding to your requests for records made under the Freedom of Information Law.

As you have described the matter, I believe that you may consider your request to have been denied and that you may appeal to the Town Board or the Board's designee. For the purpose of offering additional background, 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..."

Based on the foregoing, an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date indicating when it can be anticipated that a request will be granted or denied. The acknowledgement by the records access officer did not make reference to such a date.

I note that there is no precise time period within which an agency must grant or deny access to records. The time needed to do so may be dependent upon the volume of a request, the possibility that other requests have been made, the necessity to conduct legal research, the search and retrieval techniques used to locate the records and the like. In short, when an agency acknowledges the receipt of a request because more than five business days may be needed to grant or deny a request, so long as it provides an approximate date indicating when the request will be granted or denied, and that date is reasonable in view of the attendant circumstances, I believe that the agency would be acting in compliance with law. Notwithstanding the foregoing, in my view, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible.*" Therefore, if records are clearly available to the public under the Freedom of Information Law, and if they are readily retrievable, there may be no basis for a lengthy delay in disclosure.

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

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

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

I hope that I have been of assistance.

RJF:tt

cc: Town Board
Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12631

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

April 17, 2001

Mr. Richard Crist
Director of Communications
Rensselaer County Legislature
1600 Seventh Avenue
Troy, NY 12180

Mr. Charles B. Smith
[redacted]

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

Dear Mr. Crist and Mr. Smith:

I have received correspondence from you relating to Mr. Smith's requests for records of March 7 and March 15. The earlier request involves the following:

> "1) Any and all correspondence and press releases issued by any elected member of the Majority Office which in any way offers criticism of Rensselaer County Executive Henry Zwack and District Attorney Kenneth Bruno concerning any of the controversies surrounding the conduct of their offices March 1 1997, to date. Such controversies include:
> A). The issues surrounding James Phillips including the allegations that county staff was utilized for private legal work.
> B). Any requests on any matter for a special prosecutor.
> C). The no show job controversy and the resulting indictments in that scandal.

> 2). Any and all memorandum, resolutions, draft resolutions, correspondence or press releases calling for the holding of legislative hearings into any of the controversies surrounding any of the aforementioned issues in Item 1."

The latter involves:

> "1) Copies of any notice of meetings, special meetings, agendas, minutes to any legislative committee meetings to discuss the VanOrt No Show Job Scandal or any related matters.
>
> 2). Copies of any correspondence on file from any member of the Majority regarding the VanOrt no show job matter."

In conjunction with the foregoing, Mr. Crist sought guidance concerning the interpretation of "some of the subjective terminology, such as 'criticism' or 'controversies', used by Mr. Smith in the request." He also referred to the breadth of the requests and the extent to which records would have to be reviewed in an effort to locate those falling within the scope of the requests. Mr. Smith received a copy of Mr. Crist's letter to me and attempted to clarify his request, for on March 15, he wrote that:

> "While it is clear to me when reading a press release or memo whether the content contains criticism of a persons actions or an event, perhaps we can remove the subjective portion of the request by simply asking you to provide 'any and all correspondence and press releases issued by any elected member of the Majority Office containing simple 'REFERENCES' to Rensselaer County Executive Henry Zwack and District Attorney Kenneth Bruno's conduct in any of the controversies surrounding their offices March 1, 1997 to date. Such controversies would include: the James Phillips controversy, the no show job scandal, the indictments, and the special prosecutor" (emphasis supplied by Mr. Smith).

Although the amended request excludes the term "criticism", for future reference, I believe that the use of that kind of term may not reasonably describe records, for it involves the making of a judgment. For instance, in discussing the matter with Mr. Crist, he described a portion of a meeting during a member of the Legislature questioned or expressed opposition to a purchase by the County Executive and asked whether reference to that kind of commentary in minutes of a meeting or other records might constitute criticism. In my view, whether that is so involves the making of a subjective judgment. While one might consider commentary of that nature to reflect criticism, another might not. In short, identifying records that indicate criticism might, in some circumstances, be problematic, and such a request may not, at least in part, reasonably describe the records.

With respect to the breadth of the requests, 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 requests, as well as the nature of an agency's filing of record-keeping system. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number.

While I am unfamiliar with the recordkeeping systems of the County Legislature, to the extent that the records sought can be located with reasonable effort, I believe that the requests would have met the requirement of reasonably describing the records. On the other hand, if the records are not maintained in a manner that permits their retrieval except by reviewing perhaps hundreds or even thousands of records individually in an effort to locate those falling within the scope of the request, to that extent, the requests would not in my opinion meet the standard reasonably describing the records.

Again, I am unaware of the manner in which the records sought are kept or filed. Mr. Crist indicated that approximately four-hundred press releases are issued annually, but that they are not filed by subject matter. They are, however, obviously available for review, and he said that Mr. Smith could do so and have copies of those of interest. More difficult in all likelihood would be locating "correspondence" that falls within the scope of the request. Unless it is kept or filed in a manner that enables staff locate the materials of Mr. Smith's interest with reasonable effort, it does not appear that that aspect of the request would meet the standard imposed by the law.

Second, while press releases and minutes of open meetings are clearly public, other records sought might be withheld. Assuming that a request has reasonably described the records and that

the records have been found, pertinent, particularly with respect to correspondence, is §87(2)(g). 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;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

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

If, for instance, a member of the Legislature in an item of correspondence offered an opinion regarding a controversy, that portion of the correspondence could in my view be withheld.

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12632

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April 18, 2001

Ms. Frances Genovese
Association of Southampton Neighborhoods
P.O. Box 724
Southampton, NY 11969

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

Dear Ms. Genovese:

I have received your letter of March 5 in which you complained with respect to your efforts in gaining access to records of the Town of Southampton. Based on your comments, I offer the following remarks.

First, as you may be aware, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) require that each agency, i.e., the Town, 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. In most towns, the records access officer is the town clerk.

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.

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

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

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

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

Since you referred to the deletion of information in letters of complaint, I point out that §87(2)(b) permits an agency to deny access to records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." 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 public 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 a public employee and that person is accused of misconduct, I believe that his or her privacy may merit protection as well. In that situation, if 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.

Lastly, the Freedom of Information Law does not deal with the manner in which records are filed or maintained. From my perspective, agencies typically maintain records in a manner that is designed to enable them to carry out their duties most effectively. Similarly, the posting of news articles that may be "favorable" to officials is, in my view, neither unusual nor the subject of any provision of law or prohibition of which I am aware.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Vincent J. Cannuscio, Supervisor

From: Robert Freeman
To: Internet:[redacted]
Date: 4/20/01 8:52AM
Subject: Dear Ken:

Dear Ken:

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" [section 87(3)(b)]. However, section 89(7) states that the Freedom of Information Law does not require the disclosure of the home addresses of present or former public employees. Further, it was held in 1977 by Supreme Court, Nassau County, that portions of a payroll record indicating union membership could be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" (Matter of Wool, New York Law Journal, November 22, 1977).

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

FOIL-AO-12634

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

April 20, 2001

Mr. Charles N. Bonura
U.S. Realty, LLC
P.O. Box 60471
Rochester, NY 14606

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

Dear Mr. Bonura:

I have received your letter of March 10 and the materials attached to it. You have sought guidance concerning your unsuccessful efforts in obtaining records, particularly "approved Request for Lease Approvals", maintained by the Rochester Housing Authority. Based on a review of the correspondence, I offer the following comments.

First, the responses to your requests repeatedly refer to the federal Freedom of Information Act (5 USC §552). In my view, since that statute applies only to records of federal agencies, it is inapplicable in the context of your requests. I note, too, that it has been held that municipal housing authorities in this state are subject to the New York Freedom of Information Law. By way of background, that statute applies to agency records and that §86(3) of the Law defines the term "agency" to include:

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

Section 3(2) of the Public Housing Law states that municipal housing authorities are public corporations. Since the definition of "agency" includes public corporations, I believe that a public housing authority is clearly an "agency" required to comply with the Freedom of Information Law, and it has been so held [Westchester Rockland Newspapers, Inc. v. Fischer, 101 AD 2d 840 (1985)].

Second, in an initial response to your request, you were informed the Authority is not required to disclose "because there is no good faith reason why you need them." In this regard, when records are accessible under the Freedom of Information Law, it has been held that they should be made equally available to any person, regardless of one's status, interest or the intended use of the records [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Moreover, the Court of Appeals, the State's highest court, has held that:

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

Farbman pertained to a situation in which a person involved in litigation against an agency requested records from that agency under the Freedom of Information Law. In brief, it was found that one's status as a litigant had no effect upon that person's right as a member of the public when using the Freedom of Information Law, irrespective of the intended use of the records. Similarly, unless there is a basis for withholding records in accordance with the grounds for denial appearing in §87(2), the use of the records, including the potential for commercial use or the status of the applicant, is in my opinion irrelevant.

Third, one of the contentions offered by the attorney for the Authority is that your request did not "reasonably describe" the records sought as required by §89(3). Here 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 Authority, to extent that the records sought can be located with reasonable effort, irrespective of the volume of the materials, 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.

Next, 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.

I note that there is a decision, Tri-State Publishing, Co. v. City of Port Jervis (Supreme Court, Orange County, March 4, 1992), which in my view, serves as precedent. The decision includes excerpts from an advisory opinion that I prepared in 1991, and I believe that the court essentially agreed with the thrust of that opinion. Because tenants in section 8 housing must meet an income qualification, it has been consistently advised that insofar as disclosure of records would identify tenants, they may be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)]. Conversely, following the deletion of identifying details pertaining to tenants, the remainder of the records, i.e., those portions indicating identities of landlords, contractors and the amounts that are paid, must be disclosed.

There was concern with respect to what the court characterized as a "hybrid situation" in which "a landlord owns one or more multiple dwellings where less than all units in each building are Section 8 units." The court determined that in that kind of situation, "it may reasonably be said that a subsidized tenant's identity would not be readily ascertainable." Based upon that finding, the court determined that the names of landlords and the addresses of multiple dwellings, as well as related information must be disclosed. The court stated 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.

In my opinion, the identity of a landlord must be disclosed, for payments are made by governmental entities to the landlord. Consequently, I believe that the records sought, if I correctly understand their content, must be disclosed.

Lastly, it does not appear that you were informed of the right to appeal the denial of your request. The provision dealing with the right to appeal a denial of access to records is found in §89(4)(a) of the Freedom of Information Law, which states in relevant part that:

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

> the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

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

> "(a) The governing body of a public corporation or the head, chief executive or governing body of other agencies shall hear appeals or shall designate a person or body to hear appeals regarding denial of access to records under the Freedom of Information Law.
>
> (b) Denial of access shall be in writing stating the reason therefor and advising the person denied access of his or her right to appeal to the person or body established to hear appeals, and that person or body shall be identified by name, title, business address and business telephone number. The records access officer shall not be the appeals officer" (section 1401.7).

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Jude McMillan
Elaine Pragle
Leonard A. Rosner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12635

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

April 25, 2001

Mr. Tom Grace
[redacted]

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

Dear Mr. Grace:

I have received your letter in which you raised a question relating to the coverage of the New York Freedom of Information Law.

Attached to your letter is a copy of a request made to the Village of New Berlin that is "meant to show that the Village ...complied with federal laws protecting property rights and is a form that must be filed to obtain federal funds for a flood control project." You added that it "was filled out at the request of , and sent to, the USDA Natural Resources Conservation Service." Your question is whether the document in question is subject to the Freedom of Information Law.

In this regard, first the Freedom of Information Law pertains to all records of an agency, such as a village, and §86 (4) defines the term "record" expansively to mean:

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

Based on the foregoing, assuming that a copy of the document signed by the Mayor is kept by or for the Village, the document would constitute a "record" that falls within the coverage of the Freedom of Information Law.

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

the Law. As I understand the nature of the record sought, a communication between the Village and the federal agency, it appears that it should be disclosed, for none of the grounds for denial would be applicable.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12636

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

April 25, 2001

Mr. Walter Kowsh, Jr.
Cedar Grove Civic Homeowners Association, Inc.
64-08 136th Street
Flushing, NY 11367

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

Dear Mr. Kowsh:

I have received your letter of March 19 and the correspondence attached to it. The correspondence consists of information given to a member of the New York City Council by the President of the School Construction Authority that you also sought. Since the President provided the information to a public official "while ignoring" your request for the same information, you asked that I "make a finding as to whether" the Authority and its President "are in violation" of the "Freedom of Information Law."

In this regard, first, it is emphasized at the outset that the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. It is not empowered to render a binding determination or compel an agency to grant or deny access.

Second, you did not enclose a copy of your request, and its nature is not completely clear. It is noted, however, that the response to the Councilmember did not include records; rather it offered information. Here I point out that the title of the Freedom of Information Law may be somewhat misleading, for it is not a statute that requires the disclosure of information per se; it deals with agency records. Further, §89(3) states in relevant part that an agency is not required to create a record in response to a request for information. Therefore, while agency officials may supply information in response to questions or offer explanations concerning their activities, they are not required to do so to comply with the Freedom of Information Law. That statute, in short, deals with an agency's obligation to respond to requests for existing records and to disclose those records to the extent required by law. Again, it is unclear whether you requested information or records.

Third, when a request is made for records, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

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

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

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

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: Dr. Milo Riverso

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1263?

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

April 25, 2001

Mr. Harvey M. Elentuck
[redacted]

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

Dear Mr. Elentuck:

I have received your letter of March 20 in which you raised questions relating to the payroll record described in §89(3)(b) of the Freedom of Information Law. As you are aware, that provision requires that each agency "shall maintain...a record setting forth the name, public office address, title and salary of every officer or employee of the agency."

In my view, since the law requires that such a record be "maintained", it must be kept on an ongoing basis. That being so, I do not believe that an agency could justify any substantial delay in disclosure following the receipt of a request. I would conjecture that an agency's payroll list is updated on a regular basis, perhaps with each payroll period, monthly or perhaps quarterly. From my perspective, to comply with the law, the record in question should be as current as is feasible.

You also asked whether the payroll record must include full names, or whether first and middle initials would suffice, whether the public office address is the Board's main address or an employee's work location, and whether salaries should reflect "contractual rates only", or whether salary includes overtime, bonuses and the like.

With respect to the name, in my opinion, first and last names would be adequate to comply with law; middle names or initials would not, in my view, have to included. With regard to the public office address, it has been suggested that the address where an employee can receive mail is likely most appropriate. In some instances, mail is not delivered to a work location. Lastly, "salary" in my opinion, is the contractual rate; it does not include overtime or bonuses, for example.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2638

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

April 25, 2001

Ms. Lynn A. Emmerling
[redacted]

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

Dear Ms. Emmerling:

I have received your letter of March 22 in which you sought a "determination" concerning the propriety of a denial of access to records by the Town of Richmond. The records requested include:

> "1) All correspondence from the Town of Richmond, including the Town of Richmond Board, Town Supervisor and Code Enforcement Department generated and sent to Attorney Richard Mayberry or anyone practicing in his firm regarding Mr. or Mrs. Emmerling, or property located at 8833 (54) Sandy Bottom Road, Honeoye, NY.
>
> "2) All correspondence from Attorney Richard Mayberry or anyone practicing in his firm and directed to the Town of Richmond Board, Town Supervisor and Code Enforcement Department regarding Mr. or Mrs. Emmerling, or property located at 8833 (54) Sandy Bottom Road, Honeoye, NY."

In response to the request, the Town's attorney wrote to the Town Clerk and advised that:

> "Attorney's work product and trial preparation material are exempt pursuant to Civil Practice Law & Rules Section 3101(b)(c) and (d), and Public Officers Law Section 87. In this instance, the attorney-client privilege and the work product rule cover my correspondence and reports to my client (Town and staff and responses) and correspondence/reports compiled by our people at my request and for my use."

In this regard, it is emphasized that the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee is not empowered to render a binding determination or otherwise compel an agency to grant or deny access to records. As such, the ensuing comments should be considered advisory in nature.

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

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

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

Second, as general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. The first ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." From my perspective, although §3101(c) and (d) of the CPLR authorize confidentiality regarding, respectively, the work product of an attorney and material prepared for litigation, those kinds of records remain confidential in my opinion only so long as they are not disclosed to an adversary or a filed with a court, for example. I do not believe that materials

that are served upon or shared with an adversary could be characterized as confidential or exempt from disclosure.

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

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

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

In my view, insofar as the records in question have been communicated between the Town and its adversary or have been filed with a court, any claim of privilege or its equivalent would be effectively waived. Once records in the nature of attorney work product or material prepared for litigation are transmitted to an adversary, i.e., from the Town to its adversary and *vice versa*, I believe that the capacity to claim exemptions from disclosure under §3101(c) or (d) of the CPLR or, therefore, §87(2)(a) of the Freedom of Information Law, ends. Conversely, however, if the records have not been disclosed to a person other than a client or clients, it appears that the assertion of the privilege would be proper.

It is also noted that it has been determined judicially that if records are prepared for multiple purposes, one of which includes eventual use in litigation, §3101(d) does not serve as a basis for withholding records; only when records are prepared solely for litigation can §3101(d) be properly asserted to deny access to records [see e.g., Westchester-Rockland Newspapers v. Mosczydlowski, 58 AD 2d 234 (1977)].

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Hon. Mary K. Luther
Richard S. Mayberry

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12639

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

April 25, 2001

Mr. Richard W. Waldron
The Town of Deerfield Planning Board
6329 Walker Road
Deerfield, NY 13502-7019

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. Waldron:

I have received your letter of March 15. In your capacity as Chairman of the Town of Deerfield Planning Board, you wrote that:

> "There are provisions in our Zoning Ordinance regulating parking and storage of motor vehicles both seasonal and junk. To determine what action is appropriate in the case of a suspected violation, the Codes Enforcement Officer needs to know the vehicle owner, it's registration, inspection and insurance status."

You added that:

> "Calls to the DMV Vehicle Safety Unit, FOIL check, (518) 473-0967, on March 9, 2001 were a study in frustration. After wandering through many optional recorded messages, I was left with the Catch 22 situation in which information could be obtained only upon written application but no mailing address."

You have sought assistance in the matter, and in this regard, I offer the following comments.

First, although the New York Freedom of Information Law generally determines rights of access to records maintained by entities of state and local government in New York, in this instance, a federal statute, the Drivers' Privacy Protection Act (18 U.S.C. §2721 et seq.), offers guidance. The provisions of the Act relevant to the matter state that:

> "(a) In General. - Except as provided in subsection (b), a State department of motor vehicles, and any officer, employee, or contractor, thereof, shall not knowingly disclose or otherwise make available to any person or entity personal information about any individual obtained by the department in connection with a motor vehicle record.
>
> (b) Permissible Uses. - Personal information referred to in subsection (a) shall be disclosed for use in connection with matters of motor vehicle or drive safety and theft, motor vehicle emissions, motor vehicle product alterations, recalls, or advisories, performance monitoring of motor vehicles and dealers by motor vehicle manufacturers, and removal of non-owner records from the original owner records of motor vehicle manufacturers to carry out the purposes of titles I and IV of the Anti Car Theft Act of 1992, the Automobile Information Disclosure Act (15 U.S.C. 1231 et seq.), the Clean Air Act (42 U.S.C. 7401 et seq.), and chapters 301, 305, and 321-331of title 49, and may be disclosed as follows:
>
> > (1) For use by any government agency, including any court or law enforcement agency, in carrying out is functions, or any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions...
> >
> > (4) For use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgements and orders, or pursuant to an order of a Federal, State, or local court..."

Since the Town would be seeking records from the Department of Motor Vehicles in carrying out its official governmental functions, I believe that the records sought should be made available to you.

To obtain information concerning the procedure for seeking the records and the fees that may be charged by the Department of Motor Vehicles, it is suggested that you contact the Department's records access officer, Ms. Alexandra Sussman. Ms. Sussman can be reached at (518) 474-0875.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Alexandra Sussman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12640

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

April 25, 2001

Mr. Monty Campbell
Vice President
Montco Construction Company, Inc.
197 Buffalo Street
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. Campbell:

I have received your letter of March 15 and the materials attached to it.

According to the materials, you requested from the Department of Public Works of the City of Buffalo:

> "1). Pencil copies of all invoices submitted to Trautman Associates for payment for each contractor.
>
> 2). Each contractors respective Testing Agency and copies of all their load tickets and test reports."

In addition, you requested copies of certain "minority status reports/EEO and certified payrolls." In response to the request, you were informed that "due to impending litigation, all requests for information...should be forwarded through your attorney."

It is your view that you have "been denied [y]our constitutional rights under the Freedom of Information Law" and inquired "as to [y]our next step in obtaining the requested information." From my perspective, although the Freedom of Information Law involves statutory rather than constitutional rights, the City is required to respond to your requests, notwithstanding the pendency of litigation. In this regard, I offer the following comments.

The possibility that the records sought might be pertinent to or used in litigation is, in my view, largely irrelevant. As stated by the Court of Appeals, the State's highest court, in a case

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

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

Based upon the foregoing, the pendency of litigation would not, in my opinion, affect either the rights of the public or a litigant under the Freedom of Information Law. Further, it appears that the records sought were prepared in the ordinary course of business. If that is so, again, the pendency of litigation would not, in my view, affect your right to seek or obtain the records 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.

If my understanding of the matter is accurate, the invoices that you requested must be disclosed, for none of the grounds for denial would be applicable.

Insofar as the payroll records at issue include a contractor's employees' names, addresses, social security numbers and their wages, I believe that portions of those records could properly be withheld pursuant to §87(2)(b). That provision permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy." Section 89(2)(a) authorizes an agency to delete identifying details to protect against an unwarranted invasion of personal privacy when it makes records available. In addition, §89(2)(b) includes a series of examples of unwarranted invasions of personal privacy, one of which pertains to:

> "disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintained it...[§89(2)(b)(iv)].

In my opinion, what is relevant to an agency is whether the employees are being paid in accordance with prevailing wage standards; their names, addresses and social security numbers are largely irrelevant to that issue and may in my view be deleted to protect against an unwarranted invasion of personal privacy.

It is noted that an Appellate Division decisions affirmed the findings of the Supreme Court in a case involving a situation in which a union sought home addresses of an agency's contractors' employees for the purpose of "monitoring and prosecution of prevailing wage law violations." The court found that the employees' home addresses could be withheld, stating that the applicant's "entitlement to access does not necessarily entitle it to the reports in their entirety. Indeed portions of the report made available to petitioner should be expunged to protect (the) privacy of the employees" [Joint Industry Board of the Electrical Industry v. Nolan, Supreme Court, New York County, May 1, 1989; affirmed 159 AD 2d 241 (1990)].

In sum, while I believe that portions of the records reflective of the titles, duties, wages, hours worked and similar data must be disclosed, disclosure of personally identifiable details pertaining to a contractor's employees may in my view be deleted or redacted from the records prior to disclosure.

Lastly, when a request is denied, the person seeking the records may appeal the denial in accordance with §89 (4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person 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 records the reasons for further denial, or provide access to the record sought."

It is suggested that you contact the commissioner of the Department of Public Works or the Office of the Corporation Counsel to ascertain the identity of the person or body to whom an appeal may be made.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Joseph N. Giambra
Michael Risman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12641

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

April 25, 2001

Ms. Anne Ball
[redacted]

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

Dear Ms. Ball:

I have received your letter of March 23 and the materials attached to it. You have sought an advisory opinion concerning your efforts in obtaining records from the Town of Glenville.

Your first question is whether the Town may "withhold entire records because they fall under the category of inter or intra-agency records or are town officials required to review the records to determine if any of the information contained in the record falls under 87.2(g)(i), (ii), (iii) or (iv)?"

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. 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)" [89 NY2d 267, 275 (1996)].

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the 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 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.).

While §87(2)(g) potentially 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.

The same kind of analysis would apply with respect to records prepared by consultants for agencies, for the Court of Appeals has held that:

> "Opinions and recommendations prepared by agency personnel may be exempt from disclosure under FOIL as 'predecisional materials, prepared to assist an agency decision maker***in arriving at his decision' (McAulay v. Board of Educ., 61 AD 2d 1048, aff'd 48 NY 2d 659). Such material is exempt 'to protect the deliberative process of government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers (Matter of Sea Crest Const. Corp. v. Stubing, 82 AD 2d 546, 549).
>
> "In connection with their deliberative process, agencies may at times require opinions and recommendations from outside consultants. It would make little sense to protect the deliberative process when such reports are prepared by agency employees yet deny this protection when reports are prepared for the same purpose by outside consultants retained by agencies. Accordingly, we hold that records may be considered 'intra-agency material' even though prepared by an outside consultant at the behest of an agency as part of the agency's deliberative process (see, Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD 2d 546, 549, supra; Matter of 124 Ferry St. Realty Corp. v. Hennessy, 82 AD 2d 981, 983)" [Xerox Corporation v. Town of Webster, 65 NY 2d 131, 132-133 (1985)].

Based upon the foregoing, records prepared by a consultant for an agency may be withheld or must be disclosed based upon the same standards as in cases in which records are prepared by the staff of an agency. It is emphasized that the Court in Xerox specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

> "While the reports in principle may be exempt from disclosure, on this record - which contains only the barest description of them - we cannot determine whether the documents in fact fall wholly within the scope of FOIL's exemption for 'intra-agency materials,' as claimed by respondents. To the extent the reports contain 'statistical or factual tabulations or data' (Public Officers Law section 87[2][g][i], or other material subject to production, they should be redacted and made available to the appellant" (id. at 133).

Therefore, a record prepared by a consultant for an agency would be accessible or deniable, in whole or in part, depending on its contents.

I note that in Gould, supra, one of the contentions was that certain reports could be withheld because they were not final and because they related to incidents for which no final determination had been made. The Court rejected that finding and stated that:

> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)..." [Gould et al. v. New York City Police Department, 87 NY2d 267, 276 (1996)].

In short, that the records are "draft" or "non-final" would not represent an end of an analysis of rights of access or an agency's obligation to review the entirety of their contents to determine rights of access.

Second, many of the records sought were prepared by "advisory commissions" created by the Town, and the question is whether those entities constitute "agencies" as defined by the Freedom of Information Law. Each of the commissions in question has only the authority to advise; none has the authority to take final and binding action. In my view, if the commissions were created by resolution, it is likely that they are not agencies. On the other hand, if a commission was created by local law, for example, and performs a necessary function in the decision-making process, I believe that it would be subject to the Open Meetings Law and that it would constitute an "agency" subject to the Freedom of Information Law. On occasion, a regulation promulgated by a state agency or a local law creates an advisory body whose advice or opinion must be sought before the decision-maker or decision-making body may act. In that situation, because the advisory body performs a necessary and integral function in the decision-making process, I believe that it would be a "public body" for purposes of the Open Meetings Law and an "agency" for purposes of the Freedom of Information Law.

If those factors are not present, I point out that several judicial decisions indicate generally that advisory 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)].

Relevant to the foregoing is §86(3) of the Freedom of Information Law defines the term "agency" to mean:

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

Based on the definition, an "agency" is a governmental entity performing a governmental function, such as the Town of Glenville. If the commissions are not public bodies for purposes of the Open Meetings Law because they do not perform a governmental function, for the same reason, they would not be agencies for purposes of the Freedom of Information Law.

If a commission is not an agency, the exception regarding inter-agency and intra-agency materials would in my view apply to materials that it prepares.

I note that Xerox, supra, dealt with reports prepared "by outside consultants retained by agencies" (id. 133). In such cases, it was found that the records prepared by consultants should be treated as if they were prepared by agency staff and should, therefore, be considered intra-agency materials. However, based on the information provided, a commission could not, in my view, be characterized as a consultant. As the term "consultant" is ordinarily used and according to an ordinary dictionary definition of that term, a consultant is an expert or a person or firm providing professional advice or services. As I understand the composition of the commissions, while they may consist of well-respected members of the community who may enjoy expertise in a variety of areas, their members are not in the business of preparing recommendations on the operation of municipal government for gain or livelihood. Further, in the context of the Xerox decision, I believe that a consultant would be person or firm "retained" for compensation by an agency to provide a service. It is my understanding that the commissions serve voluntarily and without compensation. For the foregoing reasons, I do not believe that the records prepared by the commissions could be viewed as a consultant's report or would fall within the scope of §87(2)(g) of the Freedom of Information Law, unless a commission is an "agency" because it performs a necessary function in the decision-making process.

Third, you asked whether "records such as retainer agreements, communications and other records between town board members, employees, and the legal consultants be withheld in their entirety based on attorney client privilege or attorney work product?"

Here I direct your attention to §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute, §4503 of the Civil Practice Law and Rules (CPLR), serves as a codification of the attorney-client privilege. From my perspective, when a municipal official or body seeks legal advice from its attorney and the attorney renders legal advice, communications of that nature would fall within the coverage of the attorney-

client privilege and would, therefore, be exempt from disclosure under §87(2)(a) of the Freedom of Information Law.

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

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

In my view, a retainer agreement, a contract, would not be subject to the attorney-client privilege and would ordinarily be accessible [see Orange County Publications, Inc. v. County of Orange, 637 NYS2d 596 (1995)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Robert A. Moore

STATE OF NEW YORK
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April 25, 2001

Ms. Genevieve Coffey
[redacted]

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

Dear Ms. Coffey:

I have received your letter of March 20 in which you sought guidance relating to a request made under the Freedom of Information Law to the Town of Pearl River.

As I understand the matter, the Town Supervisor denied access to certain records because the records are pertinent to "a court case." You added that the matter involves litigation that you have initiated against a builder, and that the Town is not a party to the litigation.

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

> "FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on governmental decision-making, its ambit is not confined to records actually used in the decision-making process (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public

> right and in the public interest, irrespective of the status or need of the person making the request.
>
> "CPLR article 31 proceeds under a different premise, and serves quite different concerns. While speaking also of 'full disclosure' article 31 is plainly more restrictive than FOIL. Access to records under CPLR depends on status and need. With goals of promoting both the ascertainment of truth at trial and the prompt disposition of actions (Allen v. Crowell-Collier Pub. Co., 21 NY 2d 403, 407), discovery is at the outset limited to that which is 'material and necessary in the prosecution or defense of an action'" [see Farbman, supra, at 80].

Based upon the foregoing, the pendency of litigation, particularly litigation in which the Town is not a party, would not, in my opinion, affect your rights 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 Supervisor.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Supervisor Kleiner

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April 25, 2001

Mr. Gerard E. McKenna, Jr.
[redacted]

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

Dear Mr. McKenna:

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

As I understand the matter, a request was made to the Town of Providence for a copy of a local law adopted by a different town. The Town Clerk initially denied the request on the ground that the local law is "not official Town of Providence document." The Town Supervisor affirmed the denial following your appeal for the same reason, and adding that it is "intra-agency material" and that "the Town was provided with a copy of said law without any authority or permission to distribute the same."

From my perspective, a copy of the local law must be made available. In this regard, I offer the following comments.

First, that a document may not be "official" is, in my view, irrelevant, for the Freedom of Information Law is applicable to all records maintained by the Town. That statute includes all records within its coverage, and §86(4) defines the term "record" expansively to mean:

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

Based on the foregoing, if a copy of the local law is in possession of the Town, it is a Town record falling within the scope of the Freedom of Information Law.

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

A local law represents an agency's final determination or policy and, as such, in my opinion would be available under §87(2)(g)(iii). In this instance, while the record in question may not serve as a final determination or policy of the Town of Providence, if it was adopted by the Town of Wright, again it would represent a final determination of that agency. In that situation, it would clearly be available from the Town of Wright or any other agency that possesses a copy.

Lastly, because all records are presumptively available under the Freedom of Information Law, unless there is a valid basis for denial, I do not believe that permission or authority to make such a record available is required.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Richard C. Hunter, Sr.
Hon. Susan Wemple

STATE OF NEW YORK
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April 25, 2001

Mr. Dale Morse
[redacted]

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. Morse:

I have received your letter of March 12 in which you sought "a determination on a Freedom of Information matter."

You indicated that you are a former employee of the Cornell Cooperative Extension ("CCE") of Jefferson County. Following your resignation, you requested copies of expense vouchers that you completed while you were employed by CCE for the year 1999. Although CCE sent you an accounting relating to the expenses for which you were reimbursed, it "refused to give [you] copies of [your] actual signed vouchers." In its denial of your request, it was contended that "disclosure would potentially result in an unwarranted invasion of personal privacy of our clientele as per §87 (2) of the Freedom of Information Law."

In this regard, it is emphasized at the outset that the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee is not empowered to render a determination that is binding or otherwise compel an agency to grant or deny access to records. In an effort to resolve that matter in a manner consistent with law, I offer the following comments.

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

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

According to §224(8)(b) of the County Law, a county extension service association is a "subordinate governmental agency" whose organization and administration are "approved by Cornell University as agent for the state." As such, I believe that the CCE is an "agency" required to comply with the Freedom of Information Law, for it performs a governmental function for the State and, in this instance, Jefferson County.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. I point out that the introductory language of §87 (2) refers to the requirement that all records be made available, except those records "or portions thereof" that fall within the grounds for denial that follow. The phrase highlighted highlighted in the preceding sentence evidences a recognition on the part of the State Legislature that a record might contain both accessible and deniable information. It also indicates that an agency is required to review requested records in their entirety to determine which portions, if any, may justifiably be withheld.

Third , as suggested in the response to your request, §87(2)(b) permits an agency to withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy." Assuming that no other ground for denial is applicable, I do not believe that a request made by the subject of a request for records pertaining to him, or by his representative who has obtained a written release authorizing disclosure to the representative, could be denied on the basis of §87(2)(b). As stated in §89(2)(c) of the Freedom of Information Law:

> "Unless otherwise provided by this article, disclosure shall not be construed to constitute an unwarranted invasion of personal privacy pursuant to paragraphs (a) and (b) of this subdivision...
>
> ii. when the person to whom a record pertains consents in writing to disclosure..."

To the extent that persons other than the applicant for records are identified in the records, there may be privacy considerations that arise relative to those individuals. In such situations, identifying details or certain portions of records might be deleted on the ground that disclosure would result in an unwarranted invasion of personal privacy with respect to those third parties.

In the context of your request, insofar as disclosure would constitute an unwarranted invasion of personal privacy in relation to CCE's "clientele", those portions of the records may be deleted. The remainder, however, must, in my view, be made available to you.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: William H. Butler

STATE OF NEW YORK
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April 25, 2001

Mr. John W. Kane
[redacted]

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

Dear Mr. Kane:

I have received your letter of March 25.

You referred to a passage in §89(3) of the Freedom of Information Law that pertains to an agency's certification that it does not possess records or cannot locate them after having made a diligent search. In this regard, you wrote that:

> "[Y]our question then is as follows:
>
> "If an agency certifies it does not have a record but it can be located, that is the 'Information Return for Tax-Exempt Private Activity Bond Issues' Under Internal Revenue Code Section 149(e) form 8083, that has been filed with the State and Federal Government, is the FCIDA required to furnish this record to me under FOIL: Even though FCIDA certify they do not it."

I am not sure that I understand the question. If it is whether an agency that does not possess a record must obtain it from another source, I do not believe that the Freedom of Information Law imposes such a duty. That statute applies to records maintained by or for an agency. If a record is filed with a different agency and the creator of the record no longer possesses a copy, the latter in my view would not be obliged to acquire a copy.

If I have misinterpreted your question, please provide a clarification so that I might assist.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Fulton County Industrial Development Agency

STATE OF NEW YORK
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April 25, 2001

Ms. Ruth Weber
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Weber:

I have received your letter of March 16, as well as the materials attached to it. In brief, you described a series of difficulties that you and others have encountered in relation to your attempts to obtain records from the Building Department of the Town of Orangetown.

In this regard, first, as the Town's governing body, I believe that the Town Board has the responsibility to ensure compliance with the Freedom of Information Law. By way of background, §89(1) of that statute requires the Committee on Open Government to promulgate regulations concerning the procedural implementation of the law (21 NYCRR Part 1401). In turn, §87(1) requires the governing body of a public corporation to adopt rules and regulations consistent those promulgated by the Committee and with the Freedom of Information Law. Further, §1401.2 of the regulations provides in relevant part that:

> "(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so."

Based on the foregoing, I believe that the records access officer has the duty of coordinating responses to requests; again, the Town Board the governing body of the Town, is responsible for ensuring compliance with the Freedom of Information Law and the rules and regulations promulgated under that statute.

Further, the records access officer, irrespective of whether he or she has physical custody of the records, has the duty of "coordinating" the Town's response to requests for records. In my view, unless an official of the Building Department is designated as records access officer, employees of that Department must act in accordance with the direction provided by the records access officer in his or her role as the coordinator of responses to requests.

Second, the Freedom of Information Law is applicable to all agency records, § 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 consideration of the foregoing any documentation in possession of or maintained for the Town would constitute a "record" that falls within the coverage of the Freedom of Information Law.

Third, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

While an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days, when such acknowledgement is given, there is no precise time period within which an agency must grant or deny access to records. The time needed to do so may be dependent upon the volume of a request, the possibility that other requests have been made, the necessity to conduct legal research, the search and retrieval techniques used to locate the records and the like. In short, when an agency acknowledges the receipt of a request because more than five business days may be needed to grant or deny a request, so long as it provides an approximate date indicating when the request will be granted or denied, and that date is reasonable in view of the attendant circumstances, I believe that the agency would be acting in compliance with law.

Notwithstanding the foregoing, in my view, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, if records are clearly available

to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a lengthy delay in disclosure. As the Court of Appeals has asserted:

> "...the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objectives cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" [Westchester News v. Kimball, 50 NY 2d 575, 579 (1980)].

Further, in my opinion, if, as a matter of practice or policy, an agency acknowledges the receipt of requests and indicates in every instance that it will determine to grant or deny access to records within some 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 in disclosure, in view of those and perhaps the other kinds of factors mentioned earlier, might be reasonable. On the other hand, if a record or report is clearly public and can be found easily, there would appear to be no rational basis for delaying disclosure. In a case in which it was found that an agency's "actions demonstrate an utter disregard for compliance set by FOIL", it was held that "[t]he records finally produced were not so voluminous as to justify any extension of time, much less an extension beyond that allowed by statute, or no response to appeals at all" (Inner City Press/Community on the Move, Inc. v. New York City Department of Housing Preservation and Development, Supreme Court, New York County, November 9, 1993).

Next, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

I point out that in Key v. Hynes [613 NYS 2d 926, 205 AD 2d 779 (1994)], it was found that a court could not validly accept conclusory allegations as a substitute for proof that an agency could not locate a record after having made a "diligent search". However, in another decision, such an allegation was found to be sufficient when "the employee who conducted the actual search for the documents in question submitted an affidavit which provided an adequate basis upon which to conclude that a 'diligent search' for the documents had been made" [Thomas v. Records Access Officer, 613 NYS 2d 929, 205 AD 2d 786 (1994)].

Lastly, although I am not suggesting that they are applicable, I direct you to §240.65 of the Penal Law and its companion, §89(8) of the Freedom of Information Law (which is Article 6 of the Public Officers Law). The former states that:

> "A person is guilty of unlawful prevention of public access to records when, with intent to prevent the public inspection of a record pursuant to article six of the public officers law, he willfully conceals or destroys any such record."

From my perspective, the preceding may be applicable in two circumstances: first, when an agency employee receives a request for a record and indicates that the agency does not maintain the record even though he or she knows that the agency does maintain the record; or second, when an agency employee destroys a record following a request for that record in order to prevent public disclosure of the record. I do not believe that §240.65 applies when an agency denies access to a record, even though the basis for the denial may be inappropriate or erroneous, or when an agency cannot locate a record that must be maintained.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this opinion will be forwarded to Town officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board
Records Access Officer
Dennis Michaels

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12647

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

April 26, 2001

Mr. Bob and Jenny Petrucci
County Residents Protection Alliance
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 facts presented in your correspondence.

Dear Mr. and Mrs. Petrucci:

I have received your letter of March 26. You questioned whether an agency can choose to make records available on paper if it can make them available in an electronic storage medium when disclosure in that medium is preferable to the applicant.

Assuming that the information sought is accessible in its entirety, that it can be transferred to the medium of the applicant's choice, and that applicant pays the actual cost of reproduction, I believe that the agency is obliged to do so. In this regard, I offer the following comments.

As you are aware, the Freedom of Information Law is applicable to agency records, and §86(4) of that statute defines the term "record" expansively to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

In view of the language quoted above, if information is maintained in some physical form, it would in my opinion constitute a "record" subject to rights of access conferred by the Law. Further, the definition of "record" includes specific reference to computer tapes and discs, and it was held more than ten years ago that " [i]nformation is increasingly being stored in computers and access to such

data should not be restricted merely because it is not in printed form" [Babigian v. Evans, 427 NYS 2d 688, 691 (1980); aff'd 97 AD 2d 992 (1983); see also, Szikszay v. Buelow, 436 NYS 2d 558 (1981)].

When information is maintained electronically, it has been advised that if the information sought is available under the Freedom of Information Law and may be retrieved by means of existing computer programs, an agency is required to disclose the information. In that kind of situation, the agency in my view would merely be retrieving data that it has the capacity to retrieve. Disclosure may be accomplished either by printing out the data on paper or perhaps by duplicating the data on another storage mechanism, such as a computer tape or disk. On the other hand, if information sought can be retrieved from a computer or other storage medium only by means of new programming or the alteration of existing programs, those steps would, in my opinion, be the equivalent of creating a new record. Since §89(3) does not require an agency to create a record, I do not believe that an agency would be required to reprogram or develop new programs to retrieve information that would otherwise be available [see Guerrier v. Hernandez-Cuebas, 165 AD 2d 218 (1991)].

In Brownstone Publishers Inc. v. New York City Department of Buildings, the question involved an agency's obligation to transfer electronic information from one electronic storage medium to another when it had the technical capacity to do so and when the applicant was willing to pay the actual cost of the transfer. As stated by the Appellate Division, First Department:

> "The files are maintained in a computer format that Brownstone can employ directly into its system, which can be reproduced on computer tapes at minimal cost in a few hours time-a cost Brownstone agreed to assume (see, POL [section] 87[1] [b] [iii]). The DOB, apparently intending to discourage this and similar requests, agreed to provide the information only in hard copy, i.e., printed out on over a million sheets of paper, at a cost of $10,000 for the paper alone, which would take five or six weeks to complete. Brownstone would then have to reconvert the data into computer-usable form at a cost of hundreds of thousands of dollars.
>
> "Public Officers Law [section] 87(2) provides that, 'Each agency shall...make available for public inspection and copying all records...' Section 86(4) includes in its definition of 'record', computer tapes or discs. The policy underlying the FOIL is 'to insure maximum public access to government records' (Matter of Scott, Sardano & Pomerantz v. Records Access Officer, 65 N.Y.2d 294, 296-297, 491 N.Y.S.2d 289, 480 N.E.2d 1071). Under the circumstances presented herein, it is clear that both the statute and its underlying policy require that the DOB comply with Brownstone's reasonable request to have the

information, presently maintained in computer language, transferred onto computer tapes" [166 Ad 2d, 294, 295 (1990)].

Additionally, in a more recent decision that cited Brownstone, it was held that: "[a]n agency which maintains in a computer format information sought by a F.O.I.L. request may be compelled to comply with the request to transfer information to computer disks or tape" (Samuel v. Mace, Supreme Court, Monroe County, December 11, 1992). That decision involved a request for a school district wide mailing list in the form of computer generated mailing labels. Since the district had the ability to generate the labels, the court ordered it to do so.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Charlen Indelicato, County Attorney

FOIL-AO-12648

From: Janet Mercer
To: "kathy@tughill.org".GWIA.DOS1
Subject: Re: Freedom of information

Dear Ms. Amyot:

I have received your letter in which you asked whether a municipal clerk can refer a resident "to the local gov't website at the local library or from their personal computer, for access to the information and no longer be required to provide a hard copy..." of a record.

In my opinion, that records may be available online does not in any way diminish the responsibility imposed by the Freedom of Information Law upon an agency to make records available at its office for inspection and copying. In short, I believe that a municipal clerk is obliged to make records available for inspection and copying, notwithstanding the availability of the records from other sources electronically.

As you are likely aware, an agency can charge up to twenty-five cents per photocopy; no fee may be assessed for the inspection of records.

I hope that I have been of assistance.

>>> "Kathy Amyot" <kathy@tughill.org> 04/26/01 01:16PM >>>
I would like to know if a resident comes into the clerks office requesting a copy of ....can the clerk refer the resident to the local gov't web site at the local library or from their personal computer, for access to the information and no longer be requirred to provide a hard copy of ... of is a hard copy at $.25 still the requirement.

Thanks,
Kathy A.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3299
FOIL-AO-12649

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

April 30, 2001

Mr. Edward M. Gomez
Publisher and Editor
The Hudson River Herald
P.O. Box 18
Hudson, NY 12231

The staff of the Committee 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. Gomez:

As you are aware, I have received a variety of correspondence from you relating to what you characterized as "the appearance of impropriety and actual abuses of power on the part of...agencies linked to government." You added that those entities have engaged in "the routine ignoring of...open-government laws..." You referred specifically to the Columbia Economic Development Corporation and the Columbia-Hudson Partnership. Based on the materials that you forwarded, both are headed by Ms. Bernardina Torrey.

I spoke at length with Ms. Torrey to learn more of the nature of the two entities. Although she indicated that all of the records that you have requested, insofar as they exist, have been disclosed, it appears that neither entity is required to comply with the Freedom of Information Law or the Open Meetings Law.

In this regard, both the Freedom of Information and Open Meetings Laws generally apply to governmental entities. The former is applicable to agencies, and section 86(3) defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

The latter pertains to meetings of public bodies, and section 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."

My understanding is that neither the Columbia Economic Development Corporation nor the Columbia-Hudson Partnership is part of any governmental entity or subject to any significant government control. While they may have relationships with one or more units of government and receive government funding, those factors alone do not, in my view, bring them within the coverage of open government statutes.

As you may be aware, there are judicial decisions that indicate that not-for-profit corporations may in some instances be subject to those statutes. For instance, it has been held that volunteer fire companies are "agencies" that fall within the scope of the Freedom of Information Law, for they perform what traditionally has been deemed an essential governmental function and would not exist but for their contractual relationship with one or more entities of local government [see Westchester-Rockland Newspapers v. Kimball, 50 NY2d 575 (1980)]. It has been held that a not-for-profit foundation associated with, created by and operating within the confines of a branch of a public university is subject to the Freedom of Information Law (see Eisenberg v. Goldstein, Supreme Court, Kings County, February 26, 1988). It has been advised and held that a local development corporation, a majority of whose board of directors is designated by government and which functions as an extension of government is subject to the Freedom of Information Law [see Buffalo News, Inc. v. Buffalo Enterprise Development Corporation, 84 NY2d 488 (1994)]. In each of those instances, the not-for-profit entities owed their existence to government and were under substantial government control.

Again, as I understand the nature of the entities at issue, neither is under substantial government control. Although one or more government officials may sit on their corporate boards of directors, they constitute a small minority on those boards. If that is so, those entities, in my opinion, are neither agencies subject to the Freedom of Information Law nor public bodies required to comply with the Open Meetings Law. This is not to suggest that they may not disclose records or conduct meetings open to the public, but rather that they are not required to do so pursuant to those statutes.

I hope that the foregoing serves to clarify your understanding of the Freedom of Information and Open Meetings Laws, and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Bernardina Torrey

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1650

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

April 30, 2001

Mr. Wayne Anderson
00-A-2430
Collins Correctional Facility
P.O. Box 340
Collins, NY 14034-0340

Dear Mr. Anderson:

I have received your letter in which you appealed a denial of a request for records made under the Freedom of Information Law 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 dealing with the right to appeal, §89(4)(a) of the Freedom of Information Law, states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

For your information, the person designated 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-AO-12651

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

May 1, 2001

Mr. Walter M. Kane, MAI
Chief Appraiser
Union State Bank
46 College Avenue
Nanuet, NY 10954

Dear Mr. Kane:

I have received your letter of March 8, which reached this office of March 15.

According to your letter, the New York State Office of Real Property Services has changed its policy concerning the data made available via "SalesWeb", which you described as "the internet application that serves as a data resource for real estate professionals." You wrote that the information available on SalesWeb is public, for it includes the contents of "documents officially recorded in county register, i.e., deeds" and has been "exclusively available to those professionals, who serve the public in various capacities..."

Nevertheless, you indicated that a notice recently posted on the SalesWeb internet site stated that:

> "In response to concerns regarding privacy, effective March 12, 2001, **buyer and seller names** will no longer be available. Accordingly, the download file option will be unavailable between March 12 and March 19 while we update the download lines"(emphasis yours).

You contend that :

> "The expressed 'concerns regarding privacy' are difficult to accept in light of the public nature of the information. That is, it is published and available to the general public at county offices. Thus, eliminating critical information from SalesWeb *does not* protect privacy in any way, it only makes it more difficult to obtain the information, and introduces a time delay. As such, it serves no legitimate purpose and does a disservice to the public at large who benefit from the use of the data" (emphasis yours).

You have asked that I "look into, and help reverse, what appears to be an arbitrary change in policy, with no real basis of need, and which is counter to the needs of the real estate market and its participants, including homeowners."

In this regard, the Freedom of Information Law does not in any way address whether the extent to which agencies must include information on their websites. I note that the issue that you raised is the subject of national debate, and that a variety of approaches have been taken. On one hand, the kind of data to which you referred has historically been accessible to the public and remains available from the traditional custodians of records containing the data, i.e., assessors and court clerks. In some states, records and data that have long been available and have been made readily accessible via the internet. On the other hand, however, many members of the public have expressed concern with respect to the extent to which personally identifiable information, even though it may be available from other public sources, should be made available, to anyone, worldwide, via the internet.

Notwithstanding the foregoing, having contacted the Office of Real Property Services to learn more of the matter, I was informed that it reversed its stance and that the items at issue will remain available on SalesWeb.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Steve Harrison, Office of Counsel
Office of Real Property Services

FOIL-AO-12652

From: Robert Freeman
To: Internet:[redacted]
Date: 5/2/01 8:57AM
Subject: Dear Mr. Ferrara:

Dear Mr. Ferrara:

I have received your letter in which you questioned whether Strong Memorial Hospital is subject to the Freedom of Information Law.

In my view, it falls beyond the scope of that statute. As you may be aware, the Freedom of Information Law is applicable to agencies, and section 86(3) defines the term "agency", in brief, to mean a governmental entity performing a governmental function. Strong Memorial Hospital, which is part of the University of Rochester, is a private institution; it is not a governmental entity. I note that the University is in no way governed by or part of the government of the City of Rochester. In short, I do not believe that the University of Rochester or Strong Memorial Hospital would be subject to 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.

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-1653

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

May 2, 2001

Ms. Claire Manber
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Manber:

I have received your letter in which you sought guidance concerning delays in response to your requests for records of the Division of Housing and Community Renewal.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: David Diamond

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12654

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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

May 7, 2001

E-Mail

TO: Thomas P. Kadgen [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. Kadgen:

I have received your letter in which you wrote that several Ulster County agencies did not have records access officers and/or did not respond to your requests. You asked where you might complain about the matter.

In this regard, this office, the Committee on Open Government is authorized to provide advice and opinions relating to the Freedom of Information Law. Consequently, a complaint may be sent to the Committee concerning any matter involving that statute. In an effort to offer guidance now, I offer the following comments.

First, pursuant to regulations promulgated by the Committee (21 NYCRR Part 1401), each agency is required to designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests, and requests should ordinarily be made to that person.

In many counties, there is one records access officer for the entire county. While I believe that the persons in receipt of your requests should have responded directly or forwarded your requests to the records access officer, it is suggested that you contact the Office of the County Attorney and inquire as to the identity of the County's records access officer or officers. With that information, I recommend that you renew your requests.

Second, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

For your information, I believe that the County Attorney has been designated to determine appeals.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12656

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

May 7, 2001

Mr. Anthony Gray
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Gray:

I have received your letter of January 8, 2001 and related materials. According to your letter and the correspondence between you and the State University at Albany Records Access Officer, Stephen Beditz, and the Records Appeal Officer, L. Jeffrey Perez, Ph.D., you requested from the University at Albany certain contracts between the University Auxiliary Services, Inc. (UAS) and campus vendors, and the UAS operating budget. You have received portions of contracts between UAS and some campus vendors, i.e., Barnes & Noble, Chartwells, and Coca-Cola. However, you have questioned the propriety of deletions made prior to their disclosure.

The November 27, 2000 letter to you regarding the Barnes & Noble contract from the Appeals Officer states in pertinent part that:

> "Your appeal challenges the University's redaction of certain portions of the contract between UAS and B&N and its failure to provide you copies of the current UAS operating budget, the food services contracts between UAS and Chartwells and copies of contract for other providers of student services at the University (e.g., Pizza Hut, Coca-Cola and the hair salon). I am affirming Mr. Beditz' response to your request for the following reasons:
>
> "It is my understanding from consultation with University representatives that certain financial information in the contract between UAS and B&N had been redacted, as Mr. Beditz stated, based upon B&N's claim that disclosure of such information would cause substantial injury to its competitive position. The redaction of such information was undertaken in accordance with the provisions of section 87(2)(d) of the Public Officers Law which allows denials of access to records or parts thereof which, if disclosed, would cause

> substantial injury to the competitive position of the person or entity from whom the information was obtained.
>
> "B&N has claimed that release of certain information contained in its contract with UAS would have a substantial impact upon its competitive position because each contract is unique and contains certain proprietary information. B&N has further indicated that each contract is negotiated independently with certain benefits and concessions afforded to the host campus, such as mark-ups, guarantees and expenditures, depending upon circumstances particular to that campus. Release of the information redacted from the copy provided to you, B&N contended, would adversely impact its negotiating position with other campuses as well as place it at a competitive disadvantage with respect to competing local and national bookstores. Since competition in business turns on the relative costs and opportunities faced by each competitor, the provisions of section 87(2)(d) advance the public policy of the State to further its economic development efforts and attract business by protecting businesses from the deleterious consequences of the disclosure of confidential commercial information."

The November 30, 2000 letter to you from Mr. Beditz regarding the Chartwells contract also indicated that "certain financial information in that document has been redacted based on Chartwells' claim that disclosure of such information would cause substantial injury to its competitive position." Similarly, his letter of January 25, 2001 stated that the Coca-Cola contract was provided "with trade secret information redacted."

In this regard, I offer the following comments.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. As suggested in the materials, the only ground of denial of significance is §87(2)(d), which permits an agency to withhold records or portions thereof that:

> "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise..."

Further, when a commercial entity is required to submit records to a state agency, pursuant to §89(5), it may request, at the time of submission, that the records or portions thereof be kept confidential in accordance with §87(2)(d). The University, through its responses to you, has indicated that portions of the records have been withheld on that basis.

I question whether either §87(2)(d) or, therefore, §89(5) would be applicable at all. The redactions involve the terms of negotiated agreements developed by the parties to those agreements; they are not records that were submitted to SUNY by a commercial enterprise. If that is so, I do not believe that §87(2)(d) would be applicable or that it would serve as a basis for a denial of access.

Even if those provisions are applicable, I do not believe that a denial of access is justifiable. In my opinion, the question under §87(2)(d) involves the extent, if any, to which disclosure would "cause substantial injury to the competitive position" of a commercial entity.

The concept and parameters of what might constitute a "trade secret" were discussed in Kewanee Oil Co. v. Bicron Corp., which was decided by the United States Supreme Court in 1973 (416 (U.S. 470). Central to the issue was a definition of "trade secret" upon which reliance is often based. Specifically, the Court cited the Restatement of Torts, section 757, comment b (1939), which states that:

> "[a] trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers" (id. at 474, 475).

In its review of the definition, the court stated that "[T]he subject of a trade secret must be secret, and must not be of public knowledge or of a general knowledge in the trade or business" (id.). The phrase "trade secret" is more extensively defined in 104 NY Jur 2d 234 to mean:

> "...a formula, process, device or compilation of information used in one's business which confers a competitive advantage over those in similar businesses who do not know it or use it. A trade secret, like any other secret, is something known to only one or a few and kept from the general public, and not susceptible to general knowledge. Six factors are to be considered in determining whether a trade secret exists: (1) the extent to which the information is known outside the business; (2) the extent to which it is known by a business' employees and others involved in the business; (3) the extent of measures taken by a business to guard the secrecy of the information; (4) the value of the information to a business and to its competitors; (5) the amount of effort or money expended by a business in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. If there has been a voluntary disclosure by the plaintiff, or if the facts pertaining to the matter are a subject of general knowledge in the trade, then any property right has evaporated."

From my perspective, the nature of record, the area of commerce in which a commercial entity is involved and the presence of the conditions described above that must be found to characterize records as trade secrets would be the factors used to determine the extent to which disclosure would "cause substantial injury to the competitive position" of a commercial enterprise. Therefore, the proper assertion of §87(2)(d) would be dependent upon the facts and, again, the effect of disclosure upon the competitive position of the entity to which the records relate.

Relevant to the analysis is a decision rendered by the Court of Appeals, which, for the first time, considered the phrase "substantial competitive injury" [Encore College Bookstores, Inc. v. Auxiliary Service Corporation of the State University of New York at Farmingdale, 87 NY2d 410 (1995)]. In that decision, the Court reviewed the legislative history of the Freedom of Information Law as it pertains to §87(2)(d), and due to the analogous nature of equivalent exception in the federal Freedom of Information Act (5 U.S.C. §552), it relied in part upon federal judicial precedent.

In its discussion of the issue, the Court stated that:

> "FOIL fails to define substantial competitive injury. Nor has this Court previously interpreted the statutory phrase. FOIA, however, contains a similar exemption for 'commercial or financial information obtained from a person and privileged or confidential' (see, 5 USC § 552[b][4]). Commercial information, moreover, is 'confidential' if it would impair the government's ability to obtain necessary information in the future or cause 'substantial harm to the competitive position' of the person from whom the information was obtained...
>
> "As established in Worthington Compressors v Costle (662 F2d 45, 51 [DC Cir]), whether 'substantial competitive harm' exists for purposes of FOIA's exemption for commercial information turns on the commercial value of the requested information to competitors and the cost of acquiring it through other means. Because the submitting business can suffer competitive harm only if the desired material has commercial value to its competitors, courts must consider how valuable the information will be to the competing business, as well as the resultant damage to the submitting enterprise. Where FOIA disclosure is the sole means by which competitors can obtain the requested information, the inquiry ends here.
>
> "Where, however, the material is available from other sources at little or no cost, its disclosure is unlikely to cause competitive damage to the submitting commercial enterprise. On the other hand, as explained in Worthington:
>
> > Because competition in business turns on the relative costs and opportunities faced by members of the same industry, there is a potential windfall for competitors to whom valuable information is released under

> FOIA. If those competitors are charged only minimal FOIA retrieval costs for the information, rather than the considerable costs of private reproduction, they may be getting quite a bargain. Such bargains could easily have competitive consequences not contemplated as part of FOIA's principal aim of promoting openness in government (id., 419-420).

The Court also observed that the reasoning underlying these considerations is consistent with the policy behind §87(2)(d) to protect businesses from the deleterious consequences of disclosing confidential commercial information so as to further the state's economic development efforts and attract business to New York (id.). In applying those considerations to Encore's request, the Court concluded that the submitting enterprise was not required to establish actual competitive harm; rather, it was required, in the words of Gulf and Western Industries v. United States, 615 F.2d 527, 530 (D.C. Cir., 1979) to show "actual competition and the likelihood of substantial competitive injury" (id., at 421).

In my view, the redacted portions of the contracts (i.e., numeric figures) are not trade secrets and likely would not cause substantial injury to the competitive position of the subject enterprises. They are not analogous to a process, formula, or financial information which shows the strengths or weaknesses of an entity. Rather, they indicate the amounts to be paid and received as the result of negotiation between two parties, and I believe that that kind of information must be disclosed.

It has been held that vendors who choose to bid on contracts to provide service to public agencies have no reasonable expectation of privacy, and that a successful bidder on a public contract "had no reasonable expectation of not having its bid open to the public" (see Contracting Plumbers Cooperative Restoration Corp. v. Ameruso, 430 NYS2d 196 (1980)].

The Appeals Officer wrote that each contract is "unique" and "is negotiated independently with certain benefits and concessions afforded to the host campus, such as mark-ups, guarantees and expenditures, depending upon circumstances particular to that campus." If indeed the contracts are unique, the deleted portions would have limited commercial value, if any, and their disclosure could not adversely impact negotiating positions on other campuses. Consequently, providing the redacted portions would not substantially injure the competitive position of the subject enterprises. Moreover, the contracts are not related to the enhancement of economic development or attracting business. Rather, they fulfill an aspect of SUNY's mission.

Revealing the terms of public contracts fosters the purpose of the Freedom of Information Law "to shed light on government decisionmaking, which in turn both permits the electorate to make informed choices regarding governmental activities and facilitates exposure of waste, negligence and abuse" (see Encore, supra).

As I view §89(5) of the Freedom of Information Law, when a commercial enterprise seeks a guarantee that the agency to which its records are submitted will not disclose the records, and the agency confers confidentiality and upholds the guarantee of confidentiality following an appeal by a person whose request for the record has been denied, the agency has the burden of proof in its

defense of the denial in any ensuing proceeding commenced for review of the denial. Stated differently, to continue the protection accorded by §89(5), an agency must believe that it can prove to a court that disclosure would, in fact, cause substantial injury to the competitive position of the commercial enterprise that submitted the record. If the agency does not believe that it can meet that burden of proof or does not have sufficient knowledge or information to ascertain the merits of the commercial entity's contentions, it must indicate that the request to the person seeking the record will be granted, in which case, following the exhaustion of administrative remedies, the commercial entity that submitted the record has fifteen days to commence a proceeding for the purpose of demonstrating to a court that disclosure would cause substantial injury to its competitive position.

As indicated earlier, agency records are presumptively available under the Freedom of Information Law, including those submitted to an agency by a commercial enterprise. In my opinion, while §89(5) provides procedural protection to commercial enterprises that are required to submit records to state agencies, its terms preserve the presumption of access and place the burden of defending secrecy either on a state agency based on its conclusion that disclosure would cause substantial injury to the competitive possession of a commercial enterprise, or on the commercial enterprise. It appears that the position taken by SUNY essentially forces the applicant for the record to expend time, effort and money to seek judicial review of the agency's denial of access to the information redacted from the contracts. As an alternative, the agency, under §89(5), in recognition of the presumption of access, could grant the applicant's request, and thereby shift the burden of proof to the vendors. Thereafter, the commercial entity claiming that disclosure would cause substantial injury to its competitive position may choose to initiate a proceeding to defend against disclosure, in which case it would have the burden of proof. In that event, the commercial enterprise, rather than the person seeking the records, would bear the expense and burden of attempting to block disclosure and litigating the matter.

It is also your view that SUNY should provide you with additional documents pertaining to the UAS operating budget. The December 29, 2000 letter from Mr. Beditz states in relevant part that:

> "On November 30, 2000 I wrote in response to your earlier request for information under the New York State Public Officers Law, Freedom of Information. In that correspondence, I transmitted the University Auxiliary Services Corporation's current budget in summary form, and indicated that detailed information was available should you desire. You subsequently telephoned my office, seeking that additional information.
>
> "In conducting additional research to identify the specific records you seek, I have determined that those additional documents are not records as defined in the Law. The NYS Public Officers Law, Article 6, Section 86.4 defines a record as '...an information kept, held, filed, produced or reproduced by, with or for an agency...' Indeed, the summary budget I transmitted is kept on file in the University's Controller's Office and therefore meets the definition of a public record, and is accessible. However, the detailed records that are used

> to compile that document are not held by or for the Controller or any other University office. Accordingly, access to such documents is not reached under the provisions of Section 87 and its exceptions."

It is emphasized that §86(4) of the Freedom of Information Law defines the term "record" expansively to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based upon the language quoted above, documents need not be in the physical possession of an agency to constitute agency records; so long as they are produced, kept or filed for an agency, the courts have held they constitute "agency records", even if they are maintained apart from an agency's premises.

For instance, it has been found that records maintained by an attorney retained by an industrial development agency were subject to the Freedom of Information Law, even though an agency did not possess the records and the attorney's fees were paid by applicants before the agency. The Court determined that the fees were generated in his capacity as counsel to the agency, that the agency was his client, that "he comes under the authority of the Industrial Development Agency" and that, therefore, records of payment in his possession were subject to rights of access conferred by the Freedom of Information Law (see C.B. Smith v. County of Rensselaer, Supreme Court, Rensselaer County, May 13, 1993).

Most importantly, in Encore (supra, 417) it was found that materials received by a corporation providing services for a branch of the State University that were kept on behalf of the University constituted "records" falling with the coverage of the Freedom of Information Law. I point out that the Court rejected "SUNY's contention that disclosure turns on whether the requested information is in the physical possession of the agency", for such a view "ignores the plain language of the FOIL definition of 'records' as information kept or held 'by, with or for an agency'" [see Encore College Bookstores, Inc. v. Auxiliary Services Corporation of the State University of New York at Farmingdale, 87 NY 2d 410. 417 (1995)].

Based on the foregoing, insofar as the records sought are maintained by or for UAS, I believe that they are, in essence, SUNY's records, and that SUNY would be required to direct the custodian of the records to disclose them in accordance with the Freedom of Information Law, or obtain them in order to disclose them to you to the extent required by law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: L. Jeffrey Perez, Ph.D.
Stephen J. Beditz

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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May 9, 2001

Mr. Peter Henner
Attorney and Counselor at Law
P.O. Box 326
Clarksville, NY 12041-0326

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence, unless otherwise indicated.

Dear Mr. Henner:

As you are aware, I have received your letter in which you asked that I "clarify and reconsider" issues addressed in an opinion of September 23 sought by Mr. John L. McCarthy relating to access to records maintained by the Workers' Compensation Board. The records at issue, according to your letter, "consist of a computerized database containing the name[s] of all employers in New York, the identity of their Workers' Compensation carrier, and the expiration date of the Worker's Compensation policy." In that opinion, it was advised that the database could be withheld under §87(2)(d) of the Freedom of Information Law on the ground that disclosure would cause substantial injury to the competitive position of the State Insurance Fund ("the Fund").

You have sought guidance "as to whether the 'substantial injury' could be averted by redacting the identity of the Workers' Compensation carrier, and limiting the information disclosed to the expiration dates of Workers' Compensation policies for employers." You contend that "[a]s a result of such redaction, there would be no mention of the State Insurance Fund, or, for that matter, of any identified carrier, and the information disclosed would not be proprietary." It is your view that "the mere disclosure of expiration dates, without mention of the carrier, does not hurt the competitive position of any carrier, and that there is therefore no reason for such information not to be made available upon request." You added that the "State Insurance Fund's alleged injury is the fact that, as a result of disclosure of the database, all insurance carriers will be able to compete on an equal basis."

In an effort to learn more of the matter, I have contacted officials of both the Workers' Compensation Board and the Fund, and the Executive Director of the Fund, Mr. Henry Neal Conolly, has contended that disclosure would clearly cause substantial injury to the competitive position of the Fund. Citing the Workers' Compensation Law, Mr. Conolly suggested that disclosure of the information sought would "significantly undermine NYSIF's ability to perform its central mission – to be the stabilizing force in the WC market by acting as the insurer of last resort and by fixing premiums 'at the lowest possible rates consistent with the maintenance of a solvent fund' [WCL §89].".

In describing the history and the role of the Fund, Mr. Conolly wrote that:

> "Since every employer is required to purchase WC insurance, the state created NYSIF to provide a guaranteed source of coverage. Private carriers may reject presumed bad risks summarily and may cancel a policy for any reason. As a result, NYSIF must write all risks regardless of their past histories and may only cancel a policy or refuse continued coverage for non-payment of premium.
>
> "However, a state insurance fund limited to the residual market, with the resulting high expenses of covering just the bad risks rejected by the private carriers, would not be capable of offering coverage at affordable prices. Similarly, since all employers must secure coverage, private carriers would have a great deal of bargaining leverage and would not have sufficient incentive to keep costs low if they had the WC market to themselves.
>
> "The solution, to those who designed the state's WC system, was to charge the Fund with the responsibility of fixing premiums at the lowest possible rates. Since NYSIF would be incapable of doing this if it were restricted to the residual market, it was created to be an active and aggressive competitor in the marketplace capable of providing coverage to preferred risks as well as bad. As a full participant in the WC market covering the full spectrum of risks, NYSIF is able to fulfill its fundamental purpose - to stabilize the market and to act as a moderating force on WC costs for all New York employers...
>
> "Anything that impairs NYSIF's ability to find and retain preferred risks undermines NYSIF's capacity to fulfill its mission and jeopardizes the stability of the WC system. This is the substantial competitive harm that will result if NYSIF's list of policyholders is disclosed to DataLister. The product sold by DataLister has one overriding purpose - to give private carriers and insurance agents data they can use to target their marketing efforts. And the companies they will target are the preferred risks covered by NYSIF...
>
> "By turning NYSIF's preferred risks into a target audience for DataLister's customers, disclosures of the Funds customer list, particularly the policy expiration dates, directly conflicts with state public policy and undermines NYSIF's ability to fulfill its mission."

Based on the foregoing and the unique situation of the Fund, it appears that the expiration date is the most significant aspect of the database in the context of marketing, and that disclosure would not enable the Fund, in your words, "to compete on an equal basis" with other carriers. That being so, I believe that disclosure of employers' policy expiration dates, even without the name of the insurance carrier, would cause competitive harm to the Fund. Moreover, disclosure would likely

have the additional effect of raising the premiums of the employers who could least afford a higher cost of doing business.

In the opinion addressed to Mr. McCarthy, reference was made to the decision rendered by the Court of Appeals in Encore College Bookstores, Inc. v. Auxiliary Services Corporation [87 NY2d 410 (1995)] and the Court's reliance upon the construction of the provision analogous to §87(2)(d) in the federal Freedom of Information Act in Worthington Compressors v. Costle [662 F2d 45 (DC Cir.)]. The Court determined that when "material is available from other sources at little or no cost, its disclosure is unlikely to cause competitive damage to the submitting commercial enterprise" (Encore, at 420). However, the Court then cited Worthington, in which it was found that:

> "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)."

Although the information sought is available from the Workers' Compensation Board following requests by company name on a per call basis, Mr. Conolly indicated that the Board informed him that it receives approximately twenty-five (25) calls annually from persons seeking to verify an employer's coverage. He referred to your client's claim that the information is public and that the database, therefore, should be public and wrote that:

> "It is disingenuous to suggest that this insignificant disclosure of information to individuals seeking to protect themselves justifies the public release of a database containing information on 1.6 million employers to an entity that will use it to compete against the very parties that submitted the data.
>
> "In applying its test, the court in *Worthington* stated, 'If private reproduction of the information would be so expensive or arcane as to be impracticable, disclosure of that information through the FOIA conduit could damage the competitive position of the submitters, to the advantage of FOIA requesters.' The fact that it would take 1.6 million individual phone calls to an office that handles 25 such calls a year is precisely the type of expensive and impracticable reproduction referred to by the court."

From my perspective, in consideration of the Fund's role in the Workers' Compensation insurance industry, the disclosure of the expiration dates of policies would be just as damaging to its competitive position without the names of current carriers as with the names of carriers included. Consequently, I believe that the Workers' Compensation Board may justifiably withhold that data pursuant to §87(2)(d) of the Freedom of Information Law.

If you would like to discuss the matter, please feel free to contact me. I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Henry Neal Conolly
John L. McCarthy
Peter J. Molinaro
Paul Magaril

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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FOIL-AO-12658

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May 9, 2001

Ms. Vivian Burke
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Burke:

Your letter of April 20 addressed to the Secretary of State has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State on which the Secretary of State serves, is authorized to offer opinions and guidance pertaining to the Freedom of Information and Open Meetings Laws. Although your questions do not deal directly with those laws, I offer the following comments.

First, in my view, minutes of town board meetings should not be prepared "in pencil." Provisions contained in Article 57-A of the Arts and Cultural Affairs Law deal with the retention and preservation of records, and local governments must retain records for particular periods of time before the records can be disposed of or destroyed. Minutes of meetings, according to the retention schedule, must be kept permanently. If a document prepared in pencil cannot be permanently preserved, it would be unreasonable in my view and inconsistent with law to prepare the record in pencil.

Second, with respect to changes in minutes of meetings, I believe that they may validly be made if they reflect the correction of an error and represent what in fact occurred at a meeting. In my view, minutes cannot be altered or amended in a manner that does not accurately reflect what transpired at a meeting.

Third, you asked whether it is "legal to remove original documents from the Town Hall leaving only copies." As I understand the law on the matter, so long as copies are true copies, they have the same effect and validity as original documents. I note that provisions have existed for years which have enabled local governments to maintain microfilm copies rather than original documents.

The agency that has general oversight concerning the maintenance of records is the State Archives and Records Administration (SARA), which is part of the State Education Department. To obtain materials regarding the treatment of town records, it is suggested that you write to that

agency at the Cultural Education Center, Albany, NY 12230 or contact SARA by phone at (518)474-6926.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

FOIL-AO-12659

From: Robert Freeman
To: Internet:[redacted]
Date: 5/9/01 5:38PM
Subject: Dear Ms. Moshenko:

Dear Ms. Moshenko:

I have received your letter in which you questioned the propriety of a school district's policy in relation to fees.

In brief, the Freedom of Information Law pertains to existing records, and section 89(3) states in part that an agency is not required to create a record in response to a request. If information is maintained electronically and the data sought cannot be extracted or retrieved based on an agency's existing computer programs, it has been advised and held judicially that reprogramming is the equivalent of creating a new record, and that an agency is not obliged to do so to comply with the Freedom of Information Law. In that instance, if the agency agrees to create a new record, it would be acting above and beyond its legal responsibilities, and it could charge essentially what the market would bear. I note, however, that if an agency has the ability to extract the data with its existing programs, it would not be creating a record, and its fee would be limited to the actual cost of reproduction.

For a more detailed explanation of the issues, it is suggested that you might review an article on our website under "publications" entitled "The Impact of Technology on the Freedom of Information Law." Also, you might go to the index to advisory opinions and click on to "f" and scroll down to "Fees - Actual Cost of Reproduction" and "Fees for Search." Several opinions accessible under those headings may be useful to you.

If you would like to discuss the issues, I will be out of the office on May 10 and 11, but will return next week.

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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May 14, 2001

Mr. Iluminado Marrero
97-B-0001
Auburn Correctional Facility
P.O. Box 618
Auburn, NY 13024

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Marrero:

I have received your letter in which you asked about the procedure to be followed when an agency has not responded to a request for records under the Freedom of Information Law. You also asked about the "proper FOIL forms" when requesting various statements from the Chenango County Sheriffs Office:

In this regard, I offer the following comments.

The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests and appeals. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Second, the regulations promulgated by the Committee on Open Government indicate that "an agency may require that a request be made in writing or may make records available upon oral request: [21 NYCRR §1401.5(a)]. As such, neither the law nor the regulations refers to, requires or authorizes the use of standard forms. Accordingly, it has consistently been advised that any written request that reasonably describes the records sought should suffice.

Third, assuming that the records sought involving written statements have not been previously disclosed, I believe that the Freedom of Information Law would determine rights of access. As a general matter, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, several of the grounds for denial could be pertinent.

Section 87(2)(b) permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". From my perspective, the propriety of a denial of access would, under the circumstances, be dependent upon the nature of statements by witnesses or the contents of other records have already been disclosed. If disclosure of the records in question would not serve to infringe upon witnesses' privacy in view of prior disclosures, §87(2)(b) might not justifiably serve as a basis for denial. However, if the statements in question include substantially different information, that provision may be applicable.

Also potentially relevant is §87(2)(e), which permits an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my view, the foregoing indicates that records compiled for law enforcement purposes can be withheld to the extent that disclosure would result in the harmful effects described in subparagraphs (i) through (iv) of §87(2)(e).

Section 87(2)(f) permits an agency to withhold records to the extent that disclosure would "endanger the life or safety of any person." Without knowledge of the facts and circumstances of your case, I could not conjecture as to the relevance of that provision.

Lastly, §87(2)(g) authorizes an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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May 14, 2001

Mr. Kristofer J. Surdis
99-R-1010
Woodbourne Correctional Facility
Pouch #1
Woodbourne, NY 12788

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Surdis:

I have received your letter in which you asked if the Committee on Open Government can assist you in requiring the Town of Ulster Police Department to respond to your requests.

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. This office is not empowered to compel an agency to grant or deny access to records.

The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

RJF:jm

STATE OF NEW YORK
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May 14, 2001

Mr. Robert J. Hogan, Jr.
99-R-6662
Mt. McGregor Correctional Facility
P.O. Box 2071
Wilton, NY 12831

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Hogan:

I have received your letter in which you requested that this office investigate certain alleged violations of the Freedom of Information Law.

In this regard, the Committee on Open Government is authorized to provide advice and guidance concerning the New York State Freedom of Information Law. This office does not have the resources to conduct investigations and is not empowered to compel an agency to grant or deny access to records.

It is also noted that 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 §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.

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,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12663

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

May 14, 2001

Mr. Ronald Mack
95-A-5418
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. Mack:

I have received your letter in which you raised questions concerning the timeliness of responses to requests for records from the New York City Police Department. You have received no responses to either your request for records or your subsequent appeal.

In this regard, I offer the following comments.

The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests and appeals. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12664

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

May 14, 2001

Mr. David 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 in which you asked this office to assist you in obtaining a record.

In this regard, the Committee on Open Government is authorized to provide advice and guidance concerning the Freedom of Information Law. This office is not empowered to compel an agency to grant or deny access to records.

As a means of offering guidance, I point out that each agency is required to designate one or more persons as "records access officer" (21 NYCRR Part 1401). The records access officer has the duty of coordinating an agency's response to requests and a request should ordinarily be directed to that person.

The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days; or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been

constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of 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,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1260

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

May 14, 2001

Mr. Thomas Kaminski
00-B-0517
Franklin Correctional Facility
P.O. Box 10
Malone, NY 12953

Dear Mr. Kaminski:

I have received your letter in which you requested an advisory opinion concerning inmate correspondence directed to the Governor.

In this regard, the Committee on Open Government is authorized to provide opinions concerning requests for records pursuant to the Freedom of Information Law. This office is not empowered to offer guidance related to the general appropriateness of correspondence with agencies or the executive branch.

As a means of offering guidance, however, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body,

> who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Lastly, having checked our files, we have received a copy of the determination of your appeal from Terrence X. Tracy of the Division of the Parole.

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1200

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

May 14, 2001

Mr. Alex Sime
93-A-6823
Auburn Correctional Facility
135 State Street
Auburn, NY 13021

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Sime:

I have received your correspondence concerning your requests addressed to the New York County District Attorney and the New York City Police Department Deputy Commissioner for legal matters for subject matter lists of records.

In this regard, 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, and requests should ordinarily be made to that person. If you have not yet received responses to your requests, it is suggested that new requests be made to Maureen T. O'Connor Records Access Officer, One Hogan Place, New York, NY 10013 and to Sgt. Richard Evangelista at the New York City Police Department, One Police Plaza, New York, NY 10038..

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)]. Similarly, if records that once existed have legally been disposed of or destroyed, the Freedom of Information Law would not apply.

An exception that rule relates to the subject of your inquiry. Specifically, §87(3) of the Freedom of Information Law states in relevant part that:

> "Each agency shall maintain...
>
> c. a reasonably detailed current list by subject matter, of all records in the possession of the agency, whether or not available under this article."

The "subject matter list" required to be maintained under §87(3)(c) is not, in my opinion, required to identify each and every record of an agency; rather I believe that it must refer, by category and in reasonable detail, to the kinds of records maintained by an agency. Further, the regulations promulgated by the Committee on Open Government state that such a list should be sufficiently detailed to enable an individual to identify a file category of the record or records in which that person may be interested [21 NYCRR 1401.6(b)]. I emphasize that §87(3)(c) does not require that an agency ascertain which among its records must be made available or may be withheld. Again, the Law states that the subject matter list must refer, in reasonable detail, to the kinds of records maintained by an agency, whether or not they are available.

Lastly, when a proper request is made, 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..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of 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,

David M. Treacy
Assistant Director

DMT:tt

FOIL-AO-12667

From: Robert Freeman
To: Internet:cmiller@ci.rye.ny.us
Date: 5/14/01 11:38AM
Subject: Dear Mr. Miller:

Dear Mr. Miller:

I have received your letter in which you questioned the capacity of an agency to withhold records prepared by consultants retained by the agency under the Freedom of Information Law. You also referred to internal governmental communications and the ability to withhold those kinds of records as well.

In this regard, based on a decision rendered by the state's highest court, records prepared by consultants retained by agencies and internal governmental communications would be treated in the same way under the Freedom of Information Law, as "intra-agency materials" that fall within the scope of section 87(2)(g). To the extent that those materials consist of advice, opinion, suggestion and the like, they may be withheld. Conversely, that provision also states that those portions of intra-agency materials consisting, for instance, of statistical or factual information must be disclosed. Therefore, there are often instances in portions of the records in question may be withheld, but other aspects of the records must be disclosed.

It is suggested that you go to the index to FOI opinions on our website, click on to "C" and scroll down to "consultant report." The opinions written within the past ten years are available in full text and should be useful in enhancing your understanding of the matter.

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-AO-12668

From: Janet Mercer
To: [redacted].GWIA.DOS1
Subject: Re: Albany City Schools

Dear Mr. Venter:

I have received your letter concerning a failure on the part of the Albany School District to respond to your request for a record.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

>>> "Bruce Venter" [redacted]s> 05/15/01 01:15PM >>>
Dear Mr. Freeman:

On May 2, 2001 I sent a freedom of information request to the Albany City School District asking for a public record. To date, I have not received a response. I believe they have a five day mandate to respond by either sending me the document or providing a reason for the delay. I offered to pay the cost of reproduction. I am asking for your assistance in this matter.

Sincerely,
Bruce M. Venter

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12609

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

May 16, 2001

Mr. Freddy Arroyo
98-A-1426
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 facts presented in your correspondence.

Dear Mr. Arroyo:

I have received your letter in which you complained about alleged violations of the Freedom of Information Law at Rikers Island Correctional Facility. In addition, you have requested this office to send a letter to Rikers regarding any such violations.

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. This office is not empowered to compel an agency to grant or deny access to records. In an effort to assist you, 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, and requests should ordinarily be made to that person. If you have not yet received responses to your requests, it is suggested that a new request be made to Thomas Antenen, Records Access Officer, New York City Department of Correction, 60 Hudson Street, 6th Floor, New York, NY 10013.

Second, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1270

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

May 16, 2001

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 facts presented in your correspondence.

Dear Mr. Agront:

I have received your letter in which you complained about the failure of the Department of Correctional Services (DOCS) to respond to your requests over several years for copies of photographs of yourself. Furthermore, you recently received notification from DOCS that such photographs have been destroyed.

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to agency records, and §86(4) defines the term "record" expansively to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based upon the foregoing language, which includes specific reference to photos, it is clear in my view that materials in which you were interested constituted "records" 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. Photos of yourself would, in my view, be accessible if they exist, for none of the grounds for denial would apply.

Second, it is possible that the records in question might properly have been destroyed. Section 57.05 of the Arts and Cultural Affairs Law describes the procedure and authority regarding the destruction of records by agencies. When records are appropriately destroyed, the Freedom of Information Law does not apply.

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12671

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

May 17, 2001

Mr. Antonio Jones
96-B-1330
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. Jones:

I have received your letter in which you requested assistance in obtaining records from the Buffalo Police Department. You indicated that you prepaid for copies of the records at the request of the Police Department but that it had not forwarded the records as of the date of your letter.

In the event that you still have not received the records, I offer the following comments.

The Freedom of Information Law does not set forth a time limitation for an agency to send records after receipt of payment. In my opinion, the failure of an agency to provide records, which it determined were available, within a reasonable time after receiving payment, could be construed as a constructive denial of access. In such circumstance, I believe that the denial may be appealed to the designated appeals officer in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of 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,

David Treacy

David M. Treacy
Assistant Director

DMT:jm

cc: Lt. Katherine A. Plesac

FOIL-AO-12672

From: Robert Freeman
To: Internet[redacted]
Date: 5/17/01 8:08AM
Subject: Dear Mr. Ranauro:

Dear Mr. Ranauro:

I have received your letter in which you raised a series of questions concerning the use of email by officials of the Town of Owasco.

In this regard, in short, I believe that email is subject to the Freedom of Information Law to the same extent as information communicated on paper. I note that the Freedom of Information Law is applicable to all agency records, and that section 86(4) defines the term "record" expansively to include "...any information in any physical form whatsoever....kept, held, filed, produced or reproduced by, with or for an agency...." Therefore, if, for example, a Town official prepares or receives email communications involving the performance of his or her duties, those communications would constitute "records" subject to rights of access.

As a general matter, the Freedom of Information Law is based on a presumption of access. Stated differently, agency records are accessible, except to the extent that they fall within the grounds for denial of access appearing in paragraphs (a) through (i) of section 87(2).

Of likely relevance in the context of your questions is section 87(2)(g), which deals with internal governmental communications. In brief, insofar as those kinds of communications consist of advice, opinion, recommendation, ideas and the like, they may be withheld. However, unless a different ground for denial applies, those portions consisting of statistical or factual information, instructions to staff that affect the public or which consist of an agency's policy or final determinations must be disclosed.

Your questions are dealt with in greater detail in an article appearing under "publications" on our website entitled "E-Mail: Food for Thought." It is suggested that you might review the article and perhaps distribute copies to Board members.

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-12673

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

May 21, 2001

Mr. George Booth
99-B-2166
Gowanda Correctional Facility
P.O. Box 311
Gowanda, NY 14070

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Booth:

I have received your letter in which you sought assistance in your efforts to obtain records, including grand jury minutes, from the Wyoming County Court.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or compel an agency to grant or deny access to records. However, based on a review of your correspondence, I offer the following comments.

First, whether records are accessible or deniable, an agency is required to respond to a request, and the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been

constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].,

Second, the Freedom of Information Law, is applicable to agency records, and that §86(3) defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines the term "judiciary" to mean:

> "the courts of the state, including any municipal or district court, whether or not of record."

Based on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law (see e.g., Judiciary Law, §255) may grant broad public access to those records. Even though other statutes may deal with access to court records, the procedural provisions associated with the Freedom of Information Law (i.e., those involving the designation of a records access officer or the right to appeal a denial) would not ordinarily be applicable.

As you may be aware, county clerks perform a variety of functions, some of which involve county records that are subject to the Freedom of Information Law, others of which may be held in the capacity as clerk of a court. If your request involves records maintained by the County Clerk in his capacity as court clerk, the Freedom of Information Law, in my opinion, would not apply.

It is also noted that the first ground for denial in the Freedom of Information Law, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute". One

such statute, §190.25(4) of the Criminal Procedure Law deals with grand jury proceedings and provides in relevant part that:

> "Grand jury proceedings are secret, and no grand juror, or other person specified in subdivision three of this section or section 215.70 of the penal law, may, except in the lawful discharge of his duties or upon written order of the court, disclose the nature or substance of any grand jury testimony, evidence, or any decision, result or other matter attending a grand jury proceeding."

As such, grand jury minutes and "other matters attending a grand jury proceeding" would be outside the scope of rights conferred by the Freedom of Information Law. Any disclosure of those records would be based upon a court order or perhaps a vehicle authorizing or requiring disclosure that is separate and distinct from the Freedom of Information Law.

Third, perhaps the most relevant provision concerning access to records maintained by law enforcement agencies is §87(2)(e), which permits an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii" identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in sub-paragraphs (i) through (iv) of §87(2)(e).

Another possible ground for denial is §87(2)(f), which permits withholding to the extent that disclosure "would endanger the life or safety of any person". The capacity to withhold on that basis is dependent upon the facts and circumstances concerning an event.

Lastly, you asked that fees for copying be waived, here I point out that there is nothing in the Freedom of Information Law that requires that an agency waive fees, irrespective of the status of an applicant for records. Further, it has been held that an agency may charge its established fees even though the applicant is an indigent inmate [Whitehead v. Morgenthau, 552 NYS 2d 518 (1990)].

I hope that the foregoing serves to enhance your understanding of the matter and that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3304
FOIL-AO-12674

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

May 21, 2001

Mr. Paul Conklin
Labor Relations Specialist
New York State United Teachers
Centerpointe Corporate Park
270 Essjay Road
Williamsville, NY 14221

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Conklin:

I have received your letter of April 2 and apologize for the delay in response. You have sought "a decision on whether the St. Mary's [School for the Deaf] Board of Trustees meetings fall under the open meetings law." You indicated that staff contends that its meetings should be open "due to the fact that they are paid with funds supplied by New York State, and must follow the mandates of the New York State Education Department." You added that "the school is a privately owned, non-profit organization" that receives "a substantial portion of its operating income from the State of New York."

In this regard, it is noted at the outset that the Committee on Open Government is not empowered to render a "decision" that is binding. Rather, §109 of the Open Meetings Law states that the Committee is authorized to issue "advisory opinions." Consequently, the following comments should be considered advisory in nature.

From my perspective, it is unlikely that the meetings of the Board are subject to the requirements of the Open Meetings Law. That statute is applicable 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."

Based on the foregoing, as a general matter, the Open Meetings Law is applicable to governmental entities, those that "conduct public business" and perform a "governmental function." In my view, the receipt of government funding does not alter the character of an entity. In this instance, because the School is a private organization, I do not believe that meetings of its Board of Trustees fall within the requirements of the Open Meetings Law.

Notwithstanding the foregoing, there may be another method of attempting to obtain information relating to the School. 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."

As in the case of the Open Meetings Law, the School, a private entity, would not be subject to the Freedom of Information Law, for it is not a governmental entity. However, documentation kept by the State Education Department, or any other agency, would fall within the coverage of that statute. Its scope is expansive, for §86(4) defines the term "record" broadly to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Therefore, while the School is not required to give effect to the Freedom of Information Law, records pertaining to the School maintained by an agency could be requested from the agency and would be subject to rights of access conferred by that statute.

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-12675

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

May 21, 2001

Mr. Robert Rose III
95-A-4297
Clinton Correctional Facility
P.O. Box 2001
Dannemora, NY 12929-2001

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Rose:

I have received your letter in which you request guidance or assistance in obtaining records from the New York City Police Department, which has not responded to your requests for records.

First, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or compel an agency to grant or deny access to records. However, based on a review of your correspondence, I offer the following comments.

Second, you cited federal laws in your correspondence. The Federal Freedom of Information and Privacy Acts (5 USC §552 and 552a) apply only to federal agencies. Similarly, the New York Freedom of Information Law is applicable to agency records, and §86(3) defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Third, whether records are accessible or deniable, an agency is required to respond to a request, and the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

For your information, the person designated by the New York City Police Department to determine appeals under the Freedom of Information Law is William J. Tesler, Special Assistant Counsel to the Deputy Commissioner, Legal Matters.

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12676

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

May 21, 2001

Mr. Henry Goodison
84-B-2116
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. Goodison:

I have received your letter in which you sought assistance in obtaining your special mental health status report. You submitted the request under the Freedom of Information Law and the Mental Hygiene Law to the Mental Health Unit Chief at Attica Correctional Facility.

In this regard, I offer the following comments.

Although the Freedom of Information Law provides broad rights of access, the first ground for denial, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute." One such statute is §33.13 of the Mental Hygiene Law, which generally requires that clinical records pertaining to persons receiving treatment in a mental hygiene facility be kept confidential.

However, §33.16 of the Mental Hygiene Law pertains specifically to access to mental health records by the subjects of the records. Under that statute, a patient may direct a request for inspection or copies of his or her mental health records to the "facility", as that term is defined in the Mental Hygiene Law, which maintains the records. If the Attica Correctional Facility maintains the records, I believe that it would be required to disclose the records to you to the extent required by §33.16 of the Mental Hygiene Law. Alternatively, it is possible that the records in question were transferred to another facility. If that is so, the records may be maintained by a different agency. It is my understanding that mental health "satellite units" that operate within state correctional facilities are such "facilities" and are operated by the New York State Office of Mental Health. Further, I have been advised that requests by inmates for records of such "satellite units" pertaining to themselves may be directed to the Director of Sentenced Services, Bureau of Forensic Services, Office of Mental Health, 44 Holland Avenue, Albany, NY 12229. Lastly, it is noted that under §33.16, there are certain limitations on rights of access.

I hope that I have been of some assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-3305
FOIL-AO-12677

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

May 21, 2001

E-Mail

TO: Trustee Kane [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 Trustee Kane:

I have received your letter in which you described difficulties encountered by a resident of the Village of Airmont in obtaining minutes of meetings of the Planning Board and the Zoning Board of Appeals. Based upon your description of the facts, I offer the following comments.

First, §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.

Second, I do not believe that an agency can require that a request be made on a prescribed form. The Freedom of Information Law, §89(3), as well as the regulations promulgated by the Committee (§1401.5), require that an agency respond to a request that reasonably describes the record sought within five business days of the receipt of a request. Further, the regulations indicate that "an agency may require that a request be made in writing or may make records available upon oral request" [§1401.5(a)]. As such, neither the Law nor the regulations refer to, require or authorize the use of standard forms. Accordingly, it has consistently been advised that any written request that reasonably describes the records sought should suffice.

It has also been advised that a failure to complete a form prescribed by an agency cannot serve to delay a response or deny a request for records. A delay due to a failure to use a prescribed form might result in an inconsistency with the time limitations imposed by the Freedom of Information Law. For example, assume that an individual requests a record in writing from an agency and that the agency responds by directing that a standard form must be submitted. By the time the individual submits the form, and the agency processes and responds to the request, it is probable that more than five business days would have elapsed, particularly if a form is sent by mail and returned to the agency by mail. Therefore, to the extent that an agency's response granting, denying or acknowledging the receipt of a request is given more than five business days following the initial receipt of the written request, the agency, in my opinion, would have failed to comply with the provisions of the Freedom of Information Law.

While the Law does not preclude an agency from developing a standard form, as suggested earlier, I do not believe that a failure to use such a form can be used to delay a response to a written request for records reasonably described beyond the statutory period. However, a standard form may, in my opinion, be utilized so long as it does not prolong the time limitations discussed above. For instance, a standard form could be completed by a requester while his or her written request is timely processed by the agency. In addition, an individual who appears at a government office and makes an oral request for records could be asked to complete the standard form as his or her written request.

In sum, it is my opinion that the use of standard forms is inappropriate to the extent that is unnecessarily serves to delay a response to or deny a request for records.

Lastly, I do not believe that any fee may be imposed relating to a search of records. From my perspective, unless a statute, an act of the State Legislature, authorizes an agency to charge a fee for personnel time, searching for records or charging more than twenty-five cents per photocopy for records up to nine by fourteen inches, no such fees may be assessed. In this instance, I know of no statute that would authorize the Village to do so.

By way of background, §87(1)(b)(iii) of the Freedom of Information Law stated until October 15, 1982, that an agency could charge up to twenty-five cents per photocopy unless a different fee was prescribed by "law". Chapter 73 of the Laws of 1982 replaced the word "law" with the term "statute". As described in the Committee's fourth annual report to the Governor and the Legislature of the Freedom of Information Law, which was submitted in December of 1981 and which recommended the amendment that is now law:

> "The problem is that the term 'law' may include regulations, local laws, or ordinances, for example. As such, state agencies by means of regulation or municipalities by means of local law may and in some instances have established fees in excess of twenty-five cents per photocopy, thereby resulting in constructive denials of access. To remove this problem, the word 'law' should be replaced by 'statute', thereby enabling an agency to charge more than twenty-five cents only in situations in which an act of the State Legislature, a statute, so specifies."

As such, prior to October 15, 1982, a local law, an ordinance, or a regulation for instance, establishing a search fee or a fee in excess of twenty-five cents per photocopy or higher than the actual cost of reproduction was valid. However, under the amendment, only an act of the State Legislature, a statute, would in my view permit the assessment of a fee higher than twenty-five cents per photocopy, a fee that exceeds the actual cost of reproducing records that cannot be photocopied, or any other fee, such as a fee for search. In addition, it has been confirmed judicially that fees inconsistent with the Freedom of Information Law may be validly charged only when the authority to do so is conferred by a statute [see Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)].

The specific language of the Freedom of Information Law and the regulations promulgated by the Committee on Open Government indicate that, absent statutory authority, an agency may charge fees only for the reproduction of records. Section 87(1)(b) of the Freedom of Information Law states:

> "Each agency shall promulgate rules and regulations in conformance with this article...and pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the availability of records and procedures to be followed, including, but not limited to...
>
> > (iii) the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess

of nine by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by statute."

The regulations promulgated by the Committee states in relevant part that:

"Except when a different fee is otherwise prescribed by statute:

(a) There shall be no fee charged for the following:
(1) inspection of records;

(2) search for records; or
(3) any certification pursuant to this Part" (21 NYCRR section 1401.8).

As such, the Committee's regulations specify that no fee may be charged for personnel time, for inspection of or search for records, except as otherwise prescribed by statute.

Although compliance with the Freedom of Information Law involves the use of public employees' time, the Court of Appeals has found that the Law is not intended to be given effect "on a cost-accounting basis", but rather that "Meeting the public's legitimate right of access to information concerning government is fulfillment of a governmental obligation, not the gift of, or waste of, public funds" [Doolan v. BOCES, 48 NY 2d 341, 347 (1979)].

In an effort to enhance compliance with law, copies of this response will be forwarded to the Board of Trustees and the Village Clerk,

I hope that I have been of assistance.

RJF:jm

cc: Board of Trustees
Village Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1628

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

May 22, 2001

Mr. Steven Harvey
92-A-5626
Woodbourne Correctional Facility
P.O. Box 1000
99 Prison Road
Woodbourne, NY 12788-1000

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Harvey:

I have received your letter in which you have sought guidance concerning rights of access to an autopsy report relating to your case.

In this regard, I offer the following comments.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Relevant to the matter is §87 (2)(a), which pertains to records that "are specifically exempted from disclosure" by state or federal statute . Since the autopsy report at issue was performed in New York City by the Office of the Chief Medical Examiner, I point out that it has been held that §557(g) of the New York City Charter has the effect of a statute and that it exempts records from disclosure under the Freedom of Information Law [see Mullady v. Bogard, 583 NYS 2d 744 (1992); Mitchell v. Borakove, Supreme Court, New York County, NYLJ, September 16, 1994]. I note that in Mitchell, the court found that autopsy reports and related records maintained by the Medical Examiner were subject to neither the Freedom of Information Law nor §677 of the County Law. The court found that the applicant was "not making his request merely as a public citizen" under the Freedom of Information Law, "But, rather, as someone involved in a criminal action that may be affected by the content of these records and thereby has a substantial interest in them." On the basis of Mitchell, it would appear that your ability to gain access to the autopsy reports in question would be dependent upon your capacity to demonstrate that you have a substantial interest in the records in accordance with §557(g) of the New York City Charter.

I hope that the foregoing assists your understanding of the matter and that I have been of some assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1267

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

May 21, 2001

Mr. Louis Leath
97-A-5249
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. Leath:

I have received your letter in which you sought assistance relating to an unanswered request for records of the New York City Fire 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 hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12680

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

May 22, 2001

Mr. Jason Ganter
99-R-4998
S block A-1(19T)
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 facts presented in your correspondence.

Dear Mr. Ganter:

I have received your letter in which you requested information regarding your institutional or central office folder.

In this regard, the Committee on Open Government generally has the authority to advise with respect to the Freedom of Information Law. This office does not have possession of records generally, nor does it have the authority to compel an agency to grant or deny access to records. Nevertheless, in an effort to offer guidance, I offer the following comments.

First, a request for records should ordinarily be directed to an agency's "records access officer." The records access officer has the duty of coordinating an agency's response to requests [see 21 NYCRR Part 1401].

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

It is also noted that §89(3) of the Freedom of Information Law requires that a request "reasonably describe" the records in which you are interested. While I am unfamiliar with the recordkeeping systems of various agencies, to the extent records sought can be located in a reasonable effort, I believe that a request would meet the requirement of reasonably describing the record.

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12681

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

May 22, 2001

Mr. Dennis D. Michaels
Deputy Town Attorney
Town of Orangetown
Town Hall
Orangeburg, NY 10962

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Michaels:

I have received a copy of your letter of March 27 in which you sought an advisory opinion concerning several issues relating to the Freedom of Information Law. The original letter must have been misplaced, and I apologize for the error.

You have asked for guidance:

> "...as to the appropriate procedures which must be followed by the Town of Orangetown, Office of Building, Zoning, Planning, Administration and Enforcement (OBZPAE) when OBZPAE receives a Freedom of Information Law (FOIL) request to view and/or copy OBZPAE records relating to a pending land use application file. Members of the citizenry and OBZPAE staff have expressed concerns to this Office relating to the time period in which OBZPAE must provide access/disclosure, under FOIL, to records relating to pending land use applications files (e.g., site development plan and subdivision plat applications), and whether certain documentation (e.g., land use boards' clerks' handwritten notes/minutes of meetings) constitute a 'record' as defined by Public Officers Law (FOIL) §86(4)."

In this regard, I offer the following comments.

First, I note by way of background that §89(1) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural implementation of that statute (21 NYCRR Part 1401). In turn, §87(1) requires the governing body of a public corporation to adopt rules and regulations consistent those promulgated by the Committee

and with the Freedom of Information Law. Further, §1401.2 of the regulations provides in relevant part that:

> "(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so."

In short, I believe that the Town Board has the overall responsibility of ensuring compliance with the Freedom of Information Law and 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.

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, I do not believe that the reference to five business days is intended to serve as a means of delaying disclosure. On the contrary, that reference in my view is intended to serve, in general, as a limitation on the time within which an agency must respond and disclose records. If additional time is need and an acknowledgement is given, there is no precise time period within which an agency must grant or deny access to records. The time needed to do so may be dependent upon the volume of a request, the possibility that other requests have been made, the necessity to conduct legal research, the search and retrieval techniques used to locate the records and the like. 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 delays disclosure until the fifth business day following the receipt of a request or acknowledges the receipt of a request and indicates in every instance that it will determine to grant or deny access to records within some 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 in disclosure, in view of those and perhaps the other kinds of factors mentioned earlier, might be reasonable. On the other hand, if a record or report is clearly public and can be found easily, there would appear to be no rational basis for delaying disclosure for even as much as five business 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).

Next, with respect to the status of notes, i.e., notes pertaining to meetings of various boards, it is emphasized that the Freedom of Information Law is applicable to all agency records, and that §86(4) of that statute defines the term "record" expansively to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

The Court of Appeals has construed the definition as broadly as its specific language suggests. The first such decision that dealt squarely with the scope of the term "record" involved documents pertaining to a lottery sponsored by a fire department. Although the agency contended that the documents did not pertain to the performance of its official duties, i.e., fighting fires, but rather to a "nongovernmental" activity, the Court rejected the claim of a "governmental versus nongovernmental dichotomy" [see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581 (1980)] and found that the documents constituted "records" subject to rights of access granted by the Law. Moreover, the Court determined that:

> "The statutory definition of 'record' makes nothing turn on the purpose for which it relates. This conclusion accords with the spirit as well as the letter of the statute. For not only are the expanding boundaries of governmental activity increasingly difficult to draw, but in perception, if not in actuality, there is bound to be considerable crossover between governmental and nongovernmental activities, especially where both are carried on by the same person or persons" (id.).

In another decision rendered by the Court of Appeals, the Court focused on an agency claim that it could "engage in unilateral prescreening of those documents which it deems to be outside of the scope of FOIL" and found that such activity "would be inconsistent with the process set forth in the statute" [Capital Newspapers v. Whalen, 69 NY 2d 246, 253 (1987)]. The Court determined that:

> "...the procedure permitting an unreviewable prescreening of documents - which respondents urge us to engraft on the statute - could be used by an uncooperative and obdurate public official or agency to block an entirely legitimate request. There would be no way to prevent a custodian of records from removing a public record from FOIL's reach by simply labeling it 'purely private.' Such a construction, which would thwart the entire objective of FOIL by

creating an easy means of avoiding compliance, should be rejected" (id., 254).

Perhaps most pertinent is a case involving notes taken by the Secretary to the Board of Regents that he characterized as "personal" in conjunction with a contention that he prepared the notes in part "as a private person making personal notes of observations...in the course of" meetings. In that decision, the court cited the definition of "record" and determined that the notes did not consist of personal property but rather were records subject to rights conferred by the Freedom of Information Law [Warder v. Board of Regents, 410 NYS 2d 742, 743 (1978)].

In sum, I believe that the notes in question are "records" that fall within the coverage of the Freedom of Information Law.

As you are aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. As indicated in Warder, insofar as notes consist of a factual rendition of events occurring or comments offered during a meeting, they would be accessible [see §87(2)(g)(i)].

Lastly, you referred to a contention that records cannot be disclosed until they have been reviewed by certain officials. From my perspective, that records might not have been reviewed by those officials is largely irrelevant to rights of access. Even if records are never reviewed by those officials, they would be subject to rights of access. Moreover, I believe that a response to a request for those records must be given in a manner consistent with the commentary offered in the initial portion of this opinion. In my view, not every official or staff person within an agency must be an expert with respect to the Freedom of Information Law. Again, it is the duty of the records access officer to coordinate the Town's response to requests, and I do not believe that each official or staff person in possession of records should have the authority to determine whether or when those records should be disclosed. If there is any question concerning procedure or the Town's obligation to disclose, the records access officer should be informed so that she can have the ability and opportunity to carry out her duties effectively on behalf of the Town.

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

FOIL-AO -12682

From: Robert Freeman
To: Internet:[redacted]
Date: 5/23/01 8:58AM
Subject: Dear Dadggs:

Dear Dadggs:

I have received your inquiry concerning the status of the estate of a deceased.

In this regard, if records have been filed with a governmental entity in New York pertaining to the estate of a deceased, they would be filed with the clerk of the Surrogate's Court in the county of residence of the deceased.

I note that the functions of the Committee on Open Government involve offering guidance concerning the Freedom of Information Law. That statute would not be pertinent in relation to your question, for it does not apply to the courts. While court records are not subject to the Freedom of Information Law, they are frequently available under other provisions law. In this instance, section 2501(8) of the Surrogate's Court Procedure Act states that "All books and records other than those sealed are open to inspection of any person at reasonable times."

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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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May 23, 2001

Mr. John J. Smead
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Smead:

I have received your letter in which you complained that a request made under the Freedom of Information Law to the Town of West Seneca Building Department was not answered. You have sought guidance in the matter, and 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, such as a town, 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 directly to you in a manner consistent with law or forwarded the request to the records access officer, it is suggested that you resubmit a request to the records access officer. In most towns, the town clerk has been so designated.

Second, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in

accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Clerk
William C. Czuprynski, Building Inspector

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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May 24, 2001

Ms. Lea Parker
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Parker:

As you are aware, I have received your letter and the correspondence attached to it. In consideration of the materials and the issues that you raised, I offer the following comments.

First and perhaps most importantly, the title of the Freedom of Information Law is somewhat misleading. That statute does not pertain to information *per se*, but rather to records. Consequently, there is no obligation imposed on an agency or its employees to provide *information* in response to questions. While information may be supplied by responding to questions, the Freedom of Information Law imposes not duty to do so. That statute, in brief, requires agencies to disclose existing records in a manner consistent with law. I note, too, that §89(3) states in relevant part that an agency is not required to create a record in response to a request.

Rather than seeking information by asking questions, it is suggested that you request existing records. For instance, instead of asking whether the District Attorney's office keeps statistics on the number of complaints filed annually, it suggested that you request records indicating the number of complaints. Rather than asking how long records are retained, you might seek records indicating the length of time that records are retained by the office.

Second, when a proper request is made, the Freedom of Information Law provides direction concerning the time and manner in which an agency must respond. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Gary J. Galperin
Carmen A. Morales

STATE OF NEW YORK
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May 24, 2001

E-Mail

TO: Prudence C. Spink <[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, unless otherwise indicated.

Dear Ms. Spink:

As you are aware, I have received your inquiry concerning the status of the Chautauqua Institution Architectural Review Board under the Open Meetings Law. Following our discussion, I contacted Town officials in order to learn more of the matter. Based upon information supplied by Town officials, I do not believe that the entity in question is required to comply with the Open Meetings Law.

In this regard, that statute is applicable to meetings of public bodies, and §102(2) defines the phrase "public body" to mean:

> "...any entity for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

Based upon the language quoted above, a public body, in brief, would be an entity consisting of two or more members that conducts public business and performs a governmental function for one or more governmental entities.

In a letter sent to me by John W. Beckman, Town Attorney for the Town of Chautauqua, it was stated that:

> "Chautauqua Institution is a not-for-profit corporation formed and governed by special acts of the State Legislature and operates without financial assistance of the town, county, or State of New York. Its land use regulations are based on deed restrictions rather than zoning. For these and other reasons, we do not believe Chautauqua Institute falls within the ambit of the Freedom of Information Law (Article 6 of the Public Officers Law)."

Although Mr. Beckman referred to the Freedom of Information Law, I believe that his comments are also pertinent concerning the status of the Institute and the Board in question under the Open Meetings Law. If the Institute is indeed separate and distinct from government and the decision concerning your property to which you referred is based upon deed restrictions rather than an assertion of any governmental authority, I do not believe that the entity in question would be subject to either the Open Meetings or Freedom of Information Laws.

I hope that the foregoing serves to clarify your understanding of the matter and that I have been of assistance.

RJF:jm

cc: John. W. Beckman
Hon. James Weidman, III, Town Supervisor

From: Robert Freeman
To: Internet[redacted]
Date: 5/24/01 2:46PM
Subject: Dear Dee - -

Dear Dee - -

In general, I believe that house plans are accessible. In rare instances, if they are unique, it is possible that access may be denied on the ground that disclosure would "cause substantial injury to the competitive position" of the person or company that prepared the plans. In the case of a bank, insofar as the plans indicate the nature of a security system, the location of alarms, etc., it has been advised that they may be withheld on the ground that disclosure could "endanger the life or safety of any person."

If you would like to discuss the matter, please feel free to call.

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May 24, 2001

Mr. John Merle
[redacted]

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. Merle:

I have received your letter of April 6 in which you sought guidance concerning a denial of your request for records by Suffolk County. The records sought relate to two homicides, and the County indicated that the records were being denied pursuant to §160.50 of the Criminal Procedure Law.

In this regard, although the Freedom of Information Law generally provides broad rights of access, it appears that the denial was proper in this instance.

As you may be aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

The first ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §160.50 of the Criminal Procedure Law. In brief, when charges are dismissed in favor of an accused, pursuant to that statute, a court routinely orders that the records pertaining to the matter must be sealed. When records have been sealed, an agency, such as the County, has no discretion to disclose; the records are exempted from disclosure to the public.

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: Derrick J. Robinson
John J. Hough

STATE OF NEW YORK
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May 25, 2001

Mr. Jeffrey G. Plant
Associate Counsel
NYS Public Employees Federation, AFL-CIO
1168-70 Troy-Schenectady Road
P. O. Box 12414
Albany, NY 12212-2414

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Plant:

I have received your letter in which you questioned the status of what you characterized as "shadow agencies", Health Research Inc. (HRI) and the SUNY Research Foundation (the Foundation), under the Freedom of Information Law. You suggested that both are not-for-profit corporations and that requests for records made to those entities were not answered.

From my perspective, based on the terms of the Freedom of the Information Law and judicial decisions, the records of those entities fall within the coverage of that statute. In this regard, I offer the following comments.

First, as you may be aware, 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."

Although the definition of "agency" refers to "governmental" entities performing a governmental function, the courts have considered the functions of not-for-profit corporations closely associated with government and the extent to which there is governmental control over those corporations in determining whether they are subject to the Freedom of Information Law.

I note, too, that both HRI and the Foundation are included within the definition of "state agency" in §53-a of the State Finance Law. Subdivision (5) of that statute provides that:

> "'State agency' means (a) any state department, bureau, commission, authority or division and shall include the state university;
>
> (b) any institution or organization designated and authorized by law to act as agent for the state, including Cornell University and Alfred University as representatives of the state university board of trustees for the administration of statutory or contract colleges at those institutions;
>
> (c) any public corporation or institution the governing board of which consists of a majority of state officials serving ex-officio or has one or more members appointed by the governor; and
>
> (d) certain membership corporations closely affiliated with specific state agencies and whose purposes are essentially to support, supplement or extend the functions and programs of such state agencies, specifically: Youth Research, Inc., The Research Foundation for Mental Hygiene, Inc., Health Research Inc., The Research Foundation of the State University of New York, and Welfare Research, Inc."

In a decision in which the question was essentially the same as yours, it was held that a community college foundation, also a not-for-profit corporation, and its records are subject to the Freedom of Information Law in conjunction with the following:

> "At issue is whether the Kingsborough Community College Foundation, Inc (hereinafter 'Foundation') comes within the definition of an 'agency' as defined in Public Officers Law §86(3) and whether the Foundation's fund collection and expenditure records are 'records' within the meaning and contemplation of Public Officers Law §86(4).
>
> The Foundation is a not-for-profit corporation that was formed to 'promote interest in and support of the college in the local community and among students, faculty and alumni of the college' (Respondent's Vertified Answer at paragraph 17). These purposes are further amplified in the statement of 'principal objectives' in the Foundation's Certificate of Incorporation:
>
> > '1 To promote and encourage among members of the local and college community and alumni or interest in and support of Kingsborough Community College and the various educational, cultural and social activities

> conducted by it and serve as a medium for encouraging fuller understanding of the aims and functions of the college'.
>
> Furthermore, the Board of Trustees of the City University, by resolution, authorized the formation of the Foundation. The activities of the Foundation, enumerated in the Verified Petition at paragraph 11, amply demonstrate that the Foundation is providing services that are exclusively in the college's interest and essentially in the name of the College. Indeed, the Foundation would not exist but for its relationship with the College" (Eisenberg v. Goldstein, Supreme Court, Kings County, February 26, 1988).

The SUNY Foundation that is the subject of your inquiry was chartered in 1951 by the Board of Regents as a non-profit educational corporation. It is my understanding that the focal point of the relationship between SUNY and the Foundation is an agreement between those institutions signed in 1977 and approved by the Attorney General and the Comptroller. The agreement describes the powers and duties of SUNY and its Board of Trustees and cites the purposes of the Foundation in its charter as follows:

> "a. To assist in developing and increasing the facilities of the State University of New York to provide more extensive educational opportunities for and service to its students, faculty, staff and alumni, and to the people of the State of New York, by making and encouraging gifts, grants, contributions and donations of real and personal property to or for the benefit of State University of New York;
>
> b. To receive, hold and administer gifts or grants, and to act without profit as trustee of educational or charitable trusts, of benefit to and in keeping with the educational purposes and objects of State University of New York; and
>
> c. To finance the conduct of studies and research in any and all fields of the arts and sciences, of benefit to and in keeping with the educational purposes and objects of State University of New York..."

The agreement also states that "a major function of the Foundation has been to serve as the fiscal administrator of funds awarded by the federal government and other authorized sources for the conduct of sponsored programs at the State-operated institutions of the University." The agreement refers to the fact that:

> "most grants of such funds are initiated by proposals by faculty members of the State-operated institutions of the University detailing the scope, objectives, staffing, and budget of the proposed sponsored program, which are then incorporated into formal applications to the

> sponsor by the University and the Foundation, following, when applicable, the filing of notice of such applications in accordance with Section 53-a of the State Finance Law; such awards are made to the Foundation for and in conjunction with the University subject to the terms and conditions specified by the sponsors, including the ultimate accountability to them for the proper management and use of such grant awards...".

In addition, the agreement states that "the Foundation's sole purpose is to serve the University", that the Foundation "shall assist the University in procurement of funds from the federal government and other authorized sources to support such sponsored programs at the University as the University shall request", that "All applications to prospective sponsors by faculty or staff members at the State-operated institutions of the University seeking support for sponsored programs shall be made by the University through the Foundation." Further, the agreement states that no application shall be made by the Foundation "without prior written approval of the chief administrative office of the college or other institution of the University where the sponsored program is to be conducted, and the prior written approval of the Chancellor or his designee.

In view of the foregoing, the Foundation's purpose is "to serve the University", the Foundation cannot carry out its duties without the approval of University officials, and it is an "integral part" of the University. Moreover, the offices of the Foundation are located at SUNY Plaza, and utilize SUNY space.

As in the case of the Foundation in Eisenberg, the Foundation, at issue here would not exist but for its relationship with SUNY. Due to the similarity between the situation you have described and that presented in Eisenberg, and in view of the essential purpose of the Foundation as described in the State Finance Law, I believe that the Foundation is an agency subject to the Freedom of Information Law. To suggest otherwise would, in my opinion, exalt form over substance.

HRI was created as a membership corporation in 1953 and later designated as a not-for-profit corporation in 1973. Its purposes are similar to those of the Foundation, but they relate to the State Department of Health. Specifically, the certificate of Incorporation states that the purposes of HRI include:

> "(a) To assist in developing and increasing the facilities of the New York State Department of Health, the institutions and agencies within such Department or associated therewith, and other departments of health within the State, to provide more extensive conduct of studies and research into the causes, nature and treatment of diseases, disorders and defects of particular importance to the public health by encouraging gifts, grants, bequests, devises, contributions and donations of real and personal property to the corporation for such purposes:

> (b) To receive, hold and administer gifts or grants for the purposes of the corporation and in keeping with the research, prevention and treatment purposes and objectives of the New York State Department of Health, the institutions, and agencies within such Department or associated therewith; and other departments of health within the State;
>
> (c) To conduct and finance the conduction of studies and research in any and all fields of the arts and sciences and in keeping with the purposes and objectives of New York State Department of Health, the institutions and agencies within such Department or associated therewith; and other departments of health within the State..."

Based on the foregoing, as in the circumstance of the Foundation, HRI's essential purpose is to enhance the functioning of a state agency, and it would not exist but for its relationship with that agency.

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].

In another decision rendered by the Court of Appeals, Buffalo News v. Buffalo Enterprise Development Corporation [84 NY 2d 488 (1994)], 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 earlier, neither of the entities in question would exist absent their relationships with state agencies. They with carry out their functions, powers and duties for those agencies, and §53-a of the State Finance Law treats them as "state agencies". In consideration of those factors, I believe that a court would determine that they are "agencies" with a responsibility to comply with the Freedom of Information Law.

Even if the entities in question are not "agencies", I believe that their records would fall within the scope of the Freedom of Information Law due to their relationships with SUNY and the State Department of Health, both of which clearly are agencies. As indicated at the outset, statute pertains to agency records. Section 86(4) defines the term "record" expansively to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes".

The Court of Appeals has construed the definition as broadly as its specific language suggests. The first such decision that dealt squarely with the scope of the term "record" involved a case cited earlier concerning documents pertaining to a lottery sponsored by a fire department. Although the agency contended that the documents did not pertain to the performance of its official duties, i.e., fighting fires, but rather to a "nongovernmental" activity, the Court rejected the claim of a "governmental versus nongovernmental dichotomy" (see Westchester Rockland, supra, 581) and found that the documents constituted "records" subject to rights of access granted by the Law. Moreover, the Court determined that:

> "The statutory definition of 'record' makes nothing turn on the purpose for which it relates. This conclusion accords with the spirit as well as the letter of the statute. For not only are the expanding boundaries of governmental activity increasingly difficult to draw, but in perception, if not in actuality, there is bound to be considerable crossover between governmental and nongovernmental activities, especially where both are carried on by the same person or persons" (id.).

The point made in the final sentence of the passage quoted above appears to be especially relevant, for there appears to be "considerable crossover" in the activities of SUNY and the Foundation, and between HRI and the Department of Health.

Perhaps most pertinent is a determination rendered by the Court of Appeals in which it was found that materials received by a corporation providing services by contract for a branch of the State University were "kept" on behalf of the University, and, therefore, constituted "records" falling with the coverage of the Freedom of Information Law. I point out that the Court rejected "SUNY's contention that disclosure turns on whether the requested information is in the physical possession of the agency", for such a view "ignores the plain language of the FOIL definition of 'records' as information kept or held 'by, with or for an agency'" [see Encore College Bookstores, Inc. v. Auxiliary Services Corporation of the State University of New York at Farmingdale, 87 NY 2d 410, 417 (1995)]. Therefore, if a document is produced for an agency, it constitutes an agency record, even if it is not in the physical possession of the agency.

Lastly, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. You wrote that your requests involved contracts between the entities in question and the State of New York, and job titles used by these entities. If that is so, and in consideration of the preceding commentary, I believe that the records sought should have been disclosed.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

cc: Donald P. Berens
Wendy Kowalczyk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1268b

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May 25, 2001

Mr. Fred Oliver
Secretary
Board of Fire Commissioners
West Seneca Fire District No. 3
2400 Berg Road
West Seneca, NY 14218

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. Oliver:

I have received your letter and the correspondence attached to it. In brief, you referred to a number of requests made by the same person, the time that the District has to respond, and the requirement that an applicant "reasonably describe" the records sought.

In this regard, I offer the following comments.

First, as you may be aware, the Freedom of Information Law pertains to existing records, and §89(3) states that an agency is not required to create a record in response to a request. Therefore, when a person seeks information rather than existing records, the Freedom of Information Law does not apply.

Second, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

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.

Third, it has been held by the state's highest court, the Court of Appeals, that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)]. The Court in Konigsberg found that the agency could not reject the request due to its breadth and also stated that:

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency'])" (id. at 250).

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping system. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number.

While I am unfamiliar with the recordkeeping systems of the District, to extent that the records sought can be located with reasonable effort, I believe that a request would meet the requirement of reasonably describing the records. On the other hand, if the records are not maintained in a manner that permits their retrieval except by reviewing perhaps hundreds or even thousands of records individually in an effort to locate those falling within the scope of the request, to that extent, the request would not in my opinion meet the standard of reasonably describing the records. If, for example, a request is made for minutes dealing with a certain issue, but the District's minutes are not indexed by subject matter, and locating those of interest would involve a review of years of documentation, it is likely that the request would not meet the standard of reasonably describing the records. However, if the minutes are kept chronologically, and a request involves minutes of meetings held between June and December of 1998, I believe that the request, irrespective of the volume of material, would meet that standard.

Lastly, it has been held that if copies of records have been made available to an applicant in the past, an agency is not required to make the same records available when requested again, unless the applicant can demonstrate "in evidentiary form" that neither he nor his representative continues to maintain copies of the records [Moore v. Santucci, 151 AD2d 677 (1989)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

OML-AO- 3310
FOIL-AO-12687

From: Robert Freeman
To: Internet[redacted]
Date: 5/30/01 4:53PM
Subject: Dear Mr. and Ms. Wallace:

Dear Mr. and Ms. Wallace:

I have received your letter in which you indicated that, as "weekenders", you have had difficulty in obtaining information relating to the development of an area near your home in Highmount. In short, you wrote that most meetings are held and records made available only on weekdays.

In this regard, there is no obligation on the part of a unit of government to maintain office hours or conduct meetings on weekends. Pursuant to regulations promulgated by the Committee on Open Government, a government agency is required to accept requests for records and make records available during "regular business hours." However, requests for records need not be made in person; a request may be made by mail. A summary of the Freedom of Information Law and a sample letter of request are included in "Your Right to Know", which is available on our website under "publications."

With respect to meetings of government bodies, in my experience, they are typically held on weekday nights. It is noted that the courts have held that recording devices can be used at open meetings, so long as those devices are used unobtrusively. Therefore, if you cannot attend a meeting, perhaps you could arrange for a friend or neighbor to do so, and that person could record the meeting so that you could keep abreast of the municality's activities.

I hope that I have been of assistance. If you have questions relating to either the Freedom of Information or Open Meetings Laws, 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-12688

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May 30, 2001

Hon. Edward P. Romaine
Suffolk County Clerk
310 Center Drive
Riverhead, NY 11901-3392

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Romaine:

I have received your letter in which you wrote that you were contacted by "volunteers who are interested in electronically posting an index of all veterans discharges filed in the County Clerk's Office." You have asked whether such an index may be posted with names, year and branch of service and whether the "actual discharge papers" may be displayed.

In this regard, by way of background, §250 of the Military Law, which has remained unchanged for some forty years, states that any certificate of honorable discharge issued after April 6, 1917 "may be recorded in any one county, in the office of the county clerk, and when so recorded shall constitute notice to all public officials of the facts set forth therein." As such, although there is no requirement that they do so, veterans may file certificates of honorable discharge with county clerks. The more recent filings, perhaps those within the last twenty years, include social security numbers.

A veteran who chooses to file a certificate of honorable discharge with a county clerk has the ability direct that it be sealed pursuant to §79-g of the Civil Rights Law. That provision states that:

> "a. Notwithstanding the provisions of any general, special or local law to the contrary, any person filing a certificate of honorable discharge in the office of a county clerk shall have the right to direct the county clerk to keep such certificate sealed.
>
> b. Thereafter, such certificate shall be made available to the veteran, a duly authorized agent or representative of such veteran or the representative of the estate of a deceased veteran but shall not be available for public inspection."

Although the Freedom of Information Law is based on a presumption of access, the first ground for denial would authorize county clerks to shield from the public certificates or honorable discharge that have been sealed based on the direction to do so by a veteran. Section 87(2)(a) pertains to records that are "specifically exempted from disclosure by state or federal statute." Section 79-g of the Civil Rights Law is such a statute, and if direction to seal is given by a veteran, a county clerk would be prohibited from disclosing, notwithstanding the provisions of the Freedom of Information Law.

When there is no direction by a veteran to seal a certificate of honorable discharge, that record, like all others, would be subject to rights conferred by the Freedom of Information Law. As I understand the content of such a record, the only item that could be withheld would be the social security number. It has been held that local government agencies may withhold social security numbers on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)], but that they not required to do so [Seelig v. Sielaff, 201 A.D. 2d 298 (1994)]. As a general matter, even though a local government agency, i.e., a county, may withhold records or portions thereof in appropriate circumstances, it is not obliged to do so, because the Freedom of Information Law is permissive. Therefore, while I believe that a local government agency may delete social security numbers from records that are otherwise available, the Freedom of Information Law would not prohibit a county clerk from disclosing certificates of honorable discharge in their entirety, unless those records are sealed under §79-g of the Civil Rights Law.

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-12689

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May 31, 2001

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 facts presented in your correspondence.

Dear Mr. McCrorie:

As you are aware, I have received your letter in which you sought an advisory opinion concerning rights of access to "the results of a re-evaluation of the City of Glen Cove Property Values." The records sought were apparently withheld on the ground that they consist of "work product."

If I understand the situation correctly, the characterization of the records as "work product" is irrelevant. Pertinent, however, is a judicial decision dealing with access to the kinds of records in which you are interested. In this regard, I offer the following comments.

First, the Freedom of Information Law applies to agency records, and §86(4) of that statute defines the term "record" expansively to include:

> "...any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, materials characterized as "work product" prepared by or for the City would constitute "records" that fall within the scope of the Freedom of Information Law.

Second, in brief, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. There is no exception dealing specifically with "work product."

Third, 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 and valuation data, different provisions of the Real Property Tax Law offer direction. As you are likely 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, inventory and valuation data 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.

That is the conclusion, as I interpret the decision, that was reached in 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

cc: Assessor, City of Glen Cove

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12690

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May 31, 2001

Dr. Richard Cordero
[redacted]

The staff of the Committee 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. Cordero:

As you are aware, I have received a variety of correspondence and requests for my opinion relative to your requests made under the Freedom of Information Law to the New York City Departments of Buildings and Investigations.

It is my understanding that the requests were precipitated by your complaints and calls for investigations concerning activities occurring at a property contiguous to your residence. It is also my understanding that "investigations" or inquiries by City agencies generally resulted in the absence of any particular action taken. For that reason, while it may be your belief that voluminous materials may have been produced pertaining to your complaints, I have been led to believe that relatively few records were produced. Although Ms. Elyse Hirschorn of the Department of Investigation indicated that the records sought, insofar they exist, will be made available to you on June 4 to the extent required by law, I offer the following comments in response to your contentions.

First, the Freedom of Information Law pertains to existing records, and §89(3) states in relevant part that an agency need not create a record in response to a request. 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 consideration of several of the responses to your requests, I point out that it has been held that if records were previously disclosed to you, an agency is not required to make the same records available a second time, unless it can be demonstrated that neither the applicant nor his or representative (i.e., that person's attorney) any longer has possession of the records [see Moore v. Santucci, 151 AD2d 677 (1989)].

Second, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests and appeals. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Further, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), which govern the procedural aspects of the Law, state that:

> "(a) The governing body of a public corporation or the head, chief executive or governing body of other agencies shall hear appeals or shall designate a person or body to hear appeals regarding denial of access to records under the Freedom of Information Law.
>
> (b) Denial of access shall be in writing stating the reason therefor and advising the person denied access of his or her right to appeal to

> the person or body established to hear appeals, and that person or body shall be identified by name, title, business address and business telephone number. The records access officer shall not be the appeals officer" (section 1401.7).

It is also noted that the state's highest court has held that a failure to inform a person denied access to records of the right to appeal enables that person to seek judicial review of a denial. Citing the Committee's regulations and the Freedom of Information Law, the Court of Appeals in Barrett v. Morgenthau held that:

> "[i]nasmuch as the District Attorney failed to advise petitioner of the availability of an administrative appeal in the office (see, 21 NYCRR 1401.7[b]) and failed to demonstrate in the proceeding that the procedures for such an appeal had, in fact, even been established (see, Public Officers Law [section] 87[1][b], he cannot be heard to complain that petitioner failed to exhaust his administrative remedies" [74 NY 2d 907, 909 (1989)].

You expressed the view that an agency must inform a person denied access to records of the "existence and address of the Committee on Open Government" and that an agency that fails to indicate grounds for denial in response to requests and appeals "must be considered to have forfeited" its capacity to assert grounds for denial in ensuing proceedings. While agencies are required by §89(4)(a) to send copies of appeals and their determinations thereon to the Committee, there is nothing in the law that requires that they provide information pertaining to the Committee to a person seeking records.

I point out, too, that the lower court in Floyd, supra, determined that the records should have been disclosed by virtue of the agency's failure to respond, but that the Appellate Division modified that aspect of the decision. Although the Appellate Division confirmed that a failure to respond to an appeal within the statutory time constitutes a constructive denial of access, thereby resulting in the exhaustion of one's administrative remedies and the right to initiate an Article 78 proceeding, it was also found that such failure did not automatically require that the agency disclose the requested records. Specifically, in rejecting the Supreme Court's automatic grant of access, the Appellate Division found that:

> "We think this is too rigid an interpretation of the statute. As a textual matter, if the effect of failure to comply were as Special Term interpreted it, it would have been more appropriate for the statute to say that if (A) the agency did not furnish the explanation in writing then (B) the agency must provide access to the material sought. Instead, however, the statute is phrased in the alternative form of requiring the agency within seven days to do either (A) or (B). As a textual matter there would appear to be no particular reason to say that failure to do either (A) or (B) would require the agency to do (B) rather than (A), which is the choice Special Term made.

> "More important, as a policy matter, we do not think the statute should be interpreted so rigidly to require the result directed by Special Term. We recognize the importance of prompt response by the agency to the request for information. Such responsiveness and accountability are the very point of FOIL. But the same statute also expresses the public policy that some kinds of material should be exempt from disclosure. Both policies must be considered. To say that even the slightest default in timely explanation destroys the exemption seems to us too draconian. We think the seven-day limitation should be read as directory rather than mandatory, and that the consequence of failure by the agency to comply with the seven-day limitation is that the applicant will be deemed to have exhausted his administrative remedies and will be entitled to seek his judicial remedy" (id., 87 AD 2d 388, 390).

I note that at the time of the decision, the statutory time for responding to an appeal was seven days; it is now ten business days.

You added that "[a] lawyer who represents himself in an action in court against a FOIL-subjected agency and prevails, is entitled....a. to court costs, and b. to other damages, particularly where the agency has intentionally violated FOIL." The provision dealing with reimbursement in a litigation context, §89(4)(c), states that:

> "The court in such a proceeding may assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed, provided, that such attorney's fees and litigation costs may be recovered only where the court finds that:
>
> i. the record involved was, in fact, of clearly significant interest to the general public; and
>
> ii. the agency lacked a reasonable basis in law for withholding the record."

Based on the foregoing, reimbursement is limited to court costs and attorney's fees, and any such award may be conferred only when each of three conditions is met: that the person denied access has substantially prevailed, that the agency had no reasonable basis for denying access, and that the records are of clearly significant interest to the general public. There is no mention of damages in the Freedom of Information Law.

Third, I am unfamiliar with the contents of existing records falling within the scope of your request. However, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent

that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Portions of the records sought are apparently being made available under §87(2)(g). That provision potentially serves as a basis for a denial of access. Nevertheless, due to its structure, it may require disclosure of certain aspects of records. 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.

Among the records sought are investigative policies and procedures. Those kinds of records would, in my view, constitute intra-agency materials that must be disclosed under subparagraph (iii) of §87(2)(g), unless a different ground for denial applies. Pertinent in this regard is §87(2)(e), which permits an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations of judicial proceedings...
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

Under the circumstances, most relevant is §87(2)(e)(iv). The leading decision concerning that provision is Fink v. Lefkowitz, which involved access to a manual prepared by a special prosecutor that investigated nursing homes, in which the Court of Appeals held that:

> "The purpose of this exemption is obvious. Effective law enforcement demands that violators of the law not be apprised the nonroutine procedures by which an agency obtains its information (see Frankel v. Securities & Exch. Comm., 460 F2d 813, 817, cert den 409 US 889). However beneficial its thrust, the purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution.
>
> "To be distinguished from agency records compiled for law enforcement purposes which illustrate investigative techniques, are those which articulate the agency's understanding of the rules and regulations it is empowered to enforce. Records drafted by the body charged with enforcement of a statute which merely clarify procedural or substantive law must be disclosed. Such information in the hands of the public does not impede effective law enforcement. On the contrary, such knowledge actually encourages voluntary compliance with the law by detailing the standards with which a person is expected to comply, thus allowing him to conform his conduct to those requirements (see Stokes v. Brennan, 476 F2d 699, 702; Hawkes v. Internal Revenue Serv., 467 F2d 787, 794-795; Davis, Administrative Law [1970 Supp], section 3A, p 114).
>
> "Indicative, but not necessarily dispositive of whether investigative techniques are nonroutine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel (see Cox v. United States Dept. of Justice, 576 F2d 1302, 1307-1308; City of Concord v. Ambrose, 333 F Supp 958). It is no secret that numbers on a balance sheet can be made to do magical things by scrupulous nursing home operators the path that an audit is likely to take and alerting them to items to which investigators are instructed to pay particular attention, does not encourage observance of the law. Rather, release of such information actually countenances fraud by enabling miscreants to alter their books and activities to minimize the possibility or being brought to task for criminal activities. In such a case, the procedures contained in an administrative manual are, in a very real sense, compilations of investigative techniques exempt from disclosure. The Freedom of Information Law was not enacted to furnish the safecracker with the combination to the safe" (id. at 572-573).

In applying those criteria to specific portions of the manual, which was compiled for law enforcement purposes, the Court found that:

> "Chapter V of the Special Prosecutor's Manual provides a graphic illustration of the confidential techniques used in a successful nursing home prosecution. None of those procedures are 'routine' in the sense of fingerprinting or ballistic tests (see Senate Report No. 93-1200, 93 Cong 2d Sess [1974]). Rather, they constitute detailed, specialized methods of conducting an investigation into the activities of a specialized industry in which voluntary compliance with the law has been less then exemplary.
>
> "Disclosure of the techniques enumerated in those pages would enable an operator to tailor his activities in such a way as to significantly diminish the likelihood of a successful prosecution. The information detailed on pages 481 and 482 of the manual, on the other hand, is merely a recitation of the obvious: that auditors should pay particular attention to requests by nursing homes for Medicaid reimbursement rate increases based upon projected increase in cost. As this is simply a routine technique that would be used in any audit, there is no reason why these pages should not be disclosed" (id. at 573).

While I am unfamiliar with the records in question, it would appear that those portions which, if disclosed, would enable potential lawbreakers to evade detection could likely be withheld. It is noted that in another decision which dealt with a request for certain regulations of the State Police, the Court of Appeals found that some aspects of the regulations were non-routine, and that disclosure could "allow miscreants to tailor their activities to evade detection" [De Zimm v. Connelie, 64 NY 2d 860 (1985)]. Nevertheless, other portions of the records might be "routine" and might not if disclosed preclude employees from carrying out their duties effectively.

Another ground for denial of possible relevance is §87(2)(f). That provision permits an agency to withhold records when disclosure "would endanger the life of safety of any person." To the extent that disclosure would endanger the life of safety of officers or others, it appears that §87(2)(f) would be applicable.

In sum, while some aspects of the records, if they exist, might be deniable, others must in my opinion be disclosed in conjunction with the preceding commentary.

I hope that the foregoing serves to 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: Felicia R. Miller
Elyse G. Hirschorn

STATE OF NEW YORK
DEPARTMENT OF STATE
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May 31, 2001

Lt. Mark P. Coleman
Lieutenant, Florida Volunteer
Fire Department
P.O. Box 181
Florida, NY 10921

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Lt. Coleman:

Your letter of May 9 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 Open Meetings and Freedom of Information Laws. In brief, you have questioned the applicability of those laws to meetings and records of a volunteer fire department.

In this regard, the Open Meetings Law is applicable to meetings of public bodies. Section 102(2) of the Law defines "public body" to mean:

> "...any entity for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

By reviewing the components in the definition of "public body", I believe that each is present with respect to the board of a volunteer fire company. The board of a volunteer fire company is clearly an entity consisting of two or more members. I believe that it is required to conduct its business by means of a quorum under the Not-for-Profit Corporation Law. Further, in my view, a volunteer fire company at its meetings conducts public business and performs a governmental function. Such a function is carried out for a public corporation, which is defined to include a municipality, such as a town or village, for example. Since each of the elements in the definition of "public body" pertains to the board of a volunteer fire company, it appears that the board of such a company is a "public body" subject to the Open Meetings Law.

I point out that the status of volunteer fire companies had long been unclear. Those companies are generally not-for-profit corporations that perform their duties by means of contractual relationships with municipalities. As not-for-profit corporations, it was difficult to determine whether or not they conducted public business and performed a governmental function. Nevertheless, in a case brought under the Freedom of Information Law dealing with the coverage of that statute with respect to volunteer fire companies, the state's highest court, the Court of Appeals, found that a volunteer fire company is an "agency" that falls within the provisions if the Freedom of Information Law [see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575 (1980)]. In its decision, the Court clearly indicated that a volunteer fire company performs a governmental function and that its records are subject to rights of access granted by the Freedom of Information Law.

In view of the decision rendered in Westchester Rockland, I believe that the board of a volunteer fire company falls within the definition of "public body" and would be required to comply with the Open Meetings Law.

With respect to the scope of the Freedom of Information Law, as indicated above, that statute applies to agency records, and §86(3) defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

As such, the Freedom of Information Law generally pertains to records maintained by entities of state and local government.

In Westchester-Rockland, the case involved access to records relating to a lottery conducted by a volunteer fire company, and it was determined that volunteer fire companies, despite their status as not-for-profit corporations, are "agencies" subject to the Freedom of Information Law. In so holding, the Court stated that:

> "We begin by rejecting respondent's contention that, in applying the Freedom of Information Law, a distinction is to be made between a volunteer organization on which a local government relies for performance of an essential public service, as is true of the fire department here, and on the other hand, an organic arm of government, when that is the channel through which such services are delivered. Key is the Legislature's own unmistakably broad declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (emphasis added; Public Officers Law, §84).

> "True, the Legislature, in separately delineating the powers and duties of volunteer fire departments, for example, has nowhere included an obligation comparable to that spelled out in the Freedom of Information statute (see Village Law, art 10; see, also, 39 NY Jur, Municipal Corporations, §§560-588). But, absent a provision exempting volunteer fire departments from the reach of article 6-and there is none-we attach no significance to the fact that these or other particular agencies, regular or volunteer, are not expressly included. For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objections cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" (id. at 579].

Moreover, although it was contended that documents concerning the lottery were not subject to the Freedom of Information Law because they did not pertain to the performance of the company's fire fighting duties, the Court held that the documents constituted "records" subject to the Freedom of Information Law [see §86(4)].

More recently, another decision confirmed in an expansive manner that volunteer fire companies are required to comply with the Freedom of Information Law. That decision, S.W. Pitts Hose Company et al. v. Capital Newspapers (Supreme Court, Albany County, January 25, 1988), dealt with the issue in terms of government control over volunteer fire companies. In its analysis, the Court states that:

> "Section 1402 of the Not-for-Profit Corporation Law is directly applicable to the plaintiffs and pertains to how volunteer fire companies are organized. Section 1402(e) provides:
>
> > '...a fire corporation, hereafter incorporated under this section shall be under the control of the city, village, fire district or town authorities having by law, control over the prevention or extinguishment of fires therein. Such authorities may adopt rules and regulations for the government and control of such corporations.'
>
> "These fire companies are formed by consent of the Colonie Town Board. The Town has control over the membership of the companies, as well as many other aspects of their structure, organization and operation (section 1402). The plaintiffs' contention that their relationship with the Town of Colonie is solely contractual is a

> mischaracterization. The municipality clearly has, by law, control over these volunteer organizations which reprovide a public function.
>
> "It should be further noted that the Legislature, in enacting FOIL, intended that it apply in the broadest possible terms. '...[I]t is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (Public Officers Law, section 84).
>
> "This court recognizes the long, distinguished history of volunteer fire companies in New York State, and the vital services they provide to many municipalities. But not to be ignored is that their existence is inextricably linked to, dependent on, and under the control of the municipalities for which they provide an essential public service."

Based upon the foregoing, it is clear that volunteer fire companies are subject to the Freedom of Information Law.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 requires that meetings be conducted in public, except to the extent that there is a basis for entry in to an executive session. Paragraphs (a) through (h) of §105(1) specify and limit the subjects that may properly be discussed during an executive session.

Enclosed for your review are copies of the Freedom of Information and Open Meetings Laws, as well as "Your Right to Know", which describes both laws.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt
Encs.

STATE OF NEW YORK
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May 31, 2001

Hon. Bill Cirocco
Elma Councilman
1171 Bowen Road
Elma, NY 14059

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 Councilman Cirocco:

I have received your letter in which you questioned whether you, as a member of the Elma Town Board, "should have to resort to the Freedom of Information Act to obtain information that [you] set policy on." According to the correspondence attached to your letter, you sought "copies of all employees' individual vouchers covering the Town's reimbursement of Medical expenses." You added in your letter to this office that you "did not request personal medical information, just the name and amount of dollars paid by the Town."

In this regard, I offer the following comments.

First, from my perspective, the Freedom of Information Law is intended to enable the public to request and obtain accessible records. Further, it has been held that accessible records should be made equally available to any person, without regard to status or interest [see e.g., Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976) and M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)]. Nevertheless, if it is clear that records are requested in the performance of one's official duties, the request might not be viewed as having been made under the Freedom of Information Law. In such a situation, if a request is reasonable, and in the absence of a rule or policy to the contrary, I believe that a member of a 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; also Town Law, §63). 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 the absence of any such rule, a member seeking records could presumably be treated in the same manner as the public generally.

Second, the Freedom of Information Law, in brief, is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

It is noted that there is nothing in the Freedom of Information Law that deals specifically with personnel records or personnel files. Further, the nature and content of so-called personnel files may differ from one agency to another, and from one employee to another. In any case, neither the characterization of documents as "personnel records" nor their placement in personnel files would necessarily render those documents "confidential" or deniable under the Freedom of Information Law (see Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980). On the contrary, the contents of those documents serve as the relevant factors in determining the extent to which they are available or deniable under the Freedom of Information Law.

The provision in the Freedom of Information Law of most significance concerning the information in question is, in my view, §87(2)(b). That provision permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy".

While the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public officers employees. It is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public officers and employees are required to be more accountable than others. Further, with regard to records pertaining to public officers and employees, the courts have found that, as a general rule, records that are relevant to the performance of a their official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, supra; Capital Newspapers v. Burns, 109 AD 2d 292 (1985) aff'd 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

In my opinion, names of employees or family members coupled with amounts of reimbursements appearing on vouchers would, if disclosed, constitute an unwarranted invasion of personal privacy, even though they do not indicate particular medical condition or problem. I believe that items of that nature are largely irrelevant to the performance of one's official duties. Further, vouchers indicating treatment, or particularly the frequency of treatment, and the amounts reimbursed, represent somewhat intimate details of peoples' lives. For that reason as well, again, I would contend that disclosure would result in an unwarranted invasion of privacy.

I hope that the foregoing serves to clarify your understanding and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Patricia King
Rosemary L. Bapst

STATE OF NEW YORK
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May 31, 2001

Mr. John J. Priest, Jr.
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Priest:

I have received your letter in which you asked whether a volunteer fire company is subject to the Freedom of Information Law.

Based on a decision rendered by the state's highest court more than twenty years ago, it is clear that volunteer fire companies are required to comply with that statute. In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to agency records, and §86(3) of the Law defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

As such, the Freedom of Information Law generally pertains to records maintained by entities of state and local governments.

However, in Westchester-Rockland Newspapers v. Kimball [50 NYS 2d 575 (1980)], a case involving access to records relating to a lottery conducted by a volunteer fire company, the Court of Appeals, found that volunteer fire companies, despite their status as not-for-profit corporations, are "agencies" subject to the Freedom of Information Law. In so holding, the Court stated that:

> "We begin by rejecting respondent's contention that, in applying the Freedom of Information Law, a distinction is to be made between a volunteer organization on which a local government relies for performance of an essential public service, as is true of the fire

> department here, and on the other hand, an organic arm of government, when that is the channel through which such services are delivered. Key is the Legislature's own unmistakably broad declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (emphasis added; Public Officers Law, §84).
>
> "True, the Legislature, in separately delineating the powers and duties of volunteer fire departments, for example, has nowhere included an obligation comparable to that spelled out in the Freedom of Information statute (see Village Law, art 10; see, also, 39 NY Jur, Municipal Corporations, §§560-588). But, absent a provision exempting volunteer fire departments from the reach of article 6-and there is none-we attach no significance to the fact that these or other particular agencies, regular or volunteer, are not expressly included. For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objections cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" (id. at 579].

Moreover, although it was contended that documents concerning the lottery were not subject to the Freedom of Information Law because they did not pertain to the performance of the company's fire fighting duties, the Court held that the documents constituted "records" subject to the Freedom of Information Law [see §86(4)].

More recently, another decision confirmed in an expansive manner that volunteer fire companies are required to comply with the Freedom of Information Law. That decision, S.W. Pitts Hose Company et al. v. Capital Newspapers (Supreme Court, Albany County, January 25, 1988), dealt with the issue in terms of government control over volunteer fire companies. In its analysis, the Court states that:

> "Section 1402 of the Not-for-Profit Corporation Law is directly applicable to the plaintiffs and pertains to how volunteer fire companies are organized. Section 1402(e) provides:
>
> > '...a fire corporation, hereafter incorporated under this section shall be under the control of the city, village,

> fire district or town authorities having by law, control over the prevention or extinguishment of fires therein. Such authorities may adopt rules and regulations for the government and control of such corporations.'
>
> "These fire companies are formed by consent of the Colonie Town Board. The Town has control over the membership of the companies, as well as many other aspects of their structure, organization and operation (section 1402). The plaintiffs' contention that their relationship with the Town of Colonie is solely contractual is a mischaracterization. The municipality clearly has, by law, control over these volunteer organizations which reprovide a public function.
>
> "It should be further noted that the Legislature, in enacting FOIL, intended that it apply in the broadest possible terms. '...[I]t is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (Public Officers Law, section 84).
>
> "This court recognizes the long, distinguished history of volunteer fire companies in New York State, and the vital services they provide to many municipalities. But not to be ignored is that their existence is inextricably linked to, dependent on, and under the control of the municipalities for which they provide an essential public service."

Based upon the foregoing, it is clear that volunteer fire companies are subject to the Freedom of Information Law.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

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 is largely irrelevant to rights of access. Therefore, when records of volunteer fire company are accessible under the Freedom of Information Law, they would be available to the public generally.

Lastly, the kinds of financial records that you described would, in my view, be generally available. The only aspects of the records that might justifiably be withheld would be personally identifying details pertaining to members of the public (not business or other entities) who make contributions to the company. To that extent, I believe that disclosure would constitute "an unwarranted invasion of personal privacy" [see §87(2)(b)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

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May 31, 2001

Ms. Debbie Beach
[redacted]

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 relating to an appeal made under the Freedom of Information Law to the Chairman of the Niagara County Legislature that had not been answered within the statutory time. You indicated that the Office of the District Attorney informed you that it had disclosed "everything in their file" pertaining to a certain case. Nevertheless, you wrote that you did not receive a certain "two page statement", the record that is the subject of your appeal, given by your nephew. The appeal indicates that the statement was presented to the grand jury.

In this regard, I am unaware of the nature of the case or the record in which you are interested. Nevertheless, I offer the following comments.

First, as you are likely aware, the provision dealing with the right to appeal a denial of access to records, §89(4)(a) of the Freedom of Information Law, states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of 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), the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records

or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

The initial ground for denial in the Freedom of Information Law, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute". One such statute, §190.25(4) of the Criminal Procedure Law, deals with grand jury proceedings and provides in relevant part that:

> "Grand jury proceedings are secret, and no grand juror, or other person specified in subdivision three of this section or section 215.70 of the penal law, may, except in the lawful discharge of his duties or upon written order of the court, disclose the nature or substance of any grand jury testimony, evidence, or any decision, result or other matter attending a grand jury proceeding."

As such, records presented to a grand jury would ordinarily 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. If the record in question is subject to provision quoted above, I believe that it would be exempt from disclosure under the Freedom of Information Law. However, if that record was presented or submitted into evidence during a public proceeding, the exemption from disclosure, in my view, would no longer apply [see Moore v. Santucci, 151 AD 2d 677 (1980)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Clyde Burmaster

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June 1, 2001

Mr. Hans Pecher
[redacted]

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. Pecher:

I have received your letter and related correspondence pertaining to requests for records of the Town of Genoa under the Freedom of Information Law.

In a letter that you received from the Town Supervisor, he alluded to the designation of a records access officer, and informed you that he "appointed [him]self as the officer in charge of regular FOIL request generators", i.e., those people who seek records frequently such as yourself. He indicated that you would be charged for the clerical time needed to prepare copies of Town records, because the Town "owns no photocopying equipment." He added, however, that the Town "does possess equipment capable of transferring an electronic image to produce a second original (a printing process)", that it does have "equipment that can reproduce a copy but it is not in the care, custody or control of the Clerk and it not classified as a photocopier", and that minutes of meetings are available on the Town's website. The Supervisor also wrote that although meetings of the Town Board are tape recorded, the capacity copy the tapes is "primitive."

In this regard, I offer the following comments.

First, if the Town has placed documents on its website, they can readily be obtained with a computer and an Internet service provider. If you do not have a home or office computer with such a service, I would conjecture that a public library would offer such a service.

Second, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural aspects of the Law (see 21 NYCRR Part 1401). In turn, §87(1)(a) of the Law states that:

> "the governing body of each public corporation shall promulgate uniform rules and regulations for all agencies in such public corporation pursuant to such general rules and regulations as may be

> promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the administration of this article."

In this instance, the governing body of a public corporation, the Town Board, is required to promulgate appropriate rules and regulations consistent with those adopted by the Committee on Open Government and with the Freedom of Information Law.

The initial responsibility to deal with requests is borne by an agency's records access officer, and the Committee's regulations provide direction concerning the designation and duties of a records access officer. Specifically, §1401.2 of the regulations provides in relevant part that:

> "(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so."

As such, the Town Board has the ability to designate "one or more persons as records access officer". Further, §1401.2(b) of the regulations describes the duties of a records access officer, including the duty to coordinate the agency's response to requests. If the Town Clerk has been designated records access officer, I believe that she has the authority to make initial determinations to grant or deny access to records in response to requests made under the Freedom of Information Law; the Supervisor would not have such authority. Absent authority to do so conferred by means of a majority vote of the Town Board, I do not believe that he could validly designate himself as being "in charge of regular FOIL request generators."

Third, the correspondence does not clearly indicate the nature of the equipment that the Town may use, irrespective of the absence of ownership of that equipment. In this regard, I point out that the statement of intent appearing at the beginning of the Freedom of Information Law indicates that "it is incumbent on the state and its localities to extend public accountability wherever and whenever feasible." In consideration of that statement, I believe that the Town is required to use whatever resources are available to further the purposes of the Freedom of Information Law. Further, with respect to obtaining a copy of a tape recording, an individual can produce a tape simply by placing his or her tape recorder next to that of a Town's recorder. When the recording is played, the individual 's recorder can make a reproduction.

Lastly, you wrote that "[t]his whole situation is a result of [your] questioning the town's of a $2.00 fee on copies of county and town real estate tax bills." With regard to fees, by way of historical background, §87(1)(b)(iii) of the Freedom of Information Law stated until October 15, 1982, that an agency could charge up to twenty-five cents per photocopy or the actual cost of

reproduction unless a different fee was prescribed by "law". Chapter 73 of the Laws of 1982 replaced the word "law" with the term "statute". As described in the Committee's fourth annual report to the Governor and the Legislature of the Freedom of Information Law, which was submitted in December of 1981 and which recommended the amendment that is now law:

> "The problem is that the term 'law' may include regulations, local laws, or ordinances, for example. As such, state agencies by means of regulation or municipalities by means of local law may and in some instances have established fees in excess of twenty-five cents per photocopy, thereby resulting in constructive denials of access. To remove this problem, the word 'law' should be replaced by 'statute', thereby enabling an agency to charge more than twenty-five cents only in situations in which an act of the State Legislature, a statute, so specifies."

Therefore, prior to October 15, 1982, a local law, an ordinance, or a regulation for instance, establishing a search fee or a fee in excess of twenty-five cents per photocopy or higher than the actual cost of reproduction was valid. However, under the amendment, only an act of the State Legislature, a statute, would in my view permit the assessment of a fee higher than twenty-five cents per photocopy, a fee that exceeds the actual cost of reproducing records that cannot be photocopied, (i.e., electronic information), or any other fee, such as a fee for search or overhead costs. In addition, it has been confirmed judicially that fees inconsistent with the Freedom of Information Law may be validly charged only when the authority to do so is conferred by a statute [see Gandin, Schotsky & Rappaport v. Suffolk County, 640 NYS 2d 214, 226 AD 2d 339 (1996); Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)].

Further, the specific language of the Freedom of Information Law and the regulations promulgated by the Committee on Open Government indicate that, absent statutory authority, an agency may charge fees only for the reproduction of records. Section 87(1)(b) of the Freedom of Information Law states:

> "Each agency shall promulgate rules and regulations in conformance with this article...and pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the availability of records and procedures to be followed, including, but not limited to...
>
> > (iii) the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by statute."

The regulations promulgated by the Committee state in relevant part that:

"Except when a different fee is otherwise prescribed by statute:

(a) There shall be no fee charged for the following:
(1) inspection of records;
(2) search for records; or
(3) any certification pursuant to this Part" (21 NYCRR 1401.8)."

Based upon the foregoing, it is likely that a fee for reproducing electronic information would involve the cost of computer time, plus the cost of an information storage medium (i.e., a computer tape or disk) to which data is transferred.

Although compliance with the Freedom of Information Law involves the use of public employees' time and perhaps other costs, the Court of Appeals has found that the Law is not intended to be given effect "on a cost-accounting basis", but rather that "Meeting the public's legitimate right of access to information concerning government is fulfillment of a governmental obligation, not the gift of, or waste of, public funds" [Doolan v. BOCES, 48 NY 2d 341, 347 (1979)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board
Hon. Richard Harrison

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12696

41 State Street, Albany, New York 12231
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June 1, 2001

Hon. Theresa A. Cooper
Town Clerk
Town of Oswego
2320 County Route 7
Oswego, NY 13126

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Cooper:

I have received your letter in which you sought my opinion concerning "the erasing of a taped meeting of the town planning board which [you] requested verbally and in writing to the planning secretary and chairman." You indicated that the Chairman informed you that the tape "was unavailable because he destroyed it."

In this regard, I offer the following comments.

First, irrespective of who might have had physical possession of the tape recording of the meeting, I believe that you, as Town Clerk, had legal custody. As you are likely aware, §30 of the Town Law states in part that the town clerk "shall have the custody of all the records, books and papers of the town."

Second, the tape recording of the meeting in my view clearly fell within the coverage of the Freedom of Information Law. That statute pertains to agency records, and §86(4) of the Law defines the term "record" expansively to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, 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 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, 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].

Third, 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.

Since questions regarding the retention of tape recordings of open meetings have been the subject of numerous questions over the course of time, I would add that the minimum retention period for such records is four months. Assuming that the meeting that was recorded occurred less than four months ago, I do not believe that the Chairman of the Planning Board or any other person would have had the right or the authority to destroy the tape recording.

Lastly, for your information, I point out that §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."

Article Six of the Public Officers Law is the Freedom of Information Law, and §89(8) of that statute includes analogous language.

From my perspective, those provisions may be applicable in two circumstances: first, when an agency officer or 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 officer or employee destroys a record following a request for that record in order to prevent disclosure of the record.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Chairman, Planning Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12697

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June 4, 2001

Hon. Robert S. Thompson
Massapequa Zoning Board Member
208 Fillmore Street
Massapequa Park, NY 11762-1512

Dear Mr. Thompson:

I have received your letter and the material attached to it. You indicated that you serve as a member of the Village of Massapequa Park Zoning Board of Appeals, and that you have had disagreements with the Board's attorney concerning the application of the Open Meetings Law to the Board.

The attachment to your letter was prepared by the Board's attorney and is entitled "Opinion and Laws regarding procedures of the zoning board of appeals of the Village of Massapequa Park." You apparently deleted the opinion, for at the end of the opinion is the following:

**"- WARNING -
PRIVILEGED, CONFIDENTIAL, AND NON-DISCOVERABLE COMMUNICATION"**

You have asked whether you may send to this office the attorney's opinion, as well as an opinion offered by an attorney for the New York Conference of Mayors.

In this regard, insofar as the attorney's opinion consists of legal advice offered to a client (i.e., the Board as a whole, or you, as a member of the Board), I believe that it would be subject to the attorney-client privilege. From my perspective, an attorney does not unilaterally determine whether or the extent which the privilege should be asserted; on the contrary, the client makes that kind of determination. Therefore, if, as a member of the Board and a client, you seek legal advice from the Board's attorney, you may waive the privilege and disclose information that would otherwise be privileged. Stated differently, you, as a client, may choose to preserve the confidentiality that may be asserted when a record is subject to the attorney-client privilege; on the other hand, however, because you are a client, you may choose to disclose, thereby waiving the privilege.

As I understand the nature of the relationship between you or your Village and the New York Conference of Mayors, neither you nor the Village could be considered the client of an attorney of that organization for the purposes of asserting the attorney-client privilege. If that is so, I believe that you have the authority to send to me, or anyone else, the material sent to you by the Conference of Mayors or its legal representative.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Barry M. Leff

From: Robert Freeman
To: [redacted].GWIA.DOS1
Date: 6/4/01 8:34AM
Subject: Re: FOIL Question

Dear Nero:

In my view, written opinions of school attorneys likely can be withheld in great measure, if not in their entirety, on two grounds. First, when an attorney prepares a legal opinion for a client, the communication falls within the scope of the attorney-client privilege. In that instance, the record would be "specifically exempted from disclosure by state....statute" pursuant to section 87(2)(a) of the FOIL. Second, an opinion transmitted by a school district attorney to a board of education or the staff of a school district would constitute "intra-agency material." Insofar as that kind of communication consists of opinion, advice, recommendation and the like, it could be withheld under section 87(2)(g).

With respect to your second question, as a general matter, what is said or heard during an executive is neither confidential nor privileged. Unless a statute (an act of Congress or the State Legislature) forbids disclosure (i.e., as in the case of the disclosure of information contained in records identifiable to specific students), there is no law that would prohibit disclosure of information discussed during an executive session.

If you have further questions, please feel free to contact me.

I hope that I have been of assistance.
>>> [redacted] > 06/01/01 08:16PM >>>
Are the written opinions of the school attorneys accessible via freedom of information?

Secondly, if an item is discussed in executive session and does not strictly adhere to the criteria of a "executive session" is such information, material confidential or public information. Thank you.

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

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June 4, 2001

E-MAIL

TO: Daniel Stuart<[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. Stuart:

As you are aware, I have received your letter in which you sought an advisory opinion concerning a denial of your request for records indicating vacation accruals pertaining to correction officers at the Elmira Correctional Facility. You added that you are "disturbed that a Grade 9, Keyboard Specialist, is acting as FOIL Officer" for the facility and that "her responses are by direction from Building #2 in Albany." That being so, you questioned "why...there is an appeal to Albany."

In this regard, I offer the following comments.

First, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) require that the head or governing body of 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. There is nothing in the Freedom of Information Law or the Committee's regulations that focuses on the qualifications of a records access officer or those who may assist the records access officer in carrying out his or her duties. The records access officer in my view clearly has the authority, and perhaps the obligation in some instances, to consult with others in an effort to ensure compliance with law.

With respect to your question relating to the appeal process, so long as the person designated to determine appeals does not engage in a direct role in dealing initially with a request, I believe that an agency would be acting in compliance with law.

Second, with respect to the substance of your request, based on a decision rendered by the state's highest court, the Court of Appeals, records or portions of records indicating a public employee's attendance, including those portions reflective of the use or accrual of vacation or sick leave, for example, must be disclosed.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. The initial ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by statute." One such provision, §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 or correction officer that are "used to *evaluate performance* toward continued employment or promotion..." In my view, there is nothing in records indicating vacation accruals that involves an evaluation of performance. In a decision in which, the Court of Appeals sustained a denial of access to reprimands of police officers, the Court emphasized that:

> "...when access to an officer's personnel records relevant to promotion or continued employment is sought under FOIL, nondisclosure will be limited to the extent reasonably necessary to effectuate the purposes of Civil Rights Law § 50-a - - to prevent the potential use of information in the records in litigation to degrade, embarrass, harass or impeach the integrity of the officer. We said as much in Matter of Prisoners' Legal Services (supra), when after describing the legislative purpose of section 50-a, we expressly stipulated that 'records having remote or not potential use, like those sought in Capital Newspapers, fall outside the scope of the statute' (73 NY2d, at 33 [emphasis supplied]). Thus, in Capital Newspapers v Burns, we upheld FOIL disclosure of a single police officer's record of absences from duty for a specific month. By itself, the information was neutral and did not contain any invidious implications capable facially of harassment or degradation of the officer in a courtroom. The remoteness of any potential use of that officer's attendance record for abusive exploitation freed the courts from the policy constraints of Civil Rights Law § 50-a, enabling judicial enforcement of the FOIL legislative objectives in that case" [Daily Gazette v. City of Schenectady, 93NY2d 145, 157-158 (1999)].

Because records reflective of vacation accruals 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.

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 correction officer. Those documents, like those that you requested, might be found in a correction 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.

Section 87(2)(b) of the Freedom of Information Law authorizes an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy", and the courts have provided substantial direction regarding the privacy of public employees. According to those decisions, it is clear that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. With regard to records pertaining to public employees, the courts have found that, as a general rule, records that are relevant to the performance of a public employee' s official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

As 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 leave used or accrued 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).

Based on the preceding analysis, it is clear in my view that the records at issue must be disclosed under the Freedom of Information Law.

I hope that I have been of assistance.

RJF:tt

cc: Records Access Officer, Elmira Correctional Facility

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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FOIL-AO-12700

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June 4, 2001

Mr. John Kwasnicki
[redacted]

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. Kwasnicki:

I have received your letter, as well as the materials appended to it. You have raised questions concerning the Tuxedo Park Library in relation to quorum requirements, the absence of oaths of office filed by members of its Board of Trustees with the County Clerk, and its alleged failure to comply with the Freedom of Information Law.

In this regard, it is emphasized at the outset that many libraries are characterized as "public", in that they can be used by the public at large. Nevertheless, some of those libraries are governmental in nature, while others are not-for-profit corporations. The latter group frequently receives significant public funding. Because they are not governmental entities, in my opinion, they would not be subject to the Freedom of Information Law. Boards of trustees of all such libraries are, however, be subject to the Open Meetings Law.

In this regard, I offer the following comments.

The Freedom of Information Law is applicable to agency records, and §86(3) of that statute defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office of other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, the Freedom of Information Law generally applies to records maintained by governmental entities.

In conjunction with §253 of the Education Law and the judicial interpretation concerning that and related provisions, I believe that a distinction may be made between a public library and an association or free association library, such as the Tuxedo Park Library. The former would in my view be subject to the Freedom of Information Law, while the latter would not. Subdivision (2) of §253 states that:

> "The term 'public' library as used in this chapter shall be construed to mean a library, other than professional, technical or public school library, established for free purposes by official action of a municipality or district or the legislature, where the whole interests belong to the public; the term 'association' library shall be construed to mean a library established and controlled, in whole or in part, by a group of private individuals operating as an association, close corporation or as trustees under the provisions of a will or deed of trust; and the term 'free' as applied to a library shall be construed to mean a library maintained for the benefit and free use on equal terms of all the people of the community in which the library is located."

The leading decision concerning the issue was rendered by the Appellate Division, Second Department, which includes Tuxedo Park within its jurisdiction. Specifically, in French v. Board of Education, the Court stated that:

> "In view of the definition of a free association library contained in section 253 of the Education Law, it is clear that although such a library performs a valuable public service, it is nevertheless a private organization, and not a public corporation. (See 6 Opns St Comp, 1950, p 253.) Nor can it be described as a 'subordinate governmental agency' or a 'political subdivision'. (see 1 Opns St Comp, 1945, p 487.) It is a private corporation, chartered by the Board of Regents. (See 1961 Opns Atty Gen 105.) As such, it is not within the purview of section 101 of the General Municipal Law and we hold that under the circumstances it was proper to seek unitary bids for construction of the project as a whole. Cases and authorities cited by petitioner are inapposite, as they plainly refer to *public*, rather than free association libraries, and hence, in actuality, amplify the clear distinction between the two types of library organizations" [see attached, 72 AD 2d 196, 198-199 (1980); emphasis added by the court].

In my opinion, the language offered by the court clearly provides a basis for distinguishing between an association or free association library as opposed to a public library. For purposes of applying the Freedom of Information Law, I do not believe that an association library, a private non-governmental entity, would be subject to that statute; contrarily, a public library, which is established by government and "belong[s] to the public" [Education Law, §253(2)] would be subject to the Freedom of Information Law.

It is noted that confusion concerning the application of the Freedom of Information Law to association libraries has arisen in several instances, perhaps because its companion statute, the Open Meetings Law, is applicable to meetings of their boards of trustees. The Open Meetings Law, which is codified as Article 7 of the Public Officers Law, is applicable to public and association libraries due to direction provided in the Education Law. Specifically, §260-a of the Education Law states in relevant part that:

> "Every meeting, including a special district meeting, of a board of trustees of a public library system, cooperative library system, public library or free association library, including every committee meeting and subcommittee meeting of any such board of trustees in cities having a population of one million or more, shall be open to the general public. Such meetings shall be held in conformity with and in pursuance to the provisions of article seven of the public officers law."

Again, since Article 7 of the Public Officers Law is the Open Meetings Law, meetings of boards of trustees of various libraries, including association libraries, must be conducted in accordance with that statute.

In consideration of the preceding commentary, I believe that quorum requirements applicable to the Tuxedo Park Library would derive from provisions of the Not-for-Profit Corporation Law, rather than statutes applicable to governmental bodies. Further, as officers of a not-for-profit corporation, I do not believe that the members of the Board of Trustees would be required to file oaths of office, for they are not public officers.

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: Carmela Chase, Director

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 4, 2001

Ms. Ruth Weber
Advisory Board
Upper Grandview Association
P.O. Box 551
Nyack, NY 10960

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. Weber *et al.*:

I have received your letters relating to difficulties encountered in your efforts in obtaining information from the Town of Orangetown in a timely manner.

Since you asked that I "rule" with respect to the Town's treatment of your requests for records, I note that the functions of this office are primarily advisory in nature. Neither the Committee on Open Government nor myself has the authority to "rule" or render a binding determination concerning rights of access. It is our hope, however, that the opinions rendered by this office are educational, persuasive and that they enhance compliance with and understanding of the Freedom of Information Law. With that goal, I offer the following comments concerning the variety of issues that you raised. Several of those issues were considered in an opinion addressed to you on April 25, and there is no need to reiterate those points. Additionally, certain of those and others were addressed in an opinion sought by Dennis D. Michaels, Deputy Town Attorney. A copy of my response to Mr. Michaels is attached.

First, in some instances, municipal boards have designated several records officers, i.e., the heads of departments or individuals having responsibilities in relation to certain departments. In the context of your comments, if the Director of the Office of Building, Zoning and Planning Administration and Enforcement (OBZPAE) has been designated as records access officer with respect to records maintained by that entity, it is his responsibility to "coordinate" responses to requests for those records. The absence of the records access officer would not, in my view, constitute a valid reason for stopping the process of responding to requests. Again, the function of that person is ensure that agency personnel give effect to the Freedom of Information Law when requests are made.

Second, it has been held that when records are accessible under the Freedom of Information Law, they should be made equally available to any person, regardless of one's status, interest or the intended use of the records [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Moreover, the Court of Appeals, the State's highest court, has held that:

> "FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on government decision-making, its ambit is not confined to records actually used in the decision-making process. (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request" [Farbman v. New York City Health and Hospitals Corporation, 62 NY 2d 75, 80 (1984)].

Therefore, once it is determined that a record is accessible under the law, I believe that it must be made available unconditionally, irrespective of its intended use.

With respect to minutes of meetings, §106(3) of the Open Meetings Law specifies that minutes of meetings must be prepared and made available to the public 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 been approved, to comply with the Open Meetings Law, it has consistently been advised that minute be prepared and made available within two weeks, and that if the minutes have not been approved, they may be marked "unapproved", "draft" or "non-final", for example. By so doing within the requisite time limitations, the public can generally know what transpired at a meeting; concurrently, the public is effectively notified that the minutes are subject to change. If minutes have been prepared within less than two weeks, I believe that those unapproved minutes would be available as soon as they exist, and that they may be marked in the manner described above.

Next, with regard to the capacity to hear what is said at meetings, I direct your attention to §100 of the Open Meetings Law, its legislative declaration. That provision states that:

> "It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it."

Based upon the foregoing, it is clear in my view that public bodies must conduct meetings in a manner that guarantees the public the ability to "be fully aware of" and "listen to" the deliberative process. Further, I believe that every statute, including the Open Meetings Law, must be implemented in a manner that gives effect to its intent. In my view, a public body must situate itself and conduct its meetings in a manner in which those in attendance can observe and hear the proceedings. To do otherwise would in my opinion be unreasonable and fail to comply with a basis requirement of the Open Meetings Law.

Lastly, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

In the context of the matters to which you referred, records submitted to the Town by persons or entities outside of government, such as developers, would likely be accessible, for none of the grounds for denial would apparently be relevant.

You referred to "special recommendations" offered by the Building Director to the Planning Board, suggesting that those records would not qualify for the "'internal memo' excuse" and contended that all "departmental letters" and notedsof meetings must be disclosed. Here I point out that the "internal memo" exception in the Freedom of Information Law, §87(2)(g), pertains to "inter-agency or intra-agency" materials, and that §86(3) of the law defines the term "agency" to mean:

> "...any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, the kinds of communications to which you referred would fall within the coverage of §87(2)(g). Nevertheless, due to its structure, that provision often requires disclosure. Specifically, the cited provision enables an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical

or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. Therefore, insofar as communications between or among Town officials, or between or among Town officials and those of another agency, consist of advice, opinion, recommendation and the like, I believe that they may be withheld.

Assuming that notes consist merely of a factual rendition of what transpired at an open meeting, I believe that they would be available. In short, it was held years ago that notes of an open meeting consisting of factual information were required to be disclosed [Warder v. Board of Regents, 410 NYS 2d 742 (1978)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board
Planning Board
Hon. Charlotte Madigan, Town Clerk
John Giardiello, Director OBZPAE
Dennis D. Michaels

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12702

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June 4, 2001

Mr. Keith Gabari
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Gabari:

I have received your letter in which you referred to various issues related to a request for records from the Town of Yorktown Police Department.

In this regard, I offer the following comments.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Since I am unaware of the contents of all of the records in which you are interested, or the effects of their disclosure, I cannot offer specific guidance. Nevertheless, the following paragraphs will review the provisions that may be significant in determining rights of access to the records in question.

Often the most relevant provision concerning access to records maintained by law enforcement agencies is §87(2)(e), which permits an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or

> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in sub-paragraphs (i) through (iv) of §87(2)(e).

Another possible ground for denial is §87(2)(f), which permits withholding to the extent that disclosure "would endanger the life or safety of any person". The capacity to withhold on that basis is dependent upon the facts and circumstances concerning an event.

A police department may withhold certain records or specific portions thereof under applicable exemptions, 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, 277 (1997)]. However, 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.

Since you specifically referred to "DD-5's", in an illustrative case dealing with DD-5's, it was found that:

> "[t]he Motion Court, after reviewing the documents in camera, declined to dismiss the petition and held that respondent had failed to meet its burden of proving exemption for the redacted DD-5 follow up report. The Motion Court held that the exceptions contained in Public Officers Law §87(2) did not apply in this factual context, citing *Cornell Univ. v. City of N.Y. Police Dept.* (153 Ad 2d 515), and ordered production of the DD-5 with appropriate redaction. On this record, after a careful review of the documents produced to the Motion Court, we are satisfied that the materials are not exempt under the law enforcement exemption (Public Officers Law §87[2][e] or the intra-agency (Public Officers Law §87[2][g])" [Mitchell v. Slade,173 Ad 2d 226, 227 (1991)].

In my opinion, based upon Mitchell, as suggested in that decision, the "factual context", the specific contents of the records, and the effects of their disclosure are the factors that must be considered in determining the extent to which those records may be withheld or, conversely, must be disclosed.

Lastly, you asked that fees for copying be waived. Here I point out that there is nothing in the Freedom of Information Law that requires that an agency waive fees, irrespective of the status of an applicant for records. Further, it has been held that an agency may charge its established fees even though the applicant is an indigent inmate [Whitehead v. Morgenthau, 552 NYS2d 518 (1990)].

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12703

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June 4, 2001

Mr. Dishawn Bell
99-A-3211
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 facts presented in your correspondence.

Dear Mr. Bell:

I have received your letter in which you requested information regarding a certified copy of a certificate of conviction.

In this regard, the Freedom of Information Law, the statute within the advisory jurisdiction of the Committee on Open Government, is applicable to agency records. Section 86(3) of that statute defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines the term "judiciary" to mean:

> "the courts of the state, including any municipal or district court, whether or not of record."

Based on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law (see e.g., Judiciary Law, §255) may grant broad public access to those records. It is recommended that a request for court records be directed to the clerk of the court in which the proceeding was conducted.

I hope that I have been of assistance.

Sincerely,

David M. Treacy

DMT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 4, 2001

Mr. Larry G. Mack
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Mack:

I have received your letter in which you questioned the propriety of a denial by Cattaraugus County of your request for records pertaining to County employees "with hourly salary rates, dates of birth, dates of hire or termination and departments assigned along with vacation day, sick days that have been accrued, with days that have been used."

With one exception, insofar as the items sought exist in the form of a record or records, I believe that they 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. While two of the grounds for denial are relevant to an analysis of rights of access, neither, with one exception, in my opinion could validly be asserted to withhold the information in which you are interested.

Of significance is §87(2)(g), which permits an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

The items in question would constitute "intra-agency materials." However, they would appear to consist solely of statistical or factual information that must be disclosed under §87(2)(g)(i), unless a different ground for denial could properly be asserted.

Although somewhat tangential to the matter, I point out that, with certain exceptions, the Freedom of Information Law is does not require an agency to create records. Section 89(3) of the Law states in relevant part that:

> "Nothing in this article [the Freedom of Information Law] shall be construed to require any entity to prepare any record not in possession or maintained by such entity except the records specified in subdivision three of section eighty-seven..."

However, a payroll list of employees is included among the records required to be kept pursuant to "subdivision three of section eighty-seven" of the Law. Specifically, that provision states in relevant part that:

> "Each agency shall maintain...
>
> (b) a record setting forth the name, public office address, title and salary of every officer or employee of the agency... "

As such, a payroll record that identifies all officers or employees by name, public office address, title and salary must be prepared to comply with the Freedom of Information Law. Moreover, I believe that the payroll record and other related records identifying employees and their wages, including records reflective of the use or accrual of sick, vacation or personal leave, must be disclosed.

Of primary relevance is §87(2)(b), which permits an agency to withhold record or portions of records when disclosure would result in "an unwarranted invasion of personal privacy." However, payroll information has been found by the courts to be available [see e.g., Miller v. Village of Freeport, 379 NYS 2d 517, 51 AD 2d 765, (1976); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NYS 2d 954 (1978)]. In addition, this Committee has advised and the courts have upheld the notion that records that are relevant to the performance of the official duties of public employees are generally available, for disclosure in such instances would result in a permissible as opposed to an unwarranted invasion of personal privacy [Gannett, supra; Capital Newspapers v. Burns, 109 AD 2d 292, aff'd 67 NY 2d 562 (1986) ; Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980; Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975) ; and Montes v. State, 406 NYS 664 (Court of Claims 1978)]. As stated prior to the enactment of the Freedom of Information Law, payroll records:

> "...represent important fiscal as well as operational information. The identity of the employees and their salaries are vital statistics kept in the proper recordation of departmental functioning and are the primary sources of protection against employment favortism. They are subject therefore to inspection" Winston v. Mangan, 338 NYS 2d 654, 664 (1972)].

In short, a record identifying agency employees by name, public office address, title and salary must in my view be maintained and made available.

Based upon the direction provided by the Freedom of Information Law and the courts, I believe that other records reflective of payments made to public employees are available. For instance, insofar as W-2 forms of public employees indicate gross wages, they must be disclosed. In conjunction with the previous commentary concerning the ability to protect against unwarranted invasions of personal privacy, I believe that portions of W-2 forms could be withheld, such as social security numbers, home addresses and net pay, as well as employees' dates of birth, for those items are largely irrelevant to the performance of one's duties. However, for reasons discussed earlier, those portions indicating public officers' or employees' names and gross wages must in my view be disclosed. That conclusion has been reached judicially, and the court cited an advisory opinion rendered by this office in so holding (Day v. Town of Milton, Supreme Court, Saratoga County, April 27, 1992).

The records sought include information apparently derived from attendance records, such as dates of hire and termination. In a case dealing with attendance records indicating the dates and dates of sick leave claimed by a particular employee that was affirmed by the Court of Appeals, it was found, in essence, that disclosure would result in a permissible rather than an unwarranted invasion of personal privacy. Specifically, the Appellate Division found that:

> "One of the most basic obligation of any employee is to appear for work when scheduled to do so. Concurrent with this is the rights of an employee to properly use sick leave available to him or her. In the instant case, intervenor had an obligation to report for work when scheduled along with a right to use sick leave in accordance with his collective bargaining agreement. The taxpayers have an interest in such use of sick leave for economic as well as safety reasons. Thus it can hardly be said that disclosure of the dates in February 1983 when intervenor made use of sick leave would constitute an unwarranted invasion of privacy. Further, the motives of petitioners or the means by which they will report the information is not determinative since all records of government agencies are presumptively available for inspection without regard to the status, need, good faith or purpose of the applicant requesting access..." [Capital Newspapers v. Burns, 109 AD 2d 92, 94-95 (1985), aff'd 67 NY 2d 562 (1986)].

Insofar as attendance records or time sheets include reference to reasons for an absence, it has been advised that an explanation of why sick time might have been used, i.e., a description of an illness or medical problem found in records, could be withheld or deleted from a record otherwise available, for disclosure of so personal a detail of a person's life would likely constitute an unwarranted invasion of personal privacy and would not be relevant to the performance of an employee's duties. A number, however, which merely indicates the amount of sick 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 County records.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Donald E. Furman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12705

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June 4, 2001

Mr. Richard L. Feulner
96-A-4574
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 facts presented in your correspondence.

Dear Mr. Feulner:

Your letter addressed to former Secretary of State Treadwell has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State upon which the Secretary of State serves, is authorized to provide advice and opinions concerning the Freedom of Information Law.

You have sought assistance in obtaining records pertaining to your conviction from the Albany County Clerk. You were informed that the file found under the index number that you provided had been sealed and does not fall within the "Public Information Law."

In this regard, it is assumed that the reference to the "Public Information Law" pertains to the Freedom of Information Law. That statute is applicable to agency records, and §86(3) defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines the term "judiciary" to mean:

> "the courts of the state, including any municipal or district court, whether or not of record."

Based on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law (see e.g., Judiciary Law, §255) may grant broad public access to those records. Even though other statutes may deal with access to court records, the procedural provisions associated with the Freedom of Information Law (i.e., those involving the designation of a records access officer or the right to appeal a denial) would not ordinarily be applicable.

As you may be aware, county clerks perform a variety of functions, some of which involve county records that are subject to the Freedom of Information Law, others of which may be held in the capacity as clerk of a court. Since the records sought appear to be court records, it is likely that the Freedom of Information Law would not apply.

With respect to the sealing of records, the most common situation in which records relating to criminal proceeding have been sealed involves a dismissal in favor of a person accused of a crime. When a criminal action is dismissed in favor of an accused, the court ordinarily orders that the records be sealed pursuant to §160.50 of the Criminal Procedure Law. You wrote, however, that you were convicted. Since that is so, it is suggested that you check to determine whether the index number that you supplied to the court is correct and the same as that cited by the Clerk, and that you specify that you were convicted.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Marlene J. Dion

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 5, 2001

Mr. John W. Kane
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Kane:

I have received your letter concerning your request for records of the Fulton County Economic Development Corporation pertaining to a certain company.

As I understand the matter based on the correspondence attached to your letter, the Corporation's Executive Vice President wrote to you, asking that you phone him so that arrangements could be made for you to "come in and review any pertinent information that is not fiscally proprietary for the company." You indicated that you attempted to contact him "over a period of several days" without success and then wrote to him to ask that the records be sent to you, thereby making such an arrangement "unnecessary."

In this regard, if the matter has not yet been resolved, it is suggested that you attempt to contact the Corporation once more in an effort to arrange a mutually agreeable time for you to review the records. If you are unable to make such an arrangement within a reasonable time due to a failure on the part of the Corporation to respond to you effectively, I believe that you could consider your request to have been denied and that you could appeal the denial pursuant to §89(4)(a) of the Freedom of Information Law. As you may be aware, the cited provision requires that an agency grant access to the records sought or "fully explain in writing...the reasons for further denial" within ten business days of the receipt of an appeal.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt
cc: Jeff Bray

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 5, 2001

Mr. Walter Kowsh, Jr.
Cedar Grove Civic Homeowners
Association, Inc.
P.O. Box 671072
Flushing, NY 11367-7072

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Kowsh:

I have received your letter in which you sought an opinion concerning a response by the New York City School Construction Authority to your appeal under the Freedom of Information Law. Specifically, you referred to a portion of the response in which it was determined that a certain matter "is still in the pre-planning stage, and therefore, there are no documents subject to FOIL at this time."

From my perspective, insofar as documents exist, they fall within the scope of the Freedom of Information Law, irrespective of the stage of a project. In this regard, I offer the following comments.

First, it is emphasized that the Freedom of Information Law pertains to all agency records and that §86(4) of the Law defines the term "record" expansively to mean:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

In a case in which an agency claimed, in essence, that it could choose which documents it considered to be "records" for purposes of the Freedom of Information Law, the state's highest court rejected that contention. As stated by the Court of Appeals:

> "...respondents' construction -- permitting an agency to engage in a unilateral prescreening of those documents which it deems to be

> outside the scope of FOIL -- would be inconsistent with the process set forth in the statute. In enacting FOIL, the Legislature devised a detailed system to insure that although FOIL's scope is broadly defined to include all governmental records, there is a means by which an agency may properly withhold from disclosure records found to be exempt (see, Public Officers Law §87[2]; §89[2],[3]. Thus, FOIL provides that a request for access may be denied by an agency in writing pursuant to Public Officers Law §89(3) to prevent an unwarranted invasion of privacy (see, Public Officers Law §89[2]) or for one of the other enumerated reasons for exemption (see, Public Officers Law §87[2]). A party seeking disclosure may challenge the agency's assertion of an exemption by appealing within the agency pursuant to Public Officers Law §89(4)(a). In the event that the denial of access is upheld on the internal appeal, the statute specifically authorizes a proceeding to obtain judicial review pursuant to CPLR article 78 (see, Public Officers Law §89[4][b]). Respondents' construction, if followed, would allow an agency to bypass this statutory process. An agency could simply remove documents which, in its opinion, were not within the scope of the FOIL, thereby obviating the need to articulate a specific exemption and avoiding review of its action. Thus, respondents' construction would render much of the statutory exemption and review procedure ineffective; to adopt this construction would be contrary to the accepted principle that a statute should be interpreted so as to give effect to all of its provisions...
>
> "...as a practical matter, the procedure permitting an unreviewable prescreening of documents -- which respondents urge us to engraft on the statute -- could be used by an uncooperative and obdurate public official or agency to block an entirely legitimate FOIL request. There would be no way to prevent a custodian of records from removing a public record from FOIL's reach by simply labeling it 'purely private'. Such a construction, which could thwart the entire objective of FOIL by creating an easy means of avoiding compliance, should be rejected" [Capital Newspapers v. Whalen, 69 NY 2d 246, 253-254 (1987)].

In short, insofar as documentation pertaining to the project exists, a claim that the materials are not records subject to the Freedom of Information Law would in my opinion conflict with the interpretation of that statute by the State's highest court.

Second, to the extent that the Authority maintains records included within your request, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Perhaps most significant with respect to any such records 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 matters for which no final determination had been made. The Court rejected that finding and stated that:

> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)..." [Gould et al. v. New York City Police Department, 87 NY2d 267, 276 (1996)].

In short, that a record is "predecisional", "non-final" or that it may relate to a matter that is in "the pre-planning stage" 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).]

It is possible, too, that other grounds for denial may be applicable. For instance, §87(2)(c) permits an agency to withhold records insofar as disclosure would "impair present or imminent contract awards or collective bargaining negotiations..."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Ross J. Holden
Michael Szabaga

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12708

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

June 5, 2001

Mr. Emilio Morales
89-T-4527
Oneida Correctional Facility
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 facts presented in your correspondence.

Dear Mr. Morales:

I have received your letter in which you sought assistance in obtaining records from the Special Narcotics FOIL unit.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that the foregoing assists your understanding of the matter and that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12709

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

June 5, 2001

Mr. James R. Ezzell
513676
Union Correctional Institution
P.O. Box 221, U-30, G-2-103
Raiford, Florida 32083-0221

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. Ezzell:

I have received your letter in which you sought assistance in obtaining records from the Niagara County Department of Social Services.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of your correspondence, I offer the following comments.

First, without knowledge of the contents of the records in which you are interested, I could not conjecture as to the extent to which the records in question might justifiably be withheld. Whether records are accessible or deniable, an agency is required to respond to a request, and the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Lastly, in the event that you still have not received the records, the Freedom of Information Law does not set forth a time limitation for an agency to send papers after receipt of payment. In my opinion, the failure of an agency to provide records it determined available, within a reasonable time after receiving payment, could be construed as a constructive denial of access.

I hope that the foregoing assists your understanding of the matter and that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12710

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

June 5, 2001

Mr. Gregory Chrysler
99-A-6079
Clinton Correctional Facility Annex
P.O. Box 2002
Dannemora, NY 12929

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Chrysler:

I have received your letter regarding a request for records from the New York City Police Department.

Your request pertained to "internal procedures, rules or manual governing eavesdropping and listening devices with a cooperating witness involved." The records were withheld under §§87(2)(e)(iv) and 87(2)(f) of the Freedom of Information Law..

In this regard, I offer the following comments.

Section 87(2)(e) permits an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would....
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

The leading decision concerning that provision is Fink v. Lefkowitz, which involved access to a manual prepared by a special prosecutor that investigated nursing homes, in which the Court of Appeals held that:

> "The purpose of this exemption is obvious. Effective law enforcement demands that violators of the law not be apprised of the nonroutine procedures by which an agency obtains its information (see Frankel v. Securities & Exch. Comm., 460 F2d 813, 817, cert

> den 409 US 889). However beneficial its thrust, the purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution...
>
> "Indicative, but not necessarily dispositive of whether investigative techniques are nonroutine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel (see Cox v. United States Dept. of Justice, 576 F2d 1302, 1307-1308; City of Concord v. Ambrose, 333 F Supp 958)."

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 [De Zimm v. Connelie, 64 NY 2d 860 (1985)]. Nevertheless, other portions of the records might be "routine" and apparently would not if disclosed preclude police officers from carrying out their duties effectively.

Lastly, the other ground for denial is §87(2)(f). That provision permits an agency to withhold records when disclosure "would endanger the life of safety of any person." To the extent that disclosure would endanger the life of safety of law enforcement officers or others, it appears that section 87(2)(f) would be applicable.

In sum, insofar as either of the exceptions described in the preceding commentary may properly be asserted, an agency could, in my opinion, deny access.

I hope that I have been of assistance.

Sincerely,

David Treacy

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1271

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

June 6, 2001

Mr. Ken Robins
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Robins:

I have received correspondence from Mr. Robert Petrucci relating to a request made under the Freedom of Information Law. He indicated that you are seeking an advisory opinion concerning the matter.

As I understand the situation, your request for "golf revenue data" was denied because it was not "certified." In this regard, I offer the following comments.

First, it is emphasized that the Freedom of Information Law pertains to existing records and that §89(3) of that statute states in part that an agency, such as the County, is not required to create a record in response to a request.

Second, assuming that the data in question exists, I note that its characterization as "uncertified", "draft" or "preliminary" is not determinative of rights of access. I point out that the Freedom of Information Law pertains to all agency records, and that §86(4) of the Law defines the term "record" to mean:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, when information is maintained by an agency in some physical form (i.e., drafts, worksheets, computer disks, etc.), I believe that it would constitute a "record" subject to rights of access.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my opinion, two of the grounds for denial would be relevant to an analysis of rights of access to the records sought. Neither, under the circumstances, would in my view have justified a denial of access.

Section 87(2)(g) of the Freedom of Information Law permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

In a case involving "budget worksheets", it was held that numerical figures, including estimates and projections of proposed expenditures, are accessible, even though they may have been advisory and subject to change. In that case, I believe that the records at issue contained three columns of numbers related to certain areas of expenditures. One column consisted of a breakdown of expenditures for the current fiscal year; the second consisted of a breakdown of proposed expenditures recommended by a state agency; the third consisted of a breakdown of proposed expenditures recommended by a budget examiner for the Division of the Budget. Although the latter two columns were merely estimates and subject to modification, they were found to be "statistical tabulations" accessible under the Freedom of Information Law as originally enacted [see Dunlea v. Goldmark, 380 NYS 2d 496, aff'd 54 AD 2d 446, aff'd 43 NY 2d 754 (1977)]. At that time, the Freedom of Information Law granted access to "statistical or factual tabulations" [see original Law, §88(1)(d)]. Currently, §87(2)(g)(i) requires the disclosure of "statistical or factual tabulations or data". As stated by the Appellate Division in Dunlea:

> "[I]t is readily apparent that the language statistical or factual tabulation was meant to be something other than an expression of opinion or naked argument for or against a certain position. The present record contains the form used for work sheets and it

> apparently was designed to accomplish a statistical or factual presentation of data primarily in tabulation form. In view of the broad policy of public access expressed in §85 the work sheets have been shown by the appellants as being not a record made available in §88" (54 Ad 2d 446, 448)."

The Court was also aware of the fact that the records were used in the deliberative process, stating that:

> "The mere fact that the document is a part of the deliberative process is irrelevant in New York State because §88 clearly makes the back-up factual or statistical information to a final decision available to the public. This necessarily means that the deliberative process is to be a subject of examination although limited to tabulations. In particular, there is no statutory requirement that such data be limited to 'objective' information and there no apparent necessity for such a limitation" (id. at 449).

Based upon the language of the determination quoted above, which was affirmed by the state's highest court, it is my view that the records in question, to the extent that they consist of "statistical or factual tabulations or data", are accessible, unless a provision other than §87(2)(g) could be asserted as a basis for denial.

Lastly, one of the contentions offered by an agency 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][iii)]. However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)..." [Gould et al. v. New York City Police Department, 87 NY2d 267, 276 (1996)].

In short, that the report is in "draft" or is not "certified" would not represent an end of an analysis of rights of access or an agency's obligation to review the entirety of its contents.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Charlene Indelicato
Bob Petrucci

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12712

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June 6, 2001

Mr. Paul Priore
[redacted]

The staff of the Committee on Open 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 in which you sought an opinion concerning the propriety of substantial redactions made by the New York City Department of Investigation from records made available under the Freedom of Information Law.

In this regard, I am unfamiliar with the nature of the information that has been withheld, and I can only conjecture as to the content of that information. In consideration of the subject matter of the requests and the response, it appears that the redactions were made primarily to protect personal privacy and to shield the Department's deliberative process from disclosure.

With respect to the protection of privacy, as you are aware, §87(2)(b) permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." Related is subparagraph (iii) of §87(2)(e), which authorizes an agency to withhold records compiled for law enforcement purposes when disclosure would "identify a confidential source or disclose confidential information relating to a criminal investigation." In many instances, the deletion of a name alone may not be adequate to ensure that person's identity (i.e., a complainant or a witness) cannot be ascertained. In those situations, I believe that an agency may withhold any portion of the record which, if disclosed, could make a person's identity easily known or traceable.

The other provision of likely significance 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, the State's highest court, was that certain reports could be withheld because they are not final and because they relate to incidents for which no final determination had been made. The Court of Appeals rejected that finding and stated that:

> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)..." [Gould et al. v. New York City Police Department, 87 NY2d 267, 276 (1996)].

In short, that a record is "predecisional" or "non-final" would not represent an end of an analysis of rights of access or an agency's obligation to review the contents of a record.

The Court also dealt with the issue of what constitutes "factual data" that must be disclosed under §87(2)(g)(i). In its consideration of the matter, the Court found that:

> "...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not

> apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][i]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182) id., 276-277).]

In my view, insofar as the redactions consist of recommendations, advice or opinions, for example, they were properly made; insofar as they consist of statistical or factual information or reflect final determinations, for example, I believe that they must be disclosed, unless other grounds for denial [i.e., §§87(2)(b) or (e)(iv)] may be asserted.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Elyse Hirschorn

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1713

41 State Street, Albany, New York 12231
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June 6, 2001

Mr. Anthony Brevner
97-A-7441
Mid-Orange Correctional Facility
900 Kings Highway
Warwick, NY 10990

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Brevner:

I have received your letter in which you requested an advisory opinion concerning a Freedom of Information Law request for a traffic ticket from the District Court of Nassau County.

In this regard, I offer the following comments.

The Freedom of Information Law, is applicable to agency records, and §86(3) defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines the term "judiciary" to mean:

> "the courts of the state, including any municipal or district court, whether or not of record."

Based on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law (see e.g., Judiciary Law, §255) may grant broad public access to those records. Even though other statutes may deal with access to court records, the procedural provisions associated with the Freedom of Information Law (i.e., those involving the designation of a records access officer or the right to appeal a denial) would not ordinarily be applicable.

In the event that you have not received a response to your request from the Court, it is suggested that you could direct a request to the police department involved with the matter.

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

12714

From: Robert Freeman
To: Internet[redacted]
Date: 6/6/01 4:16PM
Subject: Dear Ms. Passenger:

Dear Ms. Passenger:

Unless I am mistaken, you are interested in obtaining assessment rolls or their equivalent in electronic media. If that is so, I believe that you have the right to obtain those records.

In general, the purpose for which a request is made is irrelevant to rights of access. The single instance in which that is not so involves the ability of an agency to deny access when disclosure would constitute "an unwarranted invasion of personal privacy." The Freedom of Information Law includes a series of examples of unwarranted invasions of privacy, one of which pertains to the "sale or release of a list of names and addrersses if such list would be used for commercial or fund-raising purposes." I would conjecture that a court would find that your requests for assessment rolls would reflect a commercial purpose. Nevertheless, a different provision in fthe Freedom of Information Law states, in essence, that if records are available under some other provision of law, nothing in the Freedom of Information Law may be asserted to diminish rights of access to those records. Assessment rolls have been independently available under other provisions of law, and therefore, the "list" provision in the Freedom of Information Law would not apply.

You might want to review advisory opinions accessible on our website. You can go to advisory opinions rendered under the Freedom of Information Law, click on to "A", and scroll down to "assessment information." the opinions prepared during the past 9 years are available in full text. Also, under "Publications" is an article, "The Impact of Technology on the FOIL", that may be of interest.

I hope that I have been of assistance.

If I have misinterpreted or if you would like to discuss the issues, 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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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12715

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

June 6, 2001

Mr. Craig Steven Rose
95-A-7042
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. Rose:

I have received your letter in which you sought assistance in obtaining records from the Division of Parole.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of your correspondence, I offer the following comments.

In the event that you still have not received a response to your request, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests and appeals. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12716

41 State Street, Albany, New York 12231
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June 6, 2001

Mr. Thomas Hayes
98-A-6130
Eastern 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. Hayes:

I have received your letter in which you requested information regarding the proper procedure for requesting evidence from the Hempstead Police Department and the court.

In this regard, I offer the following comments.

First, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), which have the force and effect of law, require the designation of one or more "records access officers." The records access officer has the duty of coordinating an agency's response to requests. As such, it is suggested that you direct your request to the "records access officer" of the Hempstead Police Department.

Second, §89(3) of the Freedom of Information Law requires that a request "reasonably describe" the records sought. While I am unfamiliar with the recordkeeping systems of various agencies, to the extent records sought can be located with reasonable effort, I believe that a request would meet the requirement of reasonably describing the record.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Records of 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 (h) of the Law.

Lastly, the Freedom of Information Law, is applicable to agency records, and §86(3) defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines the term "judiciary" to mean:

> "the courts of the state, including any municipal or district court, whether or not of record."

Based on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law (see e.g., Judiciary Law, §255) may grant broad public access to those records. Even though other statutes may deal with access to court records, the procedural provisions associated with the Freedom of Information Law (i.e., those involving the designation of a records access officer or the right to appeal a denial) would not ordinarily be applicable.

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12717

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

June 6, 2001

Mr. Bernard J. Blum
Friends of Rockaway, 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 information presented in your correspondence.

Dear Mr. Blum:

I have received your letter and a variety of related materials concerning your requests for records of New York City agencies, as well as an investigation of the activities of several agencies.

In this regard, it is noted at the outset that the functions of the Committee on Open Government are limited to matters involving public access to government information, primarily under the Freedom of Information and Open Meetings Laws.

With respect to your requests for records, first, I point out that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Second, while the Freedom of Information Law does not require that you indicate "exactly" the records of your interest as suggested by Commissioner Stern, it states in §89(3) that an applicant must "reasonably describe" the records sought. Therefore, a request should include sufficient detail to enable the staff of an agency to locate and identify the records.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1278

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

June 7, 2001

E-Mail

TO: Don Kaake <[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. Kaake:

As you are aware, I have received your inquiry concerning your right to gain access to "the odometer of Village of Angelica, NY police cars, because no mileage records are kept."

From my perspective, the issue is whether your request involves a "record" that falls within the scope of the Freedom of Information Law. The Freedom of Information Law is applicable 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."

It has been held that items of physical evidence (i.e., tools and clothing) do not constitute records and are beyond the coverage of the Freedom of Information Law, even though inspection of those items might have yielded information [Allen v. Stroynowski, 129 AD 2d 700; mot. for leave to appeal denied, 70 NY 2d 871 (1989)]. In my view, a vehicle, including the gauges within the vehicle, would not constitute a record, and the Village would not be obliged to enable you to gain entrance into its vehicle in order to enable to inspect its contents. An odometer is a device, and due to its nature and function, what it shows will change any time the vehicle is driven.

While I am unaware of the issue that precipitated your request, a constructive course of action might involve recommending that the Board of Trustees establish a policy or rule whereby records must be kept indicating miles driven in its vehicles.

I hope that the foregoing serves to clarify your understanding of the matter and that I have been of assistance.

RJF:jm

cc: Board of Trustees
Karen Herdman, Clerk

From: Robert Freeman
To: Internet:[redacted]
Date: 6/7/01 10:29AM
Subject: Dear Ms. Thompson:

Dear Ms. Thompson:

I have received your letter in which asked whether "the appearance schedule of defendants can be inspected prior to the commencement of court."

While the Freedom of Information Law does not apply to the courts, other statutes frequently grant broad rights of access to court records. An "appearance schedule" is likely the equivalent (or may be) a docket, and section 255-b of the Judiciary Law states that "A docket-book, kept by a clerk of a court, must be kept open, during the business hours fixed by law, for search and examination by any person." In addition, assuming that most of the courts of your interest are town and village justice courts, section 2019-a of the Uniform Justice Court Act, entitled "Justices' criminal records and docket" provides in relevant part that: "The records and dockets of the court except as otherwise provided by law shall be at reasonable times open for inspection to the public..."

In short, the kind of record in which you are interested must in my view be disclosed pursuant to statutes other than the Freedom of Information Law.

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-12720

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

June 7, 2001

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 information presented in your correspondence.

Dear Mr. Case:

I have received your letter in which you raised questions concerning "small spiral notebooks" contained in canisters maintained at the summits of thirteen peaks in the Catskill Mountains. The notebooks are signed by those who reach the summit, and twelve are on state owned land. The canisters, according to your letter, had been maintained by the Catskill Mountain 3500 Club but are now owned by the State Department of Environmental Conservation.

You have raised several questions in relation to the foregoing, and in this regard, I offer the following comments.

First, you questioned "how and where the completed notebooks [should] be stored", and "for how long." There is nothing in the Freedom of Information Law that deals with the manner in which records must be stored or the locations where they should be stored. However, Article 57 of the Arts and Cultural Affairs Law deals with the maintenance, retention and disposal of records by state agencies. In brief, the State Archives, acting in cooperation with a state agency, develops schedules indicating minimum retention periods for records based on the value (i.e., legal, fiscal, historical) or significance of the records.

Second, you asked whether there is "procedure or precedent for a private organization to keep public records." 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."

Based on the foregoing, if a record is kept by a consultant, for example, or by a private entity *for* an agency, it constitutes an agency record that falls within the coverage of the Freedom of Information Law.

Third, with respect to procedure, §89(1) of the Freedom of Information Law requires the Committee on Open Government to promulgate general regulations concerning the implementation of that statute (see 21 NYCRR Part 1401). In turn, §87(1) requires each agency to adopt its own regulations consistent with the law and the Committee's regulations. One aspect of the Committee's regulations requires 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. In the case of the Department of Environmental Conservation, a records access officer has been designated at each regional office.

With regard to the notebook kept in the canister on private land, the question in my view, is whether it is maintained for the Department. If it is, I believe that it would constitute an agency record; if it is not, but rather is maintained for your organization, the Freedom of Information Law, in my view, would not apply.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

From: Robert Freeman
To: Internet:[redacted]
Date: 6/7/01 10:29AM
Subject: Dear Ms. Thompson:

Dear Ms. Thompson:

I have received your letter in which asked whether "the appearance schedule of defendants can be inspected prior to the commencement of court."

While the Freedom of Information Law does not apply to the courts, other statutes frequently grant broad rights of access to court records. An "appearance schedule" is likely the equivalent (or may be) a docket, and section 255-b of the Judiciary Law states that "A docket-book, kept by a clerk of a court, must be kept open, during the business hours fixed by law, for search and examination by any person." In addition, assuming that most of the courts of your interest are town and village justice courts, section 2019-a of the Uniform Justice Court Act, entitled "Justices' criminal records and docket" provides in relevant part that: "The records and dockets of the court except as otherwise provided by law shall be at reasonable times open for inspection to the public..."

In short, the kind of record in which you are interested must in my view be disclosed pursuant to statutes other than the Freedom of Information Law.

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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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12722

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

June 7, 2001

Mr. John W. Kane
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Kane:

I have received your letter in which you wrote that Mr. Arthur Spring, Fulton County Attorney, suggested that you seek an advisory opinion concerning rights of access to records relating to an investigation of County property and employees. You indicated that the matter went before a grand jury, and Mr. Spring denied your request on the grounds that the records sought "were compiled for law enforcement purposes", that "the allegations could not be proven and any disclosure would constitute 'an unwarranted invasion of personal privacy.'"

Although I am unaware of the specific contents of the records in question, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

The provision to which the County Attorney alluded initially would be §87(2)(e), which enables an agency to withhold records or portions thereof that:

> "are compiled for law enforcement purposes and which if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or

iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures;

The ability to deny access under the exception quoted above is limited to those instances in which the harmful effects described in subparagraphs (i) through (iv) would occur by means of disclosure. Since the investigation apparently ended several years ago, it is likely that only subparagraph (iii) would apply. That provision might properly be asserted to withhold records insofar as they include names or other identifying details pertaining to informants, witnesses and perhaps others.

The second provision to which the County Attorney referred would be §87(2)(b), which authorizes 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. Further, the courts have found that, as a general rule, records that are relevant to the performance of a public employee's official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

Several of the decisions cited above, for example, Farrell, Sinicropi, Geneva Printing, Scaccia and Powhida, dealt with situations in which determinations indicating the imposition of some sort of disciplinary action pertaining to particular public employees were found to be available. However, when allegations or charges of misconduct have not yet been determined or did not result in disciplinary action, the records relating to such allegations may, according to case law, be withheld, for disclosure would result in an unwarranted invasion of personal privacy [see e.g., Herald Company v. School District of City of Syracuse, 430 NYS 2d 460 (1980)].

If there was no determination to the effect that a public employee engaged in misconduct, I believe that a denial of access based upon considerations of privacy would be consistent with law.

Also pertinent 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.

Lastly, but possibly most importantly, the first ground for denial in the Freedom of Information Law, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute". One such statute, §190.25(4) of the Criminal Procedure Law deals with grand jury proceedings and provides in relevant part that:

> "Grand jury proceedings are secret, and no grand juror, or other person specified in subdivision three of this section or section 215.70 of the penal law, may, except in the lawful discharge of his duties or upon written order of the court, disclose the nature or substance of any grand jury testimony, evidence, or any decision, result or other matter attending a grand jury proceeding."

As such, grand jury minutes or other records "attending a grand jury proceeding" would be outside the scope of rights conferred by the Freedom of Information Law. Any disclosure of those records would be based upon a court order or perhaps a vehicle authorizing or requiring disclosure that is separate and distinct from the Freedom of Information Law.

I hope that the foregoing serves to enhance your understanding of the matter and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Arthur Spring

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12723

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

June 7, 2001

Mr. Stephen Hines
95-A-4986
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. Hines:

I have received your letter in which you requested the Committee to contact the Yonkers Police Department regarding your outstanding request for records.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of your correspondence, I offer the following comments.

In the event the Department still has not responded to your 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)].

I hope that I have been of assistance.

Sincerely,

David Treacy

David M. Treacy
Assistant Director

DMT:tt

cc: Records Access Officer, Yonkers Police Department

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12724

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

June 7, 2001

Mr. Anthony Russo
99-B-1842
Orleans Correctional Facility
3531 Gaines Basin Road
Albion, NY 14411-9199

Dear Mr. Russo:

I have received your letter in which you requested information regarding the alleged failure of certain offices to respond to your requests for medical records.

In this regard, I offer the following comments.

The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to request. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of

Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

With respect to rights of access, as you are aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Medical records prepared by Department of Correctional Services staff pertaining to inmates would in my opinion constitute "intra-agency materials" that fall within the scope of §87(2)(g). Under that provision, although statistical or factual information must be disclosed, opinions and recommendations, for example, may be withheld. As such, if the Freedom of Information Law governs rights of access to medical records, diagnostic opinions could justifiably be withheld. Under §18 of the Public Health Law, however, in most instances, the entirety of the contents of medical records is available to the subject of the records.

Further, in situations in which one statute deals with a subject generally and another statute deals with a particular area within the general subject, the particular prevails over the general. In this instance, the Freedom of Information Law deals with access to government records generally; §18 of the Public Health Law deals specifically with access to medical records, some of which are maintained by governmental entities.

Insofar as your inquiry pertains to records maintained at correctional facilities, the regulations promulgated by the Department of Correctional Services under the Freedom of Information Law indicate that a request for those records should be made to the facility superintendent or his designee. Appeals would be directed to Counsel to the Department, Anthony J. Annucci.

With respect to requests for medical records from private health care facilities or physicians,§18 of the Public Health Law is applicable. Section 18(1)(c) of the Public Health Law defines "health care facility" or "facility" to mean a hospital, a home care services agency, a hospice, a health maintenance organization, or a shared health facility, as those terms are defined in other provisions of the Public Health Law. Appeals would be directed to the Department of Health.

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

RJF:jm

cc: Anthony J. Annucci

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12725

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

June 8, 2001

Mr. Harvey M. Elentuck
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Elentuck:

I have received your letter in which you complained with respect to delays by the New York City Board of Education in making copies of records available to you that were determined to be accessible 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..."

Based on the foregoing, an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date indicating when it can be anticipated that a request will be granted or denied.

I note that there is no precise time period within which an agency must grant or deny access to records. The time needed to do so may be dependent upon the volume of a request, the possibility that other requests have been made, the necessity to conduct legal research, the search and retrieval techniques used to locate the records and the like. In short, when an agency acknowledges the receipt of a request because more than five business days may be needed to grant or deny a request, so long as it provides an approximate date indicating when the request will be granted or denied, and that date is reasonable in view of the attendant circumstances, I believe that the agency would be acting in compliance with law. 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 disclosing for an unreasonable time after it acknowledges that records will be made available, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of 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: Chad Vignola, Esq.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12726

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

June 11, 2001

Mr. Harold J. Neithardt
97-A-3500
Eastern N.Y. 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. Neithardt:

I have received your letter in which you requested this office to contact the Westchester County Clerk concerning your request for hearing transcripts.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of your correspondence, I offer the following comments.

The Freedom of Information Law is applicable to agency records, and §86(3) defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines the term "judiciary" to mean:

> "the courts of the state, including any municipal or district court, whether or not of record."

Based on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law (see e.g., Judiciary Law, §255) may grant broad public

access to those records. I recommend that you resubmit your request to the clerk, citing an applicable provision of law as the basis for the request.

I hope that I have been of assistance.

Sincerely,

David Treacy

David M. Treacy
Assistant Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12727

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

June 11, 2001

Ms. Alexandra Fisher
Mr. Ray Fleischhacker
Wall Street Tenants Association
45 Wall Street - Apt. 2121
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, unless otherwise indicated.

Dear Ms. Fisher and Mr. Fleischhacker:

I have received your letter, as well as a variety of materials attached to it, in which you sought an advisory opinion concerning the treatment of your requests for records made to the Empire State Development Corporation ("ESDC") relating to a plan to construct a new facility for the New York Stock Exchange. Although some of the documentation that you requested was made available, two aspects of your request were denied. Further, you complained with respect to the delay in disclosure of records and the rejection of your request to review records during weekends.

Having reviewed the materials and discussed the matter with representatives of ESDC, 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 portions of your request that were denied include "[c]opies of any written representation or written record of verbal representations by Rockrose Development to the Empire State Development Corp. regarding any and all proposals or plans for relocation of tenants of 45 Wall Street", and "[a] copy of any signed contract(s) between Rockrose and the City of New York and/or the Empire State Development Corp."

The contract, or an analogous document, was the subject of an opinion prepared on March 26 that involved a request for a "letter of intent"signed by the New York Stock Exchange that is in possession of the New York City Economic Development Corporation ("EDC"). Reference was made in that opinion to §87(2)(c), which permits an agency to withhold records which, if disclosed, "would impair present or imminent contract awards or collective bargaining negotiations" and to the following contention offered by Counsel to the Corporation:

> "The letter of intent merely establishes the framework for the NYSE project and subsequent negotiations, but, with the exception of certain limited provisions, does not, in and of itself, create any legally binding obligations or liabilities. Since the agreements for the project have not been finalized, it is my determination that disclosure of the letter of intent is premature and would unduly impair and compromised the City's ability to negotiate the final project documents with the NYSE. Additionally, to the extent that any terms of the letter of intent can be construed as a binding obligation, consideration of the 'effects of disclosure' on the city's ongoing negotiations with respect to the project is paramount. Although negotiation of the letter of intent only involves one private party, as you point out, the NYSE project, in its entirety, involves negotiations with multiple parties with various property interests. Disclosure of the letter of intent could have the effect of undermining the City's negotiations, causing it to lose leverage in its negotiations with property owners and tenants on the site of the proposed NYSE project, and compromising its ability to negotiate the best possible deal for the City."

Counsel to the Corporation also specified that the Letter of Agreement includes reference to certain deadlines, which, if disclosed, would, in her view, damage New York City's bargaining position with any number of those parties. In short, she indicated that if those dates became known to a party or parties to the negotiations would have the ability to develop a negotiation or bargaining strategy that would place the City and EDC at a clear disadvantage.

I am mindful of the opinions and the judicial decision involving the contention that records that are known to both parties to negotiations must be disclosed, for in those situations, there is no "inequality of knowledge" [see Community Board 7 of Borough of Manhattan v. Schaeffer, 570 NYS 2d 769; affirmed, 83 AD 2d 422, reversed on other grounds, 84 NY 2d 148 (1994)]. Those opinions and the case law pertained to situations in which there were only two parties involved in a negotiation process. While the contents of the Letter of Intent are known by and in the possession of the New York Stock Exchange and the EDC, its contents are not known to the other parties involved or potentially involved in negotiations regarding the project. That being so, it appears that disclosure would "impair" present or imminent contract awards" and that the denial of the request was consistent with law.

If the contract or contracts to which you referred are the same as or analogous to the letter of intent that was the subject of the earlier opinion dealing with the same development project, my response would involve a reiteration of those points. If that is the case, the denial with respect to that aspect of your request would appear to be consistent with law.

With regard to the other records that were withheld, those involving communications from Rockrose to the ESDC concerning plans for the relocation of tenants, ESDC's representative indicated that the basis for the denial was §87(2)(g), which deals with "inter-agency" and "intra-

agency materials," and that the communications in question were given by Rockrose acting essentially as a consultant.

By way of background, as you may be aware, §86(3) of the Freedom of Information Law defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

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").

While Rockrose is clearly not an agency, the Court of Appeals, the state's highest court, has determined that records prepared by a consultants for agencies should be treated as if they were prepared by agency staff and that, therefore, those records constitute "intra-agency materials" [Xerox Corporation v. Town of Webster 65 NY2d 131 (1985)]. The relationship between ESDC and Rockrose is unclear. On the one hand, Rockrose, as I understand the matter, is a developer that is or has been involved in negotiations with ESDC; on the other, ESDC's representative informed me that Rockrose, due to its expertise, has functioned as a consultant in relation to the preparation of relocation plans. In Xerox, the Court referred to consultants "retained" by agencies, and, in general, it is my view that the term "retained" implies compensation. I am unaware of whether there is any consideration in the nature of compensation that ESDC has offered or made to Rockrose.

If the relationship between the ESDC and Rockrose in the context of your inquiry is essentially that of agency and consultant, §87(2)(g) would be applicable in analyzing rights of access. If, however, a relationship of that nature does not exist, that provision would not be pertinent in determining rights of access.

Assuming that §87(2)(g) is applicable, I point out that, due to its structure, it may require the disclosure of portions of records. Specifically, 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 [i.e., §87(2)(c)]. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

Next, with regard to delays in responding to requests, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Section 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)].

Lastly, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), which deal with the procedural implementation of the Freedom of Information Law, state in relevant part that an agency "shall accept requests for public access to records and produce records during all hours they are regularly open for business." There is no requirement that an agency make records available on weekends or during times other than regular business hours.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Anita W. Laremont
Joseph Petillo

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12728

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June 13, 2001

Mr. Ronald J. Latham
91-A-0736
Washington Correctional Facility
P.O. Box 180
Comstock, NY 12821-0180

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Latham:

I have received your letter requesting an opinion on the availability of certain records pertaining to your parole hearing. I have also received a copy of the Division of Parole's response to your appeal.

According to your correspondence, you requested records indicating a dismissal of charges of second degree murder. Your requests have been denied by the Inmate Records Access Officer and the Division of Parole. In this regard, I offer the following comments.

First, with respect to your request for a letter from the District Attorney to the Division of Parole indicating the charge of second degree murder. The Division determined that the record was exempt from disclosure under §87(2)(g) 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.

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.

Second, the Division's response to your appeal states that the District Attorney's letter is summarized in a portion of an Inmate Status Report that is exempt from disclosure. I am unfamiliar with the contents of such report and, therefore, cannot offer specific guidance on this issue. However, I offer the following comments on the portion of the Division's response that states "[p]ursuant to the Mental Hygiene Law §33.13, any mental health records and information that the Division may have in it [sic] file relative to your mental health, or any treatment you may have received for a mental health problem, are statutorily exempt from disclosure."

Although the Freedom of Information Law provides broad rights of access, the first ground for denial, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute." One such statute is §33.13 of the Mental Hygiene Law, which generally requires that clinical records pertaining to persons receiving treatment in a mental hygiene facility be kept confidential.

However, §33.16 of the Mental Hygiene Law pertains specifically to access to mental health records by the subjects of the records. Under that statute, a patient may direct a request for inspection or copies of his or her mental health records to the "facility", as that term is defined in the Mental Hygiene Law, which maintains the records. If the Washington Correctional Facility maintains the records as a facility, I believe that it would be required to disclose the records to you to the extent required by §33.16 of the Mental Hygiene Law. Alternatively, it is possible that the records in question were transferred when you were placed in a state correctional facility. If that is so, the records may be maintained by a different agency. It is my understanding that mental health "satellite units" that operate within state correctional facilities are such "facilities" and are operated by the New York State Office of Mental Health. Further, I have been advised that requests by inmates for records of such "satellite units" pertaining to themselves may be directed to the Director of Sentenced Services, Bureau of Forensic Services, Office of Mental Health, 44 Holland Avenue, Albany, NY 12229. Lastly, it is noted that under §33.16, there are certain limitations on rights of access.

Next, it is noted that the Division of Parole's regulations prohibit the release of records received and/or prepared by another agency. In my view, an agency's regulations cannot diminish rights of access conferred by a statute, such as the Freedom of Information Law [Zuckerman v. NYS Board of Parole, 385 NYS 2d 811, 53 AD 2d 405 (1976), Morris v. Martin, Chairman of theState Board of Equalization and Assessment, 440 NYS 2d 365, 82 AD 2d 965, reversed 55 NY 2d 1026 (1982)].

Lastly, the Division also addressed your request for the Division of Criminal Justice Services' rap sheet and states that this document is also exempt from disclosure.

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]. If you seek access to your own rap sheet, it is suggested that you submit your request to the Division of Criminal Justice Services.

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

cc: Terrence X. Tracy

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12729

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June 13, 2001

Mr. Frank D'Antuono
96-B-1852
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. D'Antuono:

I have received your letter in which you request this office to compel a records appeals officer to respond to your appeals.

In this regard, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of your correspondence, I offer the following comments.

Whether records are accessible or deniable, an agency is required to respond to a request, and the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12730

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June 15, 2001

Ms. Carol M. Lane
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Lane:

I have received your letter and a copy of a proposed local law designed to implement the Freedom of Information Law in the Village of Poquott.

Having reviewed the proposal, I offer the following comments.

First, as you may be aware, §89(1) of the Freedom of Information Law requires the Committee on Open Government to promulgate general rules and rules regulations concerning the procedural implementation of that statute. The Committee has done so, and I have enclosed a copy of its regulations. In turn, §87(1) requires the governing body of a public corporation (i.e., the board of trustees in a village) to adopt rules and regulations consistent with the Freedom of Information Law and the regulations promulgated by the Committee.

I note that it has been suggested that a municipality adopt its regulations by resolution rather than by local law. In short, resolutions can be amended easily, and such a consideration may be important when the statute is altered or if an agency's local law is deficient.

Second, the proposal that you enclosed is, in my view, inconsistent with law.

Part B requires that a form prepared by the Village be used to seek Village records. I do not believe that an agency can require that a request be made on a prescribed form. The Freedom of Information Law, §89(3), as well as the regulations promulgated by the Committee (§1401.5), require that an agency respond to a request that reasonably describes the record sought within five business days of the receipt of a request. Further, the regulations indicate that "an agency may require that a request be made in writing or may make records available upon oral request" [§1401.5(a)]. As such, neither the Law nor the regulations refer to, require or authorize the use of standard forms. Accordingly, it has consistently been advised that any written request that reasonably describes the records sought should suffice.

It has also been advised that a failure to complete a form prescribed by an agency cannot serve to delay a response or deny a request for records. A delay due to a failure to use a prescribed form might result in an inconsistency with the time limitations imposed by the Freedom of Information Law. For example, assume that an individual requests a record in writing from an agency and that the agency responds by directing that a standard form must be submitted. By the time the individual submits the form, and the agency processes and responds to the request, it is probable that more than five business days would have elapsed, particularly if a form is sent by mail and returned to the agency by mail. Therefore, to the extent that an agency's response granting, denying or acknowledging the receipt of a request is given more than five business days following the initial receipt of the written request, the agency, in my opinion, would have failed to comply with the provisions of the Freedom of Information Law.

While the Law does not preclude an agency from developing a standard form, as suggested earlier, I do not believe that a failure to use such a form can be used to delay a response to a written request for records reasonably described beyond the statutory period. However, a standard form may, in my opinion, be utilized so long as it does not prolong the time limitations discussed above. For instance, a standard form could be completed by a requester while his or her written request is timely processed by the agency. In addition, an individual who appears at a government office and makes an oral request for records could be asked to complete the standard form as his or her written request.

In sum, it is my opinion that the use of standard forms is inappropriate to the extent that is unnecessarily serves to delay a response to or deny a request for records.

Part D states that the fee for copies of documents "shall not be less than twenty-five cents ($.25) per page...." Section 87(1)(b) of the Freedom of Information Law provides that the maximum fee for photocopies of records up to nine by fourteen inches is twenty-five cents per photocopy, unless a statute (an act of the State Legislature) authorizes the assessment of a different fee. When records are larger or cannot be photocopied, as in the case of computer tapes or disks, that provision states that the fee is to be based on the actual cost of reproduction.

Lastly, proposal does not include provisions which must be appear in an agency's regulations. For instance, there is no reference to the hours during which requests may be made, nor is there any designation of a person or body to whom an appeal may be made following a denial of access to records.

In addition to the regulations, enclosed is a copy of model regulations that can be used by agencies as a means of fully complying with the procedural implementation of the Freedom of Information Law. Copies of both will be sent to the Board of Trustees.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12731

41 State Street, Albany, New York 12231
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June 14, 2001

Mr. Kevin J. Smyth
93-B-1546
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. Smyth:

I have received your letter regarding requests for records from various federal and state agencies. Many of the records you seek pertain to a joint state/federal law enforcement investigation.

The Committee on Open Government is authorized to provide advice concerning the New York State Freedom of Information Law. I offer the following comments based on that statute.

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."

From my perspective, when a federal agency cooperates with a state agency on a joint project, the federal agency is not considered a state agency for purposes of the Freedom of Information Law. The provisions of the federal Freedom of Information Act (5 U.S.C. §552) would determine the availability of federal agency records. On the other hand, the availability of state agency or local government records would be determined by the New York State Freedom of Information Law.

The Freedom of Information Law defines the term "record" expansively to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12732

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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

June 14, 2001

Mr. Alexander M. Marathon
79-B-00127
Albany County Correctional Facility
840 Shaker Road
Albany, NY 12211

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Marathon:

I have received your letter in which you complained that the Executive Director of South Tower Malls, Inc. has not responded to your requests for records under the Freedom of Information Law.

In this regard, the Freedom of Information Law pertains to agency records, and §86(4) of that statute defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

A public corporation is a unit of government (i.e., a county, city or town) and is an agency that is subject to the Freedom of Information Law. However, I believe that South Mall Towers, Inc. is a private corporation which does not perform a governmental function. As such, it would not be subject to the Freedom of Information Law, and the Executive Director would not be required to respond to your requests for records under that statute.

I regret that I cannot be of further assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 12733

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June 14, 2001

Mr. James LaRocca
86-A-9738
Fishkill Correctional Facility
P.O. Box 1245
Beacon, NY 12508

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. LaRocca:

I have received your letter in which you sought assistance in obtaining records from the Westchester County District Attorney's Office.

In this regard, I offer the following comments.

First, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to 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 constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of 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 autopsy reports are exempt from disclosure to the general public. Under County Law, §677, autopsy reports and related records are available as of right only to the next of kin and a district attorney; others could only obtain the records by means of a court order.

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12734

41 State Street, Albany, New York 12231
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Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

June 15, 2001

Mr. Thomas Higgins
85-A-1106
Auburn Correctional Facility
135 State Street, Box 618
Auburn, NY 13024

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Higgins:

I have received your letter in which you sought assistance in obtaining records from the New York City Police Department. You have sought a variety of records related to your arrest and indictment.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of your correspondence, I offer the following comments.

Whether records are accessible or deniable, an agency is required to respond to a request, and the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

You suggested that it has been held that complaint follow up reports (DD5's) and police officers' memo books are accessible under the Freedom of Information Law. In my view, that was not the conclusion reached in Gould v. New York City Police Department [89 NY2d 267 (1996)]. The Court found that a "blanket denial" of access to those records was inconsistent with law, and that agencies must review the records to determine the extent, if any, to which the grounds for denial of access appearing in §89(2) might properly be asserted.

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12735

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

June 15, 2001

Mr. Alex Ramirez
94-A-6171
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. Ramirez:

I have received your letter in which you inquired about your ability to appeal following an agency's failure to respond to your Freedom of Information Law requests.

In this regard, I offer the following comments.

The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully

explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12736

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

June 18, 2001

Mr. Kimnee Wilson
00-A-6346
C-2-138
Shawangunk Correctional Facility
P.O. Box 700
Wallkill, NY 12589

Dear Mr. Wilson:

I have received your letter of June 11, which reached this office today, in which you appealed denials of your requests for records 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 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."

In short, appeals should be directed not to this office, but rather to the head of an agency or that person's designee.

I note that you referred to the possibility of a fee waiver. While provisions involving the waiver of fees appear in the federal Freedom of Information Act, which applies to federal agencies, there is no comparable provision in the New York Freedom of Information Law. Further, it has been held that an agency subject to the New York Freedom of Information Law may charge its established fee, even if the applicant for records is an indigent inmate [see Whitehead v. Morgenthau, 552 NYS2d 518 (1990)].

I hope that the foregoing serves to clarify your understanding of the matter and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12737

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

June 18, 2001

E-MAIL

TO: Jan Pennington, Gismort@aol.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 facts presented in your correspondence.

Dear Ms. Pennington:

I have received your letter in which you questioned the authority of the Office of the Erie County District Attorney to limit the time afforded you to inspect records to twenty minutes during a given day.

In this regard, 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 in which an issue 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 Office of the District Attorney, 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.

I hope that I have been of assistance.

cc: Records Access Officer, Office of the Erie County District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12738

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

June 18, 2001

Mr. Danny Andersen
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Anderson:

I have received your letter in which you raised questions concerning rights of access to certain records of the Long Island Power Authority.

In this regard, 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."

Since the definition includes reference to public authorities, I believe that the Long Island Power Authority clearly constitutes an "agency" required to comply with the Freedom of Information Law.

Second, you wrote that the records sought "are those of purchased and installed ground source heat pumps by the local residential community", and you added that the Authority provides a "rebate" to customers who have installed those devices. As you are likely aware, the Freedom of Information Law, in brief, is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Pertinent to your inquiry in my view is §87(2)(b), which authorizes an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." Section 89(2)(b) provides a series of examples of unwarranted invasions of personal privacy. From my perspective, that a consumer chooses to purchase or install a certain device, through the Authority or otherwise, likely constitutes information of a personal nature that is beyond the scope of rights of access conferred by the Freedom of Information Law. Further, one of the examples of

an unwarranted invasion of personal privacy pertains to the "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)].

In short, it is likely in my opinion that the Authority could deny access to the records sought.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Records Access Officer, Long Island Power Authority

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12739

41 State Street, Albany, New York 12231
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June 18, 2001

Mr. Steven Smith
91-A-2339
Fishkill Correctional Facility
Box 1245
Beacon, NY 12508

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Smith:

I have received a carbon copy of your letter to MEDILABS in which you request records under the Freedom of Information Law. You are interested in obtaining a variety of records related to the drawing of your blood by a MEDILABS technician at the Fishkill Correctional Facility.

In this regard, if the facility is a governmental entity, its records would be subject to the Freedom of Information Law. I would conjecture, however, that in consideration of its name, the facility is not governmental.

Assuming that the Freedom of Information Law applies, in terms of rights granted by that statute, it is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

With regard to medical records, the Freedom of Information Law, in my view, likely permits that some of those records may be withheld in whole or in part, depending upon their contents. For instance, medical records prepared by hospital personnel could be characterized as "intra-agency materials" that fall within the scope of §87(2)(g) of the Freedom of Information Law. To the extent that such materials consist of advice, opinion, recommendation and the like, I believe that the Freedom of Information Law would permit a denial.

Nevertheless, a different statute, §18 of the Public Health Law, generally grants rights of access to medical records to the subjects of the records. As such, that statute may provide greater access to medical records than the Freedom of Information Law. It is suggested that you send your request to the medical facility and make specific reference to §18 of the Public Health Law when seeking medical records.

To obtain additional information concerning access to medical records and the fees that may be charged for searching and copying those records, you may write to:

Access to Patient Information Program
New York State Department of Health
Hedley Park Place
Suite 303
433 River Street
Troy, NY 12180

I hope that I have been of some assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12710

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

June 19, 2001

Mr. Jose Colon
92-B-0610
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. Colon:

I have received your letter in which you sought assistance in obtaining records from the Department of Corrections pertaining to complaints about, or disciplinary actions taken against, a correction officer. You indicated that the Department of Correctional Services has not responded to your request.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of your correspondence, I offer the following comments.

With respect to access to records involving disciplinary actions, by way of background, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

The first ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §50-a of the Civil Rights Law. In brief, that statute provides that personnel records of police and correction officers that are used to evaluate performance toward continued employment or promotion are confidential. The Court of Appeals, the State's highest court, in reviewing the legislative history leading to its enactment, has held that the exemption from disclosure conferred by §50-a of the Civil Rights Law "was designed to limit access to said personnel records by criminal defense counsel, who used the contents of the records, including unsubstantiated and irrelevant complaints against officers, to embarrass officers during cross-examination" [Capital Newspapers v. Burns, 67 NY2d 562, 568 (1986)]. In another decision which dealt with unsubstantiated complaints against correction officers, the Court of Appeals held that the purpose of §50-a "was to prevent the release of sensitive personnel records that could be used in litigation for purposes of harassing or embarrassing correction officers" [Prisoners' Legal Services v. NYS Department of Correctional Services, 73 NY 2d 26, 538 NYS 2d 190, 191 (1988)]. The Court recently 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 consideration of the foregoing, I believe that the records of your interest would be exempt from disclosure pursuant to §50-a of the Civil Rights Law.

Notwithstanding the foregoing, I believe that the Department is required to respond to your request. Here I point out that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of 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,

David Treacy

David M. Treacy
Assistant Director

DMT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12741

41 State Street, Albany, New York 12231
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June 19, 2001

Ms. Sandra Tan
Buffalo News
One News Plaza
P.O. Box 100
Buffalo, NY 14240

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Tan:

As you are aware, I have received your letter and the materials relating to it concerning rights of access to "the Buffalo Police Department's 911 incident reports." According to your letter, until recently, the reports had been made available to members of the news media and the public, and you enclosed a copy of a printout that you characterized as a "typical 911 incident report." The report includes the date and time of an incident, a street address, what appears to be a complaint number, and a brief description of the nature of a complaint, i.e., "suspicious prsn", "burg in prog", "neighbor dispt", "criminal misch", "narcotics", etc. The report, which is a computer printout containing reference to approximately fifty incidents, includes no names.

In response to a recent request for "an electronic copy" of a record containing the same items of information as those indicated in the "typical" incident report, the City's Assistant Corporation Counsel, Susan P. Wheatley, denied access for the following reasons:

> "1. Public Officers Law §87(2)(a) permits denial of access to records that are specifically exempted from disclosure by state or federal law. Records of calls to a municipality's 911 system are specifically exempted from disclosure under (New York) County Law §308(4). In addition, portions of the records would be exempt from disclosure under (New York) Civil Rights Law 50-b(1), which protects that identity, and any information that may tend to identify, sex offense victims.
>
> "2. Disclosure of portions of the records, and specifically those falling within the protection of Civil Rights Law 50-b(1), would constitute an unwarranted invasion of personal privacy under Public

> Officers Law §§87(2)(b) and 89(2)(b)(iv) and (v). Due to the massive number of records that you are requesting and their format, review of the records to identify specifically protected entries and redaction of personal identifying information contained therein would be impossible or impractical.
>
> "3. The requested records were compiled for law enforcement purposes and disclosure of the records, or portions of them would interfere with law enforcement investigations or judicial proceedings, identify a confidential source or disclose confidential information relating to a criminal investigation, and/or endanger the life or safety of any person. See Public Officers Law §87(2)(e)(i) and (ii) and (f). The records you have requested could identify witnesses to, or victims of, criminal activity. Again, in view of the number of the records you have requested and their format, review and redaction would be impossible or impractical.
>
> "In addition to the above reasons for denying your request, the City of Buffalo Police Department is still investigating whether the records you have requested are available in the form or format you specified."

From my perspective, the denial of the request was inconsistent with law. In this regard, I offer the following comments.

Perhaps most importantly, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. It is emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In my view, the phrase quoted in the preceding sentence evidences a recognition on the part of the Legislature that a single record or report, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld. That being so, I believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

The Court of Appeals expressed its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department [87 NY2d 267 (1996)], stating that:

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see,* Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one

> of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" (id., 275).

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the Police Department contended that complaint follow up reports could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g), an exception separate from those cited in response to your request. The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276), and stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, stating that:

> "...to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents (*Matter of Fink vl. Lefkowitz, supra*, 47 N.Y.2d, at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material (*see, Matter of Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 133, 490 N.Y.S. 2d, 488, 480 N.E.2d 74; *Matter of Farbman & Sons v. New York City Health & Hosps. Corp., supra*, 62 N.Y.2d, at 83, 476 N.Y.S.2d 69, 464 N.E.2d 437)" (id.).

In the context of your request,the Department has engaged in a blanket denial of access in a manner which, in my view, is equally inappropriate.

Assuming that a 911 call is made through an "enhanced" system, a so-called "E-911 system, the record of that call would be confidential. In an E-911 system, in addition to the information offered orally by the caller, the recipient of the call also receives the phone number of the instrument used to make the call and the location from which the call was made. Relevant in that circumstance is the first ground for denial, §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §308(4) of the County Law, which states that:

> "Records, in whatever form they may be kept, of calls made to a municipality's E911 system shall not be made available to or obtained by any entity or person, other than that municipality's public safety agency, another government agency or body, or a private entity or a person providing medical, ambulance or other emergency services, and shall not be utilized for any commercial purpose other than the provision of emergency services."

In my view, "records...of calls" means either a recording or a transcript of the communication between a person making a 911 emergency call, and the employee who receives the call. I do not believe that §308(4) can validly be construed to mean records regarding or relating to a 911 call. If that were so, innumerable police and fire reports, including arrest reports and police blotter entries, would be exempt from disclosure in their entirety. In short, I do not believe that a report analogous to that attached to your letter would be subject to §308 of the County Law.

Ms. Wheatley also referred to §50-b of the Civil Rights Law and §§87(2)(b) and 89(2)(b) of the Freedom of Information Law as grounds for the denial of access. Those provisions would, in my view, rarely if ever be pertinent in relation to the kinds of reports at issue. The former prohibits governmental entities from disclosing records that would identify the victim of a sex offense; the latter deal with the ability of an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." On the "typical" report that you enclosed, which, again, makes reference to approximately fifty incidents, no item has been deleted, and none would have dealt with a sex offense. The report contains no names and appears to relate to events that occurred at a multiple dwelling over a period of nearly two years. When a report relates to a dwelling in which there are many tenants, a description of a complaint as a sex offense or "domestic trbl" likely would not identify the victim of such an offense or those involved in a domestic dispute. Absent personally identifiable details, I do not believe that the City may justify a denial of access on the basis of either §50-b of the Civil Rights Law or the provisions pertaining to personal privacy appearing in the Freedom of Information Law.

When §50-b is pertinent, a record identifying the victim of a sex offense would be exempted from disclosure pursuant to §87(2)(a) of the Freedom of Information Law. Nevertheless, even if the location of the commission of the crime is disclosed, it may be impossible to identify the victim with any degree of certainty or accuracy. A victim of a sex offense that occurred at a particular location might have been a resident, a friend, a relative, a cleaning person, a meter reader or any other person performing some sort of function or providing a service at that location. As suggested above, if the event occurred at a multiple dwelling or commercial establishment, the ability to identify a victim would, in my view, be remote.

With respect to references to domestic disputes ("domestic trbl"), while the details of an event or the names of those involved might justifiably withheld to protect privacy, 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. Again, in the case of a printout involving a multiple dwelling, the mere reference to a domestic dispute would not likely enable the public to identify those involved.

The printout that you enclosed is, in my view, essentially the equivalent of a police blotter. 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 a 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).

Reports that indicate that an event occurred, such as those at issue, would appear to be analogous to the disclosure of the contents of the traditional police blotter and, therefore, should be disclosed.

Ms. Wheatley also relied on §87(2)(e)(i) and (ii) and (f) of the Freedom of Information Law as grounds for denial of access. Section 87(2)(e) provides in relevant part that an agency may withhold "records compiled for law enforcement purposes" when disclosure would "i. interfere with law enforcement investigations or judicial proceedings; ii. deprive a person of a right to a fair trial or impartial adjudication..." Section 87(2)(f) authorizes an agency to deny access to records insofar as disclosure "would endanger the life or safety of any person." It is reiterated that the reports do not include names, and as in the case of the traditional police blotter, they contain no information concerning the nature or course of an investigation. On the contrary, they merely indicate that certain events may have occurred at particular times and places. As stated earlier, the state's highest court has determined on several occasions that the exceptions to rights of access "are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption" (Gould, Hanig, Fink, supra), and that there must be "particularized and specific justification for not disclosing requested documents" (id.). In my view, the possibility that the harmful effects described in §§87(2)(e) and (f) would arise by means of disclosure is conjectural and remote, and that possibility, without more, would not justify a denial of access.

Lastly, Ms. Wheatley indicated that the Department was "investigating whether the records...are available in the form and format you specified", a "text or database format." In this regard, 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, 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. 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 City 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 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.

I note, too, that based on judicial decisions, the volume of a request is largely irrelevant. Assuming that a request "reasonably describes" the records as required by §89(3) of the Freedom of Information Law, i.e., that an agency can locate and identify the records sought, it has been held that a request cannot be rejected due to its breadth [Konigsberg v. Coughlin, 68 NY2d 245 (1986)]. Further, it has been held that denials of access to records based on an agency's contention that it had insufficient staff cannot be sustained, for a denial on that basis would "thwart the very purpose of the Freedom of Information Law" [United Federation of Teachers v. New York City Health and Hospitals Corporation, 428 NYS2d 823 (1980)]. Moreover, the Court of Appeals, recognizing that implementation of the Freedom of Information Law may be burdensome, has stated that "Meeting the public's legitimate rights of access concerning government is fulfillment of a governmental obligation, not the gift of, or waste of, public funds" [Doolan v. BOCES, 48 NY2d 341, 347 (1979)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Michael B. Risman
Susan P. Wheatley
Jim Heaney

STATE OF NEW YORK
DEPARTMENT OF STATE
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June 19, 2001

Mr. James Johnson
82-A-6202- B-7-13
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 facts presented in your correspondence.

Dear Mr. Colon:

I have received your letter in which you requested an advisory opinion regarding your request for a "verdict sheet" from the Queens County Supreme Court under the Freedom of Information Law.

In this regard, although the courts and court records are not subject to the Freedom of Information Law [see definitions of "agency", §86(3), and "judiciary", §86(1)], many court records are nonetheless accessible to the public under various statutes. For example, §255 of the Judiciary Law states that:

> "[A] clerk of a court must, upon request, and upon payment of, or offer to pay, the fees 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."

It is suggested that you resubmit your request to the court clerk citing the applicable provision of law.

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:tt

STATE OF NEW YORK
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June 19, 2001

Virginia M. Fichera, Ph.D.
Professor of Foreign Languages & Humanities
P.O. Box 44
Sterling, NY 13156

The staff of the Committee on 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. Fichera:

I have received your letter, as well as the materials attached to it. You have asked that the Committee "investigate" with respect to the collection and dissemination of records by the State University College at Oswego that include your social security number.

In this regard, the Committee on Open Government is authorized to offer advice and opinions concerning public access to and the disclosure of government records. This office, however, has neither the staff nor the statutory capacity to conduct what may be characterized as an "investigation." Nevertheless, in an effort to provide assistance to you and guidance to officials at the College, I offer the following commentary, much of which is a reiteration of an advisory opinion prepared at the request of another member of the College faculty more than five years ago.

An initial issue, in my view, involves the authority of the College to require the submission of a social security number. Pertinent to the matter is the federal Privacy Act (5 USC §552a). Although the Privacy Act generally applies only to federal agencies, provisions within the Act concerning the ability of government to obtain social security numbers also apply to entities of state and local government. Section 7 of the Act states that:

> "(a)(1) [I]t shall be unlawful for any Federal, State or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security number.
>
> (2) the provision of paragraph (a) of this subsection shall not apply with respect to --

(A) any disclosure which is required by Federal Statute, or

> (B) the disclosure of a social security number to any Federal, State, or local agency maintaining a system of records in existence and operating before January 1, 1975, if such disclosure was required under statute or regulation adopted prior to such date to verify the identity of an individual
>
> (b) Any Federal, State, or local government agency which requests an individual to disclose his social security account number shall inform that individual whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it."

The quoted provision places limitations upon the collection and use of social security numbers by government, and unless "grandfathered in" under the Privacy Act, agencies cannot require the submission of social security numbers, except in conjunction with social security or other statutorily authorized purposes.

Next, with respect to the disclosure or dissemination of a social security number of an employee, two state statutes, the Freedom of Information Law and the Personal Privacy Protection Law (respectively Articles 6 and 6-A of the Public Officers Law), are relevant to an analysis of the matter. Because of the language of those statutes, they must be construed together and in relation to one another.

By way of background, the Freedom of Information Law includes within its coverage all agency records and is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

The Personal Privacy Protection Law deals in part with the disclosure of records or personal information by state agencies concerning data subjects. A "data subject" is "any natural person about whom personal information has been collected by an agency" [Personal Privacy Protection Law, §92(3)]. "Personal information" is defined to mean "any information concerning a data subject which, because of name, number, symbol, mark or other identifier, can be used to identify that data subject" [§92(7)]. For purposes of that statute, the term "record" is defined to mean "any item, collection or grouping of personal information about a data subject which is maintained and is retrievable by use of the name or other identifier of the data subject" [§92(9)].

With respect to disclosure, §96(1) of the Personal Privacy Protection Law states that "No agency may disclose any record or personal information", except in conjunction with a series of exceptions that follow. One of those exceptions involves a situation in which a record is "subject to article six of this chapter [the Freedom of Information Law], unless disclosure of such information would constitute an unwarranted invasion of personal privacy as defined in paragraph (a) of subdivision two of section eighty-nine of this chapter." Section 89(2-a) of the Freedom of Information Law states that "Nothing in this article shall permit disclosure which constitutes an unwarranted invasion of personal privacy as defined in subdivision two of this section if such disclosure is prohibited under section ninety-six of this chapter." Therefore, if a state agency cannot

disclose records pursuant to §96 of the Personal Protection Law, it is precluded from disclosing to the public under the Freedom of Information Law.

From my perspective, based on judicial interpretations, public disclosure of a social security number, absent the consent of a data subject, constitutes an unwarranted invasion of personal privacy. One element of a series of decisions is the finding that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that those individuals are required to be more accountable than others. The courts have determined that, as a general rule, records that are relevant to the performance of the official duties of a public officer or employee are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that items relating to public officers or employees are irrelevant to the performance of their official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977, dealing with membership in a union; Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1981, involving the back of a check payable to a municipal attorney that could indicate how that person spends his/her money; Seelig v. Sielaff, 200 AD 2d 298 (1994), concerning disclosure of social security numbers].

Because the State University is a state agency subject to the Personal Privacy Protection Law, I believe that it and the College, as a component of the University, are precluded from releasing records to the public the disclosure of which would constitute an unwarranted invasion of personal privacy. Pertinent to the matter is a decision cited earlier, Seelig v. Sielaff, supra. In Seelig, the lower court enjoined a New York City agency from releasing the social security numbers of correction officers without their written consent. While the Appellate Division agreed that disclosure of social security numbers would result in an unwarranted invasion of correction officers' privacy, the Court unanimously reversed and vacated the judgment because the agency involved is an entity of local government. Specifically, it was found that:

> "The injunctive relief granted by the IAS Court was based upon Public Officers Law §92 (1), part of this State's Personal Privacy Protection Law. That law by its own terms excepts the judiciary, the State Legislature, and 'any unit of local government' from its purview. Consequently, the relief granted against the respondents was improper" (id., 299).

While a local government may opt to disclose personal information, even when disclosure would result in an unwarranted invasion of personal privacy, a state agency subject to the Personal Privacy Protection Law would be prohibited from so doing.

In sum, I do not believe that a state agency, such as the College, can validly disseminate the social security numbers of its employees (or others, such as students) to the public, without the consent of the subjects of those items, for the Personal Privacy Protection Law essentially forbids such disclosure.

Also pertinent to the matter is §96(1)(b) of the Personal Privacy Protection Law. That provision permits, but does not require, the disclosure of personal information relating to a data subject when the disclosure is:

> "to those officers and employees of, and to those who contract with, the agency that maintains the record if such disclosure is necessary to the performance of their official duties pursuant to a purpose of the agency required to be accomplished by statute or executive order or necessary to operate a program specifically authorized by law..."

Based on the foregoing, in order to disclose social security numbers to staff or employees at the College, I believe that two conditions must be met: first, that those items are "necessary to the performance of [the] official duties" of the staff or employees who seek or acquire the social security numbers; and second, that disclosure of those items is accomplished in order to comply with law or necessary to "operate a program specifically authorized by law."

In my view, it is questionable whether either of conditions can be met in the circumstances that you presented.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: William Brown
John F. Lalande, II
Wendy Kowalczyk

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June 19, 2001

Mr. Abdallah Abdul-Latif
97-A-0170
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 facts presented in your correspondence.

Dear Mr. Abdul-Latif:

I have received your letters in which you sought assistance in obtaining records from the Kings County District Attorney's Office and the New York City Assigned Counsel Plan.

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, by way of background, you requested seventeen bank surveillance videotapes from the District Attorney's Office that allegedly depict a robbery for which you were apparently convicted.

Here I point out that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Since the matter has been closed, it would appear that the key issue involves the extent to which the video tape depicts persons other than yourself. Insofar as disclosure would constitute " an unwarranted invasion of personal privacy" [see §87(2)(b)] pertaining to those persons, I believe that the tape may be withheld.

I note, however, that even when records might ordinarily be withheld under the Freedom of Information Law, it has been held that there is no basis for denial once the records are presented in a public judicial proceeding. In Moore v. Santucci, a decision rendered by the Appellate Division, Second Department, the Court found that:

> "...while statements of the petitioner, his codefendants and witnesses obtained by the respondent in the course of preparing a criminal case for trial are generally exempt from disclosure under FOIL (see, Matter of Knight v. Gold, 53 AD2d 694, appeal dismissed 43 NY2d 841), once the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public" [151 AD2d 677, 679 (1989)].

In short, insofar as the videotapes were shown in open court, they were publicly disclosed. Once that occurs, unless the record is later sealed, nothing in the Freedom of Information Law would serve to enable an agency to deny access to that record.

Nevertheless, 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 possesses any of the records that you have requested. If the attorney no longer maintains the

record, he should prepare an affidavit so stating that can be submitted to the office of the district attorney.

You also mentioned your attempt to obtain records from the assigned counsel program, and I assume that you are referring to assignments under "Article 18-B", which encompasses §§722 to 722-f of the County Law. Under §722, the governing body of a county and the City Council in New York City are required to adopt plans for providing counsel to persons "who are financially unable to obtain counsel." Those plans may involve providing representation by a public defender, by a legal aid organization, through a bar association, or by means of a combination of the foregoing.

While I believe that the records of the governmental entity required to adopt a plan under Article 18-B are subject to the Freedom of Information Law, the records of an individual attorney performing services under Article 18-B may or may not be subject to the Freedom of Information Law, depending upon the nature of the plan. For instance, if a plan involves the services of a public defender, I believe that the records maintained by an office of public defender would fall within the scope of the Freedom of Information Law (see County Law, §716), for that office in my view would constitute an "agency" as defined in §86(3) of the Freedom of Information Law. However, if it involves services rendered by private attorneys or associations, those persons or entities would not in my view constitute agencies subject to the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:tt

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June 20, 2001

Mr. Tim Tenaglia
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Tenaglia:

I have received your letter concerning requests made to the Shoreham Wading River School District under the Freedom of Information Law. It appears that the District has delayed making records available to you. You also allege that the District "is in violation of the Open Meetings Law", for minutes of meetings have not been made available in a timely manner.

Having reviewed your correspondence and the requests that you forwarded, I offer the following comments.

First, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

Based on the foregoing, an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date indicating when it can be anticipated that a request will be granted or denied. The acknowledgement by the records access officer did not make reference to such a date.

I note that there is no precise time period within which an agency must grant or deny access to records. The time needed to do so may be dependent upon the volume of a request, the possibility

that other requests have been made, the necessity to conduct legal research, the search and retrieval techniques used to locate the records and the like. In short, when an agency acknowledges the receipt of a request because more than five business days may be needed to grant or deny a request, so long as it provides an approximate date indicating when the request will be granted or denied, and that date is reasonable in view of the attendant circumstances, I believe that the agency would be acting in compliance with law. Notwithstanding the foregoing, in my view, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, if records are clearly available to the public under the Freedom of Information Law, and if they are readily retrievable, there may be no basis for a lengthy delay in disclosure.

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Second, it is emphasized that the Freedom of Information Law pertains to existing records. If, for example, the District did not prepare a record indicating the locations where a job announcement was posted, there would be no obligation to create or prepare a new record containing that information on your behalf. I note, too, that in one request, you sought the provision of the "state education law regarding the release of photos or videos of our students." From my perspective, in some instances, 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 1716 of the Education Law", no interpretation or judgment is necessary, 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.

Third, an issue that might be pertinent with respect to some aspects of your requests involves the extent to which the requests "reasonably describe" the records sought as required by §89(3) of the Freedom of Information Law. I point out that it has been held by the Court of Appeals that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

The Court in Konigsberg found that the agency could not reject the request due to its breadth and also stated that:

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency'])" (id. at 250).

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping system. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number.

While I am unfamiliar with the recordkeeping systems of the District, to the extent that the records sought can be located with reasonable effort, I believe that the request would have met the requirement of reasonably describing the records. On the other hand, if the records are not maintained in a manner that permits their retrieval except by reviewing perhaps hundreds or even thousands of records individually in an effort to locate those falling within the scope of the request, to that extent, the request would not in my opinion meet the standard of reasonably describing the records.

Next, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Insofar as your requests involve existing records that can be located with reasonable effort, I believe that the records must be disclosed, for none of the grounds for denial would appear to be pertinent.

Lastly, §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.

Further, in relation to votes by members of the Board of Education, although it is reiterated that 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 members of government agencies. 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, such as a board of education, 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)].

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. A record of votes of the members typically appears in minutes required to be prepared pursuant to §106 of the Open Meetings Law.

In an effort to enhance compliance with and understanding of open government laws, copies of this response will be sent to District officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Robert Pellicone
Andrew Miller

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12746

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June 21, 2001

Mr. Jonathan Torres
00-A-6207
Marcy Correctional Facility
P.O. Box 3600
Marcy, NY 13403

Dear Mr. Torres:

I have received your letter in which you requested records concerning investigations in the 9th Precinct in New York City under the federal Freedom of Information and Privacy Acts.

In this regard, first, the Committee on Open Government is authorized to offer advice and opinions concerning the Freedom of Information Law. The Committee does not maintain custody or control of records generally.

Second, the statutes to which you referred pertain only to records maintained by federal agencies. The applicable statute in the context of your request is the New York Freedom of Information Law. Further, pursuant to regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), each agency is required to designate one or more "records access officers." The records access officer has the duty of coordinating an agency's response to requests. It is suggested that your request be directed to the records access officer at the New York City Police Department.

Since one aspect of your request involves disciplinary action that may have been taken against certain police officers, I note that §50-a of the Civil Rights Law prohibits the Department from disclosing those kinds of records without the consent of the police officers or a court order.

Lastly, while the federal Freedom of Information Act includes provisions concerning the waiver of fees, the state equivalent includes no similar provision. Moreover, it has been held that an agency subject to the New York Freedom of Information Law may charge its established fees even when the applicant is an indigent inmate (Whitehead v. Morgenthau, 552 NYS 2d 518 (1990)].

I hope that the foregoing serves to clarify your understanding of the matter.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 22, 2001

Mr. Matthew Lee
Inner City Press/Community on the Move
1919 Washington Avenue
Bronx, NY 10457

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence, unless otherwise indicated.

Dear Mr. Lee:

I have received a variety of correspondence from you concerning your requests made under the Freedom of Information Law for records of the Banking Department. It is noted at the outset that I have had numerous conversations relating to your requests and appeals with attorneys for the Department, and it is my belief that, at this juncture, the Department has fulfilled its duties under the law. Nevertheless, I would like to comment with respect to your contention that the Department has withheld "information that is clearly 'otherwise publicly available,' including in SEC filings which [you] cite and quote from." You added that "[o]f particular concern...is that [you] have had to make nearly identical FOIL appeals to the NYBD in the past, after which time information was released" and that "[t]o be forced to revisit this issue each time, with the attendant delays....is unfortunate and should be unnecessary."

In this regard, there is case law dealing with a different kind of situation but which in my view involves the same principle. In Moore v. Santucci [151 AD2d 677 (1989)], a request was made for records that ordinarily could be withheld under the Freedom of Information Law. Nevertheless, the records had been introduced into evidence and disclosed during a public judicial proceeding. Because the records were disclosed in that manner, the court determined that the exceptions to rights of access appearing in §87(2) did not apply. In like manner, if the Banking Department maintains records that have been disclosed by another agency, such as the SEC, I do not believe that it could justify a denial of access.

With respect to delays in disclosure, having spoken with Department officials concerning requests for records on many occasions, it appears that the Department receives numerous requests, and that the process of locating and reviewing records to determine rights of access may be time consuming.

As you are aware, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

While an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days, when such acknowledgement is given, there is no precise time period within which an agency must grant or deny access to records. The time needed to do so may be dependent upon the volume of a request, the possibility that other requests have been made, the necessity to conduct legal research, the search and retrieval techniques used to locate the records and the like. In short, when an agency acknowledges the receipt of a request because more than five business days may be needed to grant or deny a request, so long as it provides an approximate date indicating when the request will be granted or denied, and that date is reasonable in view of the attendant circumstances, I believe that the agency would be acting in compliance with law.

Notwithstanding the foregoing, in my view, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, if records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a lengthy delay in disclosure.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Sara A. Kelsey
Christine Cardi

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 20, 2001

Mr. Sam Cullman
K Video Productions, Inc.
611 Broadway #710
New York, NY 10012

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Cullman:

I have received your letter in which you sought assistance in relation to a request for records that was denied by the New York City Police Department.

By way of background, you indicated that your employer, K Video Productions, Inc., is in the process of preparing a "feature length documentary about the social and political changes in New York City in the past decade." In an effort to view and perhaps obtain video materials useful in the documentary, you contacted the New York Police Academy Library in September and were granted access to the Library, at which time you "saw three Police Academy Instructional videos" that would be useful in producing the documentary. Although you wrote that the tapes "are fairly accessible to the public for viewing at the Police Academy Library", the librarian indicated that copies could not be taken out of the building. Thereafter, you requested copies of the three videos from the Department under the Freedom of Information Law. The request was denied on the basis of §87(2)(e)(iv) of the Freedom of Information Law, and you appealed the denial on October 9. Despite having contacted the Department on several occasions, as of the date of your letter to this office, your appeal had not yet been determined.

In this regard, I offer the following comments.

First, the provision concerning the right to appeal a denial of access to records, §89(4)(a) of the Freedom of Information Law, states in relevant part that the person designated by the head of an agency to determine appeals "shall within ten business days of the receipt of 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 if an agency does not respond to an appeal within ten business days of its receipt of an appeal that the applicant for the record has exhausted his or her administrative remedies and may initiate a judicial proceeding to seek review of the denial of access [see Floyd v. McGuire, 87 AD2d 388, appeal dismissed, 57 NY2d 774 (1982)]. Therefore, you may choose to bring suit against the Department under Article 78 of the Civil Practice Law and Rules.

It is my hope, however, that a review of this response by the Department will serve to resolve the matter.

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. 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, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld. That being so, I believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

The Court of Appeals, the state's highest court, expressed its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department [87 NY2d 267 (1996)], stating that:

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see,* Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" (id., 275).

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the Police Department contended that complaint follow up reports could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g), an exception separate from those cited in response to your request. The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276), and stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, stating that:

> "...to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents (*Matter of Fink 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 Department has engaged in a blanket denial of access in a manner which, in my view, is equally inappropriate.

Third, the Freedom of Information Law pertains to all records maintained by or for an agency, and §86(4) defines the term "record" to mean:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, assuming that the videotapes are maintained by or for the Department, I believe that they would constitute Department "records" subject to rights of access. The denial of your request by the Department itself indicates that the Department has custody of the tapes.

Next, when records are accessible under the Freedom of Information Law, they must be made available for inspection and copying. Section 89(3) specifies that "[u]pon payment of, or offer to pay, the fee prescribed therefor, the entity shall provide a copy of such record..." Under §87(1)(b(iii), the fee in this instance would be based on the "actual cost of reproduction."

I note that the Court of Appeals in Russo v.Nassau County Community College [81 NY2d 690 (1993)] found that curricular material, a film used in a course given by the College, constituted a "record" that fell within the requirements of the Freedom of Information Law. Further, since the film had been seen by many students, there was no basis for withholding the film or denying a request for a copy. Assuming that the videotapes in question have been or could have been viewed by any member of the public, in my view, there would be no basis for a denial of access. I believe that the Department in that circumstance would have effectively waived its ability to withhold the tapes.

Even if you or other members of the public had not been given the opportunity to view the tapes, if they had never been disclosed to the public, it is likely that the blanket denial of access by the Department was overbroad. The leading decision involving similar records indicated that portions of the records might justifiably be withheld, but that the remainder must be disclosed. Specifically, Fink v. Lefkowitz involved access to a manual prepared by a special prosecutor that investigated nursing homes in which the Court of Appeals held that:

> "The purpose of this exemption is obvious. Effective law enforcement demands that violators of the law not be apprised the

> nonroutine procedures by which an agency obtains its information (see Frankel v. Securities & Exch. Comm., 460 F2d 813, 817, cert den 409 US 889). However beneficial its thrust, the purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution.
>
> "To be distinguished from agency records compiled for law enforcement purposes which illustrate investigative techniques, are those which articulate the agency's understanding of the rules and regulations it is empowered to enforce. Records drafted by the body charged with enforcement of a statute which merely clarify procedural or substantive law must be disclosed. Such information in the hands of the public does not impede effective law enforcement. On the contrary, such knowledge actually encourages voluntary compliance with the law by detailing the standards with which a person is expected to comply, thus allowing him to conform his conduct to those requirements (see Stokes v. Brennan, 476 F2d 699, 702; Hawkes v. Internal Revenue Serv., 467 F2d 787, 794-795; Davis, Administrative Law [1970 Supp], section 3A, p 114).
>
> "Indicative, but not necessarily dispositive of whether investigative techniques are nonroutine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel (see Cox v. United States Dept. of Justice, 576 F2d 1302, 1307-1308; City of Concord v. Ambrose, 333 F Supp 958)."

In applying those criteria to specific portions of the manual, which was compiled for law enforcement purposes, the Court found that:

> "Chapter V of the Special Prosecutor's Manual provides a graphic illustration of the confidential techniques used in a successful nursing home prosecution. None of those procedures are 'routine' in the sense of fingerprinting or ballistic tests (see Senate Report No. 93-1200, 93 Cong 2d Sess [1974]). Rather, they constitute detailed, specialized methods of conducting an investigation into the activities of a specialized industry in which voluntary compliance with the law has been less then exemplary.
>
> "Disclosure of the techniques enumerated in those pages would enable an operator to tailor his activities in such a way as to significantly diminish the likelihood of a successful prosecution. The information detailed on pages 481 and 482 of the manual, on the other hand, is merely a recitation of the obvious: that auditors should

> pay particular attention to requests by nursing homes for Medicaid reimbursement rate increases based upon projected increase in cost. As this is simply a routine technique that would be used in any audit, there is no reason why these pages should not be disclosed" (id. at 573).

As the Court of Appeals has suggested, to the extent that the records in question include descriptions of investigative techniques which if disclosed would enable potential lawbreakers to evade detection or endanger the lives or safety of law enforcement personnel or others [see also, Freedom of Information Law, §87(2)(f)], a denial of access would be appropriate. I would conjecture, however, that not all of the investigative techniques or procedures contained in the records sought incident and the ensuing investigation could be characterized as "non-routine", and that it is unlikely that disclosure of each aspect of the records would result in the harmful effects of disclosure described above.

The other provision 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, i.e., a training tape, would jeopardize the lives or safety of public employees or others, the cited provision might be applicable.

In an effort to enhance compliance with the Freedom of Information Law, a copy of this opinion will be forwarded to William Tesler, the Department's designated appeals officer.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: William Tesler

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 22, 2001

Mr. John J. Culkin
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Culkin:

I have received your letter in which you sought an advisory opinion concerning the propriety of a denial of your request for time cards pertaining to a particular employee of the State Insurance Fund.

In consideration of the judicial interpretation of the Freedom of Information Law, I believe that time cards and attendance records pertaining to public employees are accessible. In this regard, I offer the following comments.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Although two of the grounds for denial relate to attendance records involving the use of leave time, based upon the language of the Law and its judicial interpretation, I believe that such records are generally available.

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.

Time cards or attendance records could be characterized as "intra-agency materials." However, those portions reflective of dates or figures concerning the use of leave time or absences or the time that employees arrive at or leave work would constitute "statistical or factual" information accessible under §87(2)(g)(i).

Perhaps most relevant is §87(2)(b), which permits an agency to withhold record or portions of records when disclosure would result in "an unwarranted invasion of personal privacy." The Committee has advised and the courts have upheld the notion that records that are relevant to the performance of the official duties of public employees are generally available, for disclosure in such instances would result in a permissible as opposed to an unwarranted invasion of personal privacy [Gannett, supra; Capital Newspapers v. Burns, 109 AD 2d 292, aff'd 67 NY 2d 562 (1986) ; Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980; Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975) ; and Montes v. State, 406 NYS 664 (Court of Claims 1978)].

In a decision affirmed by the State's highest court dealing with attendance records, specifically those indicating the days and dates of sick leave claimed by a particular employee, it was found, in essence, that disclosure would result in a permissible rather than an unwarranted invasion of personal privacy. In that case, the Appellate Division found that:

> "One of the most basic obligation of any employee is to appear for work when scheduled to do so. Concurrent with this is the rights of an employee to properly use sick leave available to him or her. In the instant case, intervenor had an obligation to report for work when scheduled along with a right to use sick leave in accordance with his collective bargaining agreement. The taxpayers have an interest in such use of sick leave for economic as well as safety reasons. Thus it can hardly be said that disclosure of the dates in February 1983 when intervenor made use of sick leave would constitute an unwarranted invasion of privacy. Further, the motives of petitioners or the means by which they will report the information is not determinative since all records of government agencies are presumptively available for inspection without regard to the status, need, good faith or purpose of the applicant requesting access..." [Capital Newspapers v. Burns, 109 AD 2d 92, 94-95 (1985), aff'd 67 NY 2d 562 (1986)].

Insofar as attendance records or time sheets include reference to reasons for an absence, it has been advised that an explanation of why sick time might have been used, i.e., a description of

an illness or medical problem found in records, could be withheld or deleted from a record otherwise available, for disclosure of so personal a detail of a person's life would 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, or time cards, must be disclosed under the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Henry Neal Conolly
Jacob Weintraub

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 22, 2001

Hon. Richard E. Slagle
Mayor
Village of Celeron
21 Boulevard Avenue
Celeron, NY 14720

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mayor Slagle:

I have received your letter and the news article attached to it. The article includes reference to a discussion at a meeting of the Ellicott Town Board during which a member of the Board recommended that the Town's attorneys should not submit itemized bills. Specifically, the article indicates that:

> "...Taylor said itemized bills could hurt the town in future legal proceedings because the bills are available under the Freedom of Information Act. Itemized bills list each time an attorney works on the town's case. Rather than have town attorneys submit itemized bill, the board chose to have attorneys submit a general time statement and make the itemized bill available to the board if there are questions."

Having served as Mayor of the Village of Celeron for several years, you indicated that you "have never seen where any future legal proceedings could be harmed because someone found out that the village attorney had been working on a case or had interviewed witnesses about a case." You added that you find the kind of secrecy described in the article to be "disturbing", and you have sought my views on the matter.

In short, I agree that a record indicating the amount of time or the number of times that an attorney has expended effort in dealing with a particular case or issue would not ordinarily jeopardize the position of his or her client. Moreover, a review of the Freedom of Information Law enables one to conclude that an agency has the ability to redact portions of bills that might include, for example, descriptions of litigation strategy or privileged communications between an attorney and his or client, which could be harmful to the interests of the agency. The remainder, however, including the general description of services rendered, must be disclosed in most instances.

More specifically, 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 in a recent decision, Gould v. New York City Police Department [87 NY 2d 267 (1996)], stating that:

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see,* Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" (id., 275).

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the agency contended that complaint follow up reports, also known as "DD5's", could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g). The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276). The Court then stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, directing that:

> "...to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents (*Matter of Fink v. Lefkowitz, supra*, 47 N.Y.2d, at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material (*see, Matter of Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 133, 490 N.Y.S. 2d, 488, 480 N.E.2d 74;

Matter of Farbman & Sons v. New York City Health & Hosps. Corp., supra, 62 N.Y.2d, at 83, 476 N.Y.S.2d 69, 464 N.E.2d 437)" (id.).

The most expansive decision relating to the issue, Orange County Publications, Inc. v. County of Orange [637 NYS 2d 596 (1995)], involved a request for "the amount of money paid in 1994 to a particular law firm for legal services rendered in representing the County in a landfill expansion suit, as well as "copies of invoices, bills, vouchers submitted to the county from the law firm justifying and itemizing the expenses for 1994" (id., 599). Although monthly bills indicating amounts charged by the firm were disclosed, the agency redacted "'the daily descriptions of the specific tasks' (the description material) 'including descriptions of issues researched, meetings and conversations between attorney and client'" (id.). The County offered several rationales for the redactions; nevertheless, the court rejected all of them, in some instances fully, in others in part.

The first contention was that the descriptive material is specifically exempted from disclosure by statute in conjunction with §87(2)(a) of the Freedom of Information Law and the assertion of the attorney-client privilege pursuant to §4503 of the Civil Practice Law and Rules (CPLR). The court found that the mere communication between the law firm and the County as its client does not necessarily involve a privileged communication; rather, the court stressed that it is the content of the communications that determine the extent to which the privilege applies. Further, the court distinguished between actual communications between attorney and client and descriptions of the legal services provided, stating that:

> "Thus, respondent's position can be sustained only if such descriptions rise to the level of protected communications.
>
> "In this regard, the Court recognizes that not all communications between attorney and client are privileged. Matter of Priest v. Hennessy, supra, 51 N.Y.2d 68, 69, 409 N.E.2d 983, 431, N.Y.S.2d 511. In particular, 'fee arrangements between attorney and client do not ordinarily constitute a confidential communication and, thus, are not privileged in the usual case' (Ibid.). Indeed, '[a] communication concerning the fee to be paid has no direct relevance to the legal advice to be given', but rather "[i]s a collateral matter which, unlike communications which relate to the subject matter of the attorney's professional employment, is not privileged' Matter of Priest v. Hennessy, supra, 51 N.Y.2d at 69, 409 N.E.2d 983, 431 N.Y.S.2d 511.
>
> "Consequently, while billing statements which 'are detailed in showing services, conversations, and conferences between counsel and others' are protected by the attorney-client privilege (Licensing Corporation of America v. National Hockey League Players Association, 153 Misc.2d 126, 127-128, 580 N.Y.S.2d 128 [Sup. Ct. N.Y.Co. 1992]; see, De La Roche v. De La Roche, 209 A.D.2d 157, 158-159 [1st Dept. 1994]), no such privilege attaches to fee

> statements which do not provide 'detailed accounts' of the legal services provided by counsel..." (id., 602).

It was also contended that the records could be withheld on the ground that they constituted attorney work product or material prepared for litigation that are exempted from disclosure by statute [see CPLR, §3101(c) and (d)]. In dealing with that claim, it was stated by the court that:

> "Respondent's denial of the FOIL request cannot be upheld unless the descriptive material is uniquely the product of the professional skills of respondent's outside counsel. The preparation and submission of a bill for fees due and owing, not at all dependent on legal expertise, education or training, cannot be 'attribute[d]...to the unique skills of an attorney' (Brandman v. Cross & Brown Co., 125 Misc.2d 185, 188 479 N.Y.S.2d 435 [Sup. Ct. Kings Ct. 1984]). Therefore, the attorney work product privilege does not serve as an absolute bar to disclosure of the descriptive material. (See, id.).
>
> "Nevertheless, depending upon how much information is set forth in the descriptive material, a limited portion of that information may be protected from disclosure, either under the work product privilege, or the privilege for materials prepared for litigation, as codified in CPLR 3101(d)...
>
> "While the Court has not been presented with any of the billing records sought, the Court understands that they may contain specific references to: legal issues researched, which bears upon the law firm's theories of the landfill action; conferences with witnesses not yet identified and interviewed by respondent's adversary in that lawsuit; and other legal services which were provided as part of counsel's representation of respondent in that ongoing legal action...Certainly, any such references to interviews, conversations or correspondence with particular individuals, prospective pleadings or motions, legal theories, or similar matters, may be protected either as work product or material prepared for litigation, or both" (emphasis added by the court) (id., 604).

Finally, it was contended that the records consisted of intra-agency materials that could be withheld under §87(2)(g) of the Freedom of Information Law. That provision permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;

> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

The court found that much of the information would likely consist of factual information available under §87(2)(g)(i) and stated that:

> "...the Court concludes that respondent has failed to establish that petitioner should be denied access to the descriptive material as a whole. While it is possible that some of the descriptive material may fall within the exempted category of expressions of opinion, respondent has failed to identify with any particularity those portions which are not subject to disclosure under Public Officers Law §87(2)(g). See, Matter of Dunlea v. Goldmark, supra, 54 A.D.2d 449, 389 N.Y.S.2d 423. Certainly, any information which merely reports an event or factual occurrence, such as a conference, telephone call, research, court appearance, or similar description of legal work, and which does not disclose opinions, recommendations or statements of legal strategy will not be barred from disclosure under this exemption. See, Ingram v. Axelrod, supra" (id., 605-606).

In short, although it was found that some aspects of the records in question might properly be withheld based on their specific contents, a blanket denial of access was clearly inconsistent with law, and substantial portions of the records were found to be accessible.

Lastly, if a town attorney maintains possession of itemized bills, those bills might be subject to the Freedom of Information Law, even if the records are not in the physical custody of the town. 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..

It has been found that records maintained by an attorney retained by an industrial development agency were subject to the Freedom of Information Law, even though an agency did not possess the records and the attorney's fees were paid by applicants before the agency. The Court determined that the fees were generated in his capacity as counsel to the agency, that the agency was his client, that "he comes under the authority of the Industrial Development Agency" and that, therefore, records of payment in his possession were subject to rights of access conferred by the Freedom of Information Law (see C.B. Smith v. County of Rensselaer, Supreme Court, Rensselaer County, May 13, 1993).

Additionally, in a decision rendered by the Court of Appeals, the state's highest court, it was found that materials received by a corporation providing services for a branch of the State University that were kept on behalf of the University constituted "records" falling with the coverage of the Freedom of Information Law. I point out that the Court rejected "SUNY's contention that disclosure turns on whether the requested information is in the physical possession of the agency", for such a view "ignores the plain language of the FOIL definition of 'records' as information kept or held 'by, with or for an agency'" [see Encore College Bookstores, Inc. v. Auxiliary Services Corporation of the State University of New York at Farmingdale, 87 NY 2d 410. 417 (1995)].

In short, insofar as the records are maintained for the Town, I believe that the Town would be required to direct the custodian of the records to disclose them in accordance with the Freedom of Information Law, or obtain them in order to disclose them to you to the extent required by law.

In an effort to enhance their understanding of the Freedom of Information Law, a copy of this opinion will be forwarded to the Town Board of the Town of Ellicott.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 3325
FOIL-AO- 12751

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June 22, 2001

Ms. Belle Brown
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Brown:

I have received your letter and a variety of related materials. The primary issue, as it relates to the duties of this office, involves the status of the Camillus Fire Department under the Freedom of Information and Open Meetings Laws.

In this regard, the Open Meetings Law is applicable to meetings of public bodies. Section 102(2) of the Law defines "public body" to mean:

> "...any entity for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

By reviewing the components in the definition of "public body", I believe that each is present with respect to the board of a volunteer fire company. The board of a volunteer fire company is clearly an entity consisting of two or more members. I believe that it is required to conduct its business by means of a quorum under the Not-for-Profit Corporation Law. Further, in my view, a volunteer fire company at its meetings conducts public business and performs a governmental function. Such a function is carried out for a public corporation, which is defined to include a municipality, such as a town or village, for example. Since each of the elements in the definition of "public body" pertains to the board of a volunteer fire company, it appears that the board of such a company is a "public body" subject to the Open Meetings Law. I point out that the status of volunteer fire companies had long been unclear. Those companies are generally not-for-profit corporations that perform their duties by means of contractual relationships with municipalities. As not-for-profit corporations, it was difficult to determine whether or not they conducted public business and performed a governmental function. Nevertheless, in a case brought under the Freedom of Information Law dealing with the coverage of that statute with respect to volunteer fire companies, the state's highest court, the Court of Appeals, found that a volunteer fire company is

an "agency" that falls within the provisions if the Freedom of Information Law [see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575 (1980)]. In its decision, the Court clearly indicated that a volunteer fire company performs a governmental function and that its records are subject to rights of access granted by the Freedom of Information Law.

In view of the decision rendered in Westchester Rockland, I believe that the board of a volunteer fire company falls within the definition of "public body" and would be required to comply with the Open Meetings Law.

In brief, the Open Meetings Law requires that meetings of public bodies be conducted in public, except to the extent that there may a basis for entry into a closed or "executive" session. Since one of the issues to which you referred involved the suspension of members of the Department, I note that one of the grounds for entry into an executive session would have permitted the Board to discuss that kind of issue in private. Section 105(1)(f) of the Open Meetings Law permits a public body to enter into executive session to discuss:

> "the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation;"

You also referred to the ability of persons in attendance to speak at meetings. 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 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, the courts have found in a variety of contexts that such rules must be reasonable. For example, although a board of education may "adopt by laws and rules for its government and operations", in a case in which a board's rule prohibited the use of tape recorders at its meetings, the Appellate Division found that the rule was unreasonable, stating that the authority to adopt rules "is not unbridled" and that "unreasonable rules will not be sanctioned" [see Mitchell v. Garden City Union Free School District, 113 AD 2d 924, 925 (1985)]. Similarly, if by rule, a public body chose to permit certain citizens to address it for ten minutes while permitting others to address it for three, or not at all, such a rule, in my view, would be unreasonable.

With respect to the scope of the Freedom of Information Law, as indicated above, that statute applies to agency records, and §86(3) defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or

> proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

As such, the Freedom of Information Law generally pertains to records maintained by entities of state and local government.

In Westchester-Rockland, the case involved access to records relating to a lottery conducted by a volunteer fire company, and it was determined that volunteer fire companies, despite their status as not-for-profit corporations, are "agencies" subject to the Freedom of Information Law. In so holding, the Court stated that:

> "We begin by rejecting respondent's contention that, in applying the Freedom of Information Law, a distinction is to be made between a volunteer organization on which a local government relies for performance of an essential public service, as is true of the fire department here, and on the other hand, an organic arm of government, when that is the channel through which such services are delivered. Key is the Legislature's own unmistakably broad declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (emphasis added; Public Officers Law, §84).
>
> "True, the Legislature, in separately delineating the powers and duties of volunteer fire departments, for example, has nowhere included an obligation comparable to that spelled out in the Freedom of Information statute (see Village Law, art 10; see, also, 39 NY Jur, Municipal Corporations, §§560-588). But, absent a provision exempting volunteer fire departments from the reach of article 6-and there is none-we attach no significance to the fact that these or other particular agencies, regular or volunteer, are not expressly included. For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objections cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" (id. at 579].

Moreover, although it was contended that documents concerning the lottery were not subject to the Freedom of Information Law because they did not pertain to the performance of the company's fire

fighting duties, the Court held that the documents constituted "records" subject to the Freedom of Information Law [see §86(4)].

More recently, another decision confirmed in an expansive manner that volunteer fire companies are required to comply with the Freedom of Information Law. That decision, S.W. Pitts Hose Company et al. v. Capital Newspapers (Supreme Court, Albany County, January 25, 1988), dealt with the issue in terms of government control over volunteer fire companies. In its analysis, the Court states that:

> "Section 1402 of the Not-for-Profit Corporation Law is directly applicable to the plaintiffs and pertains to how volunteer fire companies are organized. Section 1402(e) provides:
>
> > '...a fire corporation, hereafter incorporated under this section shall be under the control of the city, village, fire district or town authorities having by law, control over the prevention or extinguishment of fires therein. Such authorities may adopt rules and regulations for the government and control of such corporations.'
>
> "These fire companies are formed by consent of the Colonie Town Board. The Town has control over the membership of the companies, as well as many other aspects of their structure, organization and operation (section 1402). The plaintiffs' contention that their relationship with the Town of Colonie is solely contractual is a mischaracterization. The municipality clearly has, by law, control over these volunteer organizations which reprovide a public function.
>
> "It should be further noted that the Legislature, in enacting FOIL, intended that it apply in the broadest possible terms. '...[I]t is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (Public Officers Law, section 84).
>
> "This court recognizes the long, distinguished history of volunteer fire companies in New York State, and the vital services they provide to many municipalities. But not to be ignored is that their existence is inextricably linked to, dependent on, and under the control of the municipalities for which they provide an essential public service."

Based upon the foregoing, it is clear that volunteer fire companies are subject to the Freedom of Information Law.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Enclosed for your review are copies of the Freedom of Information and Open Meetings Laws, as well as "Your Right to Know", which describes both laws.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt
Encs.

cc: President, Camillus Fire Department

FOIL-AO-12752

From: Robert Freeman
To: Internet:[redacted]
Date: 6/25/01 10:19AM
Subject: Dear Mr. Barr:

Dear Mr. Barr:

I have received your letter in which you complained that the Cayuga County Clerk's Office is not permitting you to review marriage records for the period of 1908 to 1935, and that you would be charged $11 per document.

To the best of my knowledge, outside of New York City, county clerks do not perform duties in relation to the issuance or maintenance of marriage licenses. Under the Domestic Relations Law, section 19, town and city clerks issue and have custody of marriage licenses. I note that the cited provision states in part that: "Whenever an application is made for a search of such records the city or town clerk, excepting the city clerk of the city of new york, may make such search and furnish a certificate of the result to the applicant upon the payment of a fee of five dollars for a search of one year and a further fee of one dollar for the second year for which such search is requested and fifty cents for each additional year thereafter, which fees shall be paid in advance of such search."

The other repository of marriage records is the State Department of Health.

It is suggested that you might contact the Office of the County Clerk and inquire as to the statutory basis for the fee, as well as the means by which that office acquired custody of the records in question.

For a review of the law regarding access to marriage records, you might want to review an opinion available on our website, which has received the concurrence of the State Department of Health. In the index to opinions rendered under the Freedom of Information Law, you can go to "marriage records", and the opinion is number 10608-A.

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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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12753

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June 25, 2001

Mr. John Claasen
Millbrook Lawns Civic Association
Melville Boulevard
14 Charmain Street
Huntington Station, NY 11746

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Claasen:

I have received your note in which you sought assistance relating to a request made under the Freedom of Information Law. According to your correspondence, last year, you requested the "names and present address of all current accessory apartment permits granted" in the Town of Huntington. The request was honored, and you were charged $14.25 for a computer printout containing the information sought. This year, however, you were informed that the fee the equivalent data would be $454.50, based on a charge of twenty-five cents per copy.

In this regard, the governing provision is §87(1)(b)(iii) of the Freedom of Information Law, which states that an agency's fees for copies:

> "...shall not exceed twenty-five cents per photocopy not in excess of nine inches by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by statute."

Based on the foregoing, when an agency prepares photocopies of records not larger than nine by fourteen inches, it may generally charge up to twenty-five cents per photocopy. If, however, a record is generated by a computer, as in the case of a printout, no photocopy is being made, and in that instance, I believe that the fee would be based on the actual cost of reproduction. In the case of a computer printout, I believe that "actual cost" would involve the agency's cost of running the computer (i.e., computer time) and the cost of the paper on which the data is printed.

I note, too, that the courts have indicated that if an agency has the ability to make the data available in the storage medium of your choice (i.e., a paper computer printout, a computer tape or disk), it is required to do so, so long as the applicant is willing to pay the actual cost of reproduction [see Brownstone Publishers, Inc. v. New York City Department of Buildings, 550 NYS2d 564, aff'd 166 AD2d 294 (1990)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Deborah Sanacore

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 25, 2001

Mr. Christopher Konzel
United Abstract & Research, Inc.
248 Moxon Drive
Rochester, NY 14612

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Konzel:

I have received your letter and the correspondence attached to it. You complained that "[t]he County of Oneida and City of Utica Governments refuse to allow the general public to view Tax Rolls for real property situated in their districts." You also indicated that Seneca County officials "refuse to have anyone review recorded public records during the process of entering the data into the computer system", and that the "date entered into their computer is the day the instrument was recorded, not the day it was entered for public viewing." Consequently, "[t]his leaves a gap for any instrument recorded or filed", and "[c]ertain projects do reflect missed documents and one may become a claim from a $76,000 judgment left out of a report."

In this regard, I offer the following comments.

First, it is noted at the outset 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 by an agency, it would in my opinion constitute a "record" subject to rights of access conferred by the Law.

Therefore, in the context of the situation that you described in Seneca County, as soon as documentation is produced by or comes into the possession of the County, I believe that it constitutes a "record" that falls within the scope of the Freedom of Information Law.

Second, when records are available under the Freedom of Information Law, they are available for inspection and copying. Consequently, if the records sought that are maintained by Oneida County and City of Utica can physically be inspected, I believe that the public has the right to do so. Further, the only fee that may be charged under the Freedom of Information Law involves the reproduction of records [see §87(1)(b)(iii)]; no fee may be assessed for a search of records or personnel time, for example (see regulations promulgated by the Committee on Open Government, 21 NYCRR Part 1401).

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..."

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 use of the records by the agency, the possibility that other requests have been made, the necessity to conduct legal research, the search and retrieval techniques used to locate the records and the like. In short, when an agency acknowledges the receipt of a request because more than five business days may be needed to grant or deny a request, so long as it provides an approximate date indicating when the request will be granted or denied, and that date is reasonable in view of the attendant circumstances, I believe that the agency would be acting in compliance with law. Notwithstanding the foregoing, in my view, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, if records are clearly available to the public under the Freedom of Information Law, and if they are readily retrievable, there may be no basis for a lengthy delay in disclosure.

When records are being used by agency staff, I believe that an agency may delay disclosure. However, when they are no longer in use, there would be no valid reason for continuing such delay.

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have

been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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, 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.

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). Further, as you may be aware, assessment rolls and related documents have been found judicially to be available to the public, whether they are maintained in paper or computer tape format, and irrespective of the purpose for which a request is made. One of the grounds for denial in the Freedom of Information Law, §87(2)(b), permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". Section 89(2)(b) describes a series of unwarranted invasions of personal privacy, including subparagraph (iii), which pertains to:

> "sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes. .. "

Therefore, if a list of names and addresses is requested for commercial or fund-raising purposes, an agency may, under most circumstances, withhold such a list. Nevertheless, in a decision rendered more than ten years ago, the issue was whether county assessment rolls were accessible under the Freedom of Information Law in computer tape format. In holding that they are, the court found that assessment rolls or equivalent records are public records and were public before the enactment of the Freedom of Information Law. Specifically, in Szikszay v. Buelow [436 NYS 2d 558 (1981)], it was found that:

> "An assessment roll is a public record (Real Property Tax Law [section] 516 subd. 2; General Municipal Law [section] 51; County Law [section] 208 subd. 4). It must contain the name and mailing or

> billing address of the owner of the parcel (Real Property Tax Law [sections] 502, 504, 9 NYCRR [section] 190-1(6)(1)). Such records are open to public inspection and copying except as otherwise provided by law (General Municipal Law [section] 51; County Law [section] 208 subd. 4). Even prior to the enactment of the Freedom of Information Law, and under its predecessor, Public Officers Law [section] 66, repealed L.1974, c. 578, assessment rolls and related records were treated as public records, open to public inspection and copying (Sanchez v. Papontas, 32 A.D.2d 948, 303 N.Y.S.2d 711, Sears Roebuck & Co. v. Hoyt, 202 Misc. 43, 107 N.Y.S.2d 756; Ops. State Comptroller 1967, p. 596)" (id. at 562, 563).

In discussing the issue of privacy and citing the provision dealing with lists of names and addresses, it was held that:

> "The Freedom of Information Law limits access to records where disclosure would constitute 'an unwarranted invasion of personal privacy' (Public Officers Law [section] 87 subd. 2(b), [section] 89 subd. 2(b)iii). In view of the history of public access to assessment records, and the continued availability of such records to public inspection, whatever invasion of privacy may result by providing copies of A.R.L.M. computer tapes to petitioner would appear to be permissible rather than 'unwarranted' (cf. Advisory Opns. of Committee on Public Access to Records, June 12, 1979, FOIL-AO-1164). In addition, considering the legislative purpose behind the Freedom of Information Law, it would be anomalous to permit the statute to be used as a shield by government to prevent disclosure. In this regard, Public Officers Law [section] 89 subd. 5 specifically provides: 'Nothing in this article shall be construed to limit or abridge any otherwise available right of access at law or in equity of any party to records.'" [id. at 563; now section 89(6)].

The court stated further that:

> "...the records in question can be viewed by any person and presumably copies of portions obtained, simply by walking into the appropriate county, city, or town office. It appears that petitioner could obtain the information he seeks if he wanted to spend the time to go through the records manually and copy the necessary information. Therefore, the balancing of interests, otherwise required, between the right of individual privacy on the one hand and the public interest in dissemination of information on the other...need not be undertaken...
>
> "Assessment records are public information pursuant to other provisions of law and have been for sometime. The form of the

> records and petitioner' s purpose in seeking them do not alter their public character or petitioner's concomitant right to inspect and copy" (id.).

Based upon the foregoing, I believe that an assessment roll or its equivalent must be disclosed. I point out that the same conclusion was reached by Supreme Court in Nassau County in an unreported decision [Real Estate Data, Inc. v. County of Nassau, Supreme Court, Nassau County, September 18, 1981].

With respect to EA-5217 forms that indicate the transfer price of real property, under §574(5) of the Real Property Tax Law, the transfer price had been confidential unless it had been requested in conjunction with the administrative or judicial review of an assessment. However, those forms, due to an amendment, have been available since July 1, 1994.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. James S. Alesi, Member of the Senate
Oneida County Attorney
Seneca County Attorney
Corporation Counsel, City of Utica

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 12755

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June 25, 2001

Mr. J. Gerard McAuliffe, Jr.
Law Offices of Schur & McAuliffe
2431 State Highway Box xxx
Mayfield, NY 12117

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. McAuliffe:

I have received your letter in which you sought an opinion concerning a request made under the Freedom of Information Law to the Alcoholism and Substance Abuse Council of Hamilton, Fulton and Montgomery Counties. The request involves the salary, job description, qualifications, fringe benefits, resume and similar information concerning an employee of the Council.

The primary issue, in my view, involves the nature of the entity in question. As you may be aware, 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, in general, an "agency" is an entity of state or local government.

Having spoken with Ms. Eileen Brink, Executive Director of the Council, it is my understanding that the Council is heavily dependent on government for its funding, but that it is not a governmental entity. I was informed that the Council is a not-for-profit corporation with a board of directors that is neither designated by nor under the control of government. If that is so, I do not believe that the Council would constitute an "agency" or, therefore, that it is required to disclose its records in accordance with that statute.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Eileen Brink

FOIL-AO-12756

From: Robert Freeman
To: Internet[redacted]
Date: 6/25/01 5:17PM
Subject: Dear Mr. Dillman:

Dear Mr. Dillman:

I have received your note in which you asked whether, if a person "volunteers to provide inclome tax returns to variance board and [you are] the only person contesting the variance", you have the right to review the returns.

In this regard, although the Freedom of Information Law provides broad rights of access to government records, one of the grounds for denial of access involves the ability to withhold records when disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, section 87(2)(b)]. From my perspective, it is clear that a government agency may withhold one's tax returns, regardless of whether those records were furnished voluntarily or otherwise, based on a finding that disclosure would result in an unwarranted invasion of personal privacy.

I hope that the foregoing serves to clarify your understanding of the Freedom of Information Law and that I have been of assistance.

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-12757

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June 25, 2001

E-Mail

TO: Henry Gallinari [redacted]

FROM: Robert J. Freeman, Executive Director RJF

Dear Mr. Gallinari:

Your letter addressed to Governor Pataki has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State, is authorized to provide advice and opinions concerning the state's Freedom of Information Law.

In response to your questions, I offer the following comments.

First, as a general matter, the Freedom of Information Law does not distinguish among those who seek records from units of state and local government. It has been held that records accessible under that statute must be made equally available "to any person" regardless of status or interest [see Burke v. Yudelson, 368 NYS2d 799, aff'd 51 AD2d 673, 378 NYS2d 165 (1976); see also M. Farbman & Sons v. New York City Health and Hosps. Corp., 62 NY2d 75 (1984)]. There are many instances in which requests are made by entities, and in most, the identity of the applicant is irrelevant. I note, however, that an agency may require that a request be made in writing. Further, if records are mailed to an applicant, or if the applicant appeals following a denial of access to records, a name and address must be given to the agency.

Second, you asked whether a local agency, such as a town, is "required to give original records to the requesting party." Assuming that a record is available in its entirety, a member of the public may inspect the record. If that person would like to have a photocopy, an agency would be required to prepare a copy upon payment of the appropriate fee. Under §87(1)(b)(iii) of the Freedom of Information Law, an agency may charge up to twenty-five cents per photocopy; no charge may be assessed for the inspection of a record. Pursuant to §89(3), a person who receives a copy of a record may ask for a certification in writing indicating that it is a true copy.

Lastly, §89(1) of the Freedom of Information Law requires the Committee on Open Government to promulgate general rules and regulations concerning the procedural implementation of the Freedom of Information Law. The Committee has done so, and its regulations (21 NYCRR Part 1401) are accessible in full text on the Committee's website under "Publications." The governing body of each municipality is required, in turn, by §87(1) to adopt procedural rules consistent with those promulgated by the Committee and with the Freedom of Information Law.

One element of the regulations promulgated by the Committee involves the requirement that the governing body, i.e., a town board, is required to designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests for records, and requests typically should be made to that person by members of the public or forwarded to that person by other town officials who may receive requests if those officials cannot respond directly. The duties of the records access officer are described in the Committee's regulations.

I hope that I have been of assistance. Should any further questions arise, please feel free to contact me.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 26, 2001

Mr. Charles L. Hunt
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Hunt:

I have received your letters and a variety of materials relating to them. You have raised a series of issues concerning the implementation of open government laws by the Town of Elma. Based on a review of the correspondence and your questions, I offer the following comments.

It is emphasized at the outset that there is no legal distinction between a "work session" or "working meeting" and a formal meeting. By way of background, the definition of "meeting" [see Open Meetings Law, §102(1)] has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

I point out that the decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that so-called "work sessions" and similar gatherings held for the purpose of discussion, but without an intent to take action, fell outside the scope of the Open Meetings Law. In discussing the issue, the Appellate Division, whose determination was unanimously affirmed by the Court of Appeals, stated that:

> "We believe that the Legislature intended to include more than the mere formal act of voting or the formal execution of an official document. Every step of the decision-making process, including the decision itself, is a necessary preliminary to formal action. Formal acts have always been matters of public record and the public has always been made aware of how its officials have voted on an issue. There would be no need for this law if this was all the Legislature intended. Obviously, every thought, as well as every affirmative act

> of a public official as it relates to and is within the scope of one's official duties is a matter of public concern. It is the entire decision-making process that the Legislature intended to affect by the enactment of this statute" (60 AD 2d 409, 415).

The court also dealt with the characterization of meetings as "informal," stating that:

> "The word 'formal' is defined merely as 'following or according with established form, custom, or rule' (Webster's Third New Int. Dictionary). We believe that it was inserted to safeguard the rights of members of a public body to engage in ordinary social transactions, but not to permit the use of this safeguard as a vehicle by which it precludes the application of the law to gatherings which have as their true purpose the discussion of the business of a public body" (id.).

Based upon the direction given by the courts, if a majority of a public body gathers to discuss public business, any such gathering, in my opinion, would ordinarily constitute a "meeting" subject to the Open Meetings Law. Since a "working meeting" held by a majority of a town board is a "meeting", the board would have the same responsibilities in relation to notice and the taking of minutes as in the case of a formal meeting, as well as the same ability to enter into executive sessions.

With respect to minutes of "working meetings", as well as other meetings, the Open Meetings Law contains what might be viewed as minimum requirements concerning the contents of minutes. Specifically, §106 of the Open Meetings Law states that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.
>
> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

Based upon the foregoing, it is clear in my view that minutes need not consist of a verbatim account of what was said at a meeting; similarly, there is no requirement that minutes refer to every topic discussed or identify those who may have spoken. Although a public body may choose to prepare expansive minutes, at a minimum, minutes of open meetings must include reference to all motions, proposals, resolutions and any other matters upon which votes are taken. If those kinds of actions, such as motions or votes, do not occur during working meetings, technically I do not believe that minutes must be prepared.

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 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.

You questioned the propriety of meetings of the Town Board being held at 8 a.m. In this regard, although the Open Meetings Law does not specify when meetings must be held, §103(a) of the Law states in part that "Every meeting of a public body shall be open to the general public..." Further, the intent of the Open Meetings Law is clearly stated in §100 as follows:

> "It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of an able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it."

As such, the Open Meetings Law confers a right upon the public to attend and listen to the deliberations of public bodies and to observe the performance of public officials who serve on such bodies.

In my opinion, every provision of law, including the Open Meetings Law, should be implemented in a manner that gives reasonable effect to its intent. That principle would be applicable with respect to the time of meetings and whether, in view of the intent of the Open Meetings, it is reasonable to schedule meetings at 8 a.m. In a decision that dealt in part with meetings of a board of education held at 7:30 a.m., it was stated that:

> "It is...apparent to this Court that the scheduling of a board meeting at 7:30 a.m. -- even assuming arguendo that such meetings were properly noticed and promptly conducted -- does not facilitate attendance by members of the public, whether employed within or without the home, particularly those with school age or younger children, and all but insures that teachers and teacher associates at the school are unable to both attend and still comply with the requirement that they be in their classrooms by 8:40 a.m." (Matter of Goetchius v. Board of Education, Supreme Court, Westchester County, New York Law Journal, August 8, 1996).

While the Court focused on the matter as it related to a Board of Education, I believe that similar factors would be present with respect to the ability of Town residents to attend meetings at 8 a.m. Many may be unable to attend because they too have small children, because of work schedules, commuting, and other matters that might effectively preclude them from attending meetings held so early in the morning. In short, in view of the decision cited above, the reasonableness of conducting meetings at 7 a.m. is in my view questionable.

Next, you referred to executive sessions held by the Board and the ambiguity of motions made to enter into executive sessions. 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 be expressing the fear that litigation may result from actions taken therein. Such a view would be contrary to both the letter and the spirit of the exception" [Weatherwax v. Town of Stony Point, 97 AD 2d 840, 841 (1983)].

Based upon the foregoing, I believe that the exception is intended to permit a public body to discuss its litigation strategy behind closed doors, rather than issues that might eventually result in litigation.

With regard to the sufficiency of a motion to discuss litigation, it has been held that:

> "It is insufficient to merely regurgitate the statutory language; to wit, 'discussions regarding proposed, pending or current litigation'. This boilerplate recitation does not comply with the intent of the statute. To validly convene an executive session for discussion of proposed, pending or current litigation, the public body must identify with particularity *the* pending, proposed or current litigation to be discussed during the executive session" [Daily Gazette Co., Inc. v. Town Board, Town of Cobleskill, 44 NYS 2d 44, 46 (1981), emphasis added by court].

As such, a proper motion might be: "I move to enter into executive session to discuss our litigation strategy in the case of the XYZ Company v. the Town of Elma."

The language of the so-called "personnel" exception, §105(1)(f) of the Open Meetings Law, is limited and precise, and I emphasize that the term "personnel" appears nowhere in that Law. 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 courts have 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.

Lastly, you questioned the legality of a response to a request for records, which were redacted prior to disclosure. Having reviewed your request and in consideration of the redaction, it appears that the Town provided the information that you requested. Although the pages containing the information were incomplete, the portions of those pages that were disclosed appear to reflect the information that you sought.

As a general matter, however, I would agree with your contention that "[a]ccess to financial records is...a public matter..." In brief, in a manner similar to 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.

In addition to rights conferred by the Freedom of Information Law, I point out that §29 of the Town Law specifies that the Town Supervisor must keep and disclose certain financial records. Subdivision (4) of §29 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 an effort to enhance understanding of and compliance with open government laws, a copy of this opinion will be forwarded to the Town Board.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12759

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June 26, 2001

Mr. William S. Brakefield
87-B-0175
Wende Correctional Facility
3622 Wende Road, P.O. Box 1187
Alden, NY 14004-1187

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Brakefield:

I have received your letter in which you requested an opinion concerning the disposal of records.

You wrote that the office of the Public Defender of Niagara County destroyed a file which you subsequently sought to obtain. In this regard, the Freedom of Information Law governs public rights of access to records. More relevant in my view is the "Local Government Records Law", Article 57-A of the Arts and Cultural Affairs Law, which deals with the management, custody, retention and disposal of records by local governments. For purposes of those provisions, §57.17(4) of the Arts and Cultural Affairs Law defines "record" to mean:

> "...any book, paper, map, photograph, or other information-recording device, regardless of physical form or characteristic, that is made, produced, executed, or received by any local government or officer thereof pursuant to law or in connection with the transaction of public business. Record as used herein shall not be deemed to include library materials, extra copies of documents created only for convenience of reference, and stocks of publications."

With respect to the retention and disposal of records, §57.25 of the Arts and Cultural Affairs Law states in relevant part that:

> "1. It shall be the responsibility of every local officer to maintain records to adequately document the transaction of public business and the services and programs for which such officer is responsible; to retain and have custody of such records for so long as the records are needed for the conduct of the business of the office; to adequately protect such records; to cooperate with the local government's records

> management officer on programs for the orderly and efficient management of records including identification and management of inactive records and identification and preservation of records of enduring value; to dispose of records in accordance with legal requirements; and to pass on to his successor records needed for the continuing conduct of business of the office...
>
> 2. No local officer shall destroy, sell or otherwise dispose of any public record without the consent of the commissioner of education. The commissioner of education shall, after consultation with other state agencies and with local government officers, determine the minimum length of time that records need to be retained. Such commissioner is authorized to develop, adopt by regulation, issue and distribute to local governments retention and disposal schedules establishing minimum retention periods..."

Based on the foregoing, records cannot be destroyed without the consent of the Commissioner of Education, and local officials cannot destroy or dispose of records until the minimum period for the retention of the records has been reached.

I point out that the Freedom of Information Law pertains to existing records. Section 89(3) of that statute provides in part that an agency is not required to prepare a record that is not maintained by the agency in response to a request. In short, if the record in question does not exist, the Freedom of Information Law would not apply.

I hope that the foregoing serves to enhance your understanding of the matter and that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12760

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

June 25, 2001

Mr. Eugene Youngblood
93-A-4690
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. Youngblood:

I have received your letters in which you explained your difficulties in obtaining a variety of records from the New York City Police Department.

In this regard, I offer the following comments.

First, you have requested records from police officers' memo books and investigative reports. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. While some aspects of the records sought might properly be withheld, relevant is a decision by the Court of Appeals concerning DD5's and police officers' memo books in which it was held that a denial of access based on their characterization as intra-agency materials would be inappropriate.

The provision at issue, §87(2)(g) of the Freedom of Information Law, enables an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

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" is also of potential significance. That provision might be applicable relative to the deletion of identifying details in a variety of situations, i.e., where a record identifies a confidential source or a witness, for example.

Often the most relevant provision concerning access to records maintained by law enforcement agencies is §87(2)(e), which permits an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in sub-paragraphs (i) through (iv) of §87(2)(e).

Another possible ground for denial is §87(2)(f), which permits withholding to the extent that disclosure "would endanger the life or safety of any person". The capacity to withhold on that basis is dependent upon the facts and circumstances concerning an event.

Additionally, in a decision concerning a request for records maintained by the office of a district attorney that would ordinarily be exempted from disclosure under the Freedom of Information Law, it was held that "once the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public" [see Moore v. Santucci, 151 AD 2d 677, 679 (1989)]. Based upon that decision, it appears that records introduced into evidence or disclosed during a public judicial proceeding should be available.

However, in the same decision, it was also found that:

> "...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

Second, you have requested copies of radio communications of certain police officers. It is emphasized that the Freedom of Information Law is applicable to all records of an agency 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 upon the foregoing, tape recordings maintained by a police department would clearly constitute "records" subject to rights conferred by the Freedom of Information Law. If a tape consists of factual information, for instance, or perhaps instructions to staff that affect the public, it would be available, unless a different ground for denial could properly be asserted.

Furthermore, it was held by the Appellate Division, Fourth Department, that "tape recordings of certain communications broadcast over public radio" must be disclosed [Buffalo Broadcasting Co., Inc. v. City of Buffalo, 126 AD 2d 983 (1987)]. In my opinion, insofar as the recordings in question were broadcast and could have been heard by anyone with a scanner or public band radio, there would be no basis for denial, for the information contained on the tapes would have been effectively disclosed when it was transmitted.

Third, you have requested copies of 911 cassette recordings. Access to those tapes would be determined by means of the kinds of considerations described in relation to police officers' memo books and DD5's.

Fourth, you requested detailed background information on records that were withheld by the New York City Police Department. In short, the Freedom of Information Law does not require that an agency provide such degree of detail in response to a request or an administrative appeal. Further, I am unaware of any provision of the Freedom of Information Law or judicial decision that would

require that a denial at the agency level identify every record withheld or include a description of the reason for withholding each document. Such a requirement has been imposed under the federal Freedom of Information Act, which may involve the preparation of a so-called "Vaughn index" [see Vaughn v. Rosen, 484 F.2D 820 (1973)]. Such an index provides an analysis of documents withheld by an agency as a means of justifying a denial and insuring that the burden of proof remains on the agency. Again, I am unaware of any decision involving the New York Freedom of Information Law that requires the preparation of a similar index. Further, one decision suggests the preparation of that kind of analysis might in some instances subvert the purpose for which exemptions are claimed. In that decision, an inmate requested records referring to him as a member of organized crime or an escape risk. In affirming a denial by a lower court, the Appellate Division found that:

> "All of these documents were inter-agency or intra-agency materials exempted under Public Officers Law section 87(2)(g) and some were materials the disclosure of which could endanger the lives or safety of certain individuals, and thus were exempted under Public Officers Law section 87(2)(f). The failure of the respondents and the Supreme Court, Westchester County, to disclose the underlying facts contained in these documents so as to establish that they did not fall 'squarely within the ambit of [the] statutory exemptions' (Matter of Farbman & Sons v. New York City Health and Hosps. Corp., 62 NY 2d 75, 83; Matter of Fink v. Lefkowitz, 47 NY 2d 567, 571), did not constitute error. To make such disclosure would effectively subvert the purpose of these statutory exemptions which is to preserve the confidentiality of this information" [Nalo v. Sullivan, 125 AD 2d 311, 312 (1987)].

Since the Police Department has indicated that it does not maintain certain records that you requested, I note that when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

Lastly, you requested the Police Department to waive fees for copies of records. While the federal Freedom of Information 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, such as the New York City Police Department, 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,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12761

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June 25, 2001

Mr. George Warwick
94-A-4504
Shawangunk Correctional Facility
P.O. Box 700
Wallkill, NY 12589

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Warwick:

I have received your letter in which you sought assistance in obtaining records from the Inmate Records Access Officer at Shawangunk Correctional Facility.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of your correspondence, I offer the following comments.

Whether records are accessible or deniable, an agency is required to respond to a request, and the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:tt

STATE OF NEW YORK
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June 26, 2001

E-MAIL

TO: Gerard Murrello [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. Murello:

I have received your letter in which you referred to difficulty in relation to your request for "payroll records for public employees for the town of Laurens..." You also expressed the belief that the Town has not promulgated procedures to implement the Freedom of Information Law.

In this regard, I offer the following comments.

First, by way of background, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural aspects of the Law (see 21 NYCRR Part 1401). In turn, §87(1)(a) of the Law states that:

> "the governing body of each public corporation shall promulgate uniform rules and regulations for all agencies in such public corporation pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the administration of this article."

In this instance, the governing body of a public corporation is the Town Board. Consequently, the Board is required to promulgate appropriate rules and regulations consistent with those adopted by the Committee on Open Government and with the Freedom of Information Law.

The initial responsibility to deal with requests is borne by an agency's records access officer, and the Committee's regulations provide direction concerning the designation and duties of a records access officer. Specifically, §1401.2 of the regulations provides in relevant part that:

> "(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so."

In most towns, the records access officer is the Town Clerk.

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).

Second, with certain exceptions, the Freedom of Information Law is does not require an agency to create records. Section 89(3) of the Law states in relevant part that:

> "Nothing in this article [the Freedom of Information Law] shall be construed to require any entity to prepare any record not in possession or maintained by such entity except the records specified in subdivision three of section eighty-seven..."

However, a payroll list of employees is included among the records required to be kept pursuant to "subdivision three of section eighty-seven" of the Law. Specifically, that provision states in relevant part that:

> "Each agency shall maintain...
>
> (b) a record setting forth the name, public office address, title and salary of every officer or employee of the agency... "

As such, a payroll record that identifies all officers or employees by name, public office address, title and salary must be prepared to comply with the Freedom of Information Law. Moreover, I believe that the payroll record and other related records identifying employees and their salaries,(i.e.) attendance records, must be disclosed.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Of relevance is §87(2)(b), which permits an agency to withhold record or portions of records when disclosure would result in "an unwarranted invasion of personal privacy." However, payroll information has been found by the courts to be available [see e.g., Miller v. Village of Freeport, 379 NYS 2d 517, 51 AD 2d 765, (1976); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NYS 2d 954 (1978)]. In Gannett, supra, the Court of Appeals held that the identities of former employees laid off due to budget cuts, as well as current employees, should be made available. In addition, this Committee has advised and the courts have upheld the notion that records that are relevant to the performance of the official duties of public employees are generally available, for disclosure in such instances would result in a permissible as opposed to an unwarranted invasion of personal privacy [Gannett, supra; Capital Newspapers v. Burns, 109 AD 2d 292, aff'd 67 NY 2d 562 (1986) ; Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980; Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975) ; and Montes v. State, 406 NYS 664 (Court of Claims 1978)]. As stated prior to the enactment of the Freedom of Information Law, payroll records:

> "...represent important fiscal as well as operational information. The identity of the employees and their salaries are vital statistics kept in the proper recordation of departmental functioning and are the primary sources of protection against employment favortism. They are subject therefore to inspection" Winston v. Mangan, 338 NYS 2d 654, 664 (1972)].

In short, a record identifying agency employees by name, public office address, title and salary must in my view be maintained and made available.

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 state's highest court has asserted:

> "...the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objectives cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" [Westchester News v. Kimball, 50 NY 2d 575, 579 (1980)].

In an effort to enhance compliance with and understanding of the Freedom of Information Law, a copy of this opinion will be forwarded to the Town Board.

I hope that I have been of assistance.

RJF:tt

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12763

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June 27, 2001

Mr. Harvey M. Elentuck
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Elentuck:

I have received your memorandum in which you asked whether, in my view, certain records should be disclosed. Specifically, you referred to:

> "...all informal legal opinions written by the Corporation Counsel [including any authorized designee] or the Division of Legal Counsel and that involve any aspect of the Freedom of Information Law, Regulations of the NYS Committee on Open Government, or the NYC Commission on Public Information and Communication."

From my perspective, the records in question need not 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.

The initial ground for denial, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute." For more than a century, the courts have found that legal advice given by a municipal attorney to his or her clients, municipal officials, is privileged when it is prepared in conjunction with an attorney-client relationship [see e.g., People ex rel. Updyke v. Gilon, 9 NYS 243, 244 (1889); Pennock v. Lane, 231 NYS 2d 897, 898, (1962); Bernkrant v. City Rent and Rehabilitation Administration, 242 NYS 2d 752 (1963), aff'd 17 App. Div. 2d 392]. As such, I believe that a municipal attorney may engage in a privileged relationship with his client and that records prepared in conjunction with an attorney-client relationship are considered privileged under §4503 of the Civil Practice Law and Rules. Further, since the enactment of the Freedom of Information Law, it has been found that records may be withheld when the privilege can appropriately be asserted when the attorney-client privilege is read in conjunction with §87(2)(a) of

the Law [see e.g., Mid-Boro Medical Group v. New York City Department of Finance, Sup. Ct., Bronx Cty., NYLJ, December 7, 1979; Steele v. NYS Department of Health, 464 NY 2d 925 (1983)]. Similarly, the work product of an attorney may be confidential under §3101 of the Civil Practice Law and Rules. That provision also appears to be applicable as a basis for withholding the notes.

The records in question would also constitute inter-agency or 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.

Lastly, the Freedom of Information Law is permissive. While an agency may choose to withhold records in accordance with the grounds for denial appearing in §87(2), there is no obligation to do so. Further, there are instances in which an agency chooses to make available or perhaps publish legal opinions. In those situations, I believe that the attorney-client privilege would have been waived.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Daniel S. Connolly

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12264

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June 28, 2001

Mr. Timothy Creech
89-B-2565
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. Creech:

I have received your letter in which you asked that the Committee on Open Government inquire as to why the New York City Police Department has not responded to your request.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of your correspondence, I offer the following comments.

The Freedom of Information Law provides direction concerning the time and manner in which agencies must response to request. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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FOIL-AO-12765

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June 28, 2001

Mr. John Rowe
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Rowe:

I have received your correspondence in which you expressed a variety of concerns relating to the responsiveness of officials of the Moravia Central School District. Based on a review of your commentaries, I offer the following remarks.

First, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

Based on the foregoing, an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date indicating when it can be anticipated that a request will be granted or denied. The acknowledgement by the records access officer did not make reference to such a date.

I note that there is no precise time period within which an agency must grant or deny access to records. The time needed to do so may be dependent upon the volume of a request, the possibility that other requests have been made, the necessity to conduct legal research, the search and retrieval techniques used to locate the records and the like. In short, when an agency acknowledges the receipt of a request because more than five business days may be needed to grant or deny a request, so long as it provides an approximate date indicating when the request will be granted or denied, and that date is reasonable in view of the attendant circumstances, I believe that the agency would be

acting in compliance with law. Notwithstanding the foregoing, in my view, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, if records are clearly available to the public under the Freedom of Information Law, and if they are readily retrievable, there may be no basis for a lengthy delay in disclosure.

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Second, although you did not enclose copies of 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. You referred, for example, to questioning the District concerning the allocation of its surpluses. I am unaware of the means by which the District maintains its records. However, if there are no records that specify how those moneys might have been allocated, the District in my view would not have been required to engage in research or prepare new records in an effort to satisfy your request.

In a related vein, §89(3) requires that an applicant "reasonably describe" the records sought. It has been held that the nature of an agency's filing or record keeping system may bear upon whether or the extent to which a request meets that standard [see Konigsberg v. Coughlin, 68 NY2d 245 (1986)]. If, for instance, purchase vouchers are kept chronologically, a request for vouchers pertaining to a certain period would reasonably describe the records, for the request would have been made in a manner consistent with the agency's filing system. On the other hand, if a request is made for vouchers indicating the purchase of certain items, and locating the vouchers would involve a page by page review of thousands of records, the request would not meet the standard of reasonably describing the records.

Lastly, you referred to a limitation on public comments at meetings of the Board of Education. In this regard, 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., 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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12766

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

June 27, 2001

Mr. Eric Birdsall
93-A-1028
Mid-Orange Correctional Facility
900 Kings Highway
Warwick, NY 10990

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Birdsall:

I have received your letter in which you requested advice concerning whether a certain directive relating to the selection of inmates for outside assignments may be available under the Freedom of Information Law.

In this regard, I offer the following comments.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

While I am unfamiliar with the contents of the record you sought §87(2)(g) is of potential significance. That section permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical

or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those 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 provision that may pertinent is §87(2)(f), which permits an agency to withhold records or portions thereof which if disclosed "would endanger the life or safety of any person."

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12767

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

June 28, 2001

Mr. Ricardo A. DiRose
85-C-0773
Attica Correctional Facility
P.O. Box 149
Attica, NY 14011

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. DiRose:

I have received your letters in which you inquired about the availability of E911 and police dispatch tapes from 1988.

In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law pertains to all agency records and is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Second, relevant in the context of your question is the initial ground for denial, §87(2)(a), which relates to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §308(4) of the County Law, which states that:

> "Records, in whatever form they may be kept, of calls made to a municipality's E911 system shall not be made available to or obtained by any entity or person, other than that municipality's public safety agency, another government agency or body, or a private entity or a person providing medical, ambulance or other emergency services, and shall not be utilized for any commercial purpose other than the provision of emergency services."

In my opinion, County Law, §308(4), applies to requests made after the effective date of the provision, July 25, 1989, for records of an E-911 system, regardless of the date of the creation of requested tapes. That kind of system, as I understand it, enables the recipient of a 911 call to identify the location of the caller. If a 911 call was made through an early 911 system, rather than

an "enhanced" system, I do not believe that §308 would apply. In that event, rights of access would be determined by the Freedom of Information Law.

The County Law, however, does not apply to New York City, and that provision, in my view, would not serve as a basis for withholding records sought from agencies within New York City. Access to such tapes, as well as the availability of police dispatch records, would be determined by the provisions of the Freedom of Information Law.

Lastly, I point out that the Freedom of Information Law pertains to existing records. Section 89(3) of that statute provides in part that an agency is not required to prepare a record that is not maintained by the agency in response to a request. In short, if the record in question no longer exists, the Freedom of Information Law would not apply.

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12768

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

June 28, 2001

Mr. Michael Eades
90-B-1664
Gouverneur Correctional Facility
P.O. Box 480
Gouverneur, NY 13642-0370

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Eades:

I have received your letter in which you requested advice concerning the submission of a Freedom of Information Law request to the Supreme Court of Monroe County.

In this regard, I offer the following comments.

The Freedom of Information Law is applicable to agency records, and §86(3) defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines the term "judiciary" to mean:

> "the courts of the state, including any municipal or district court, whether or not of record."

Based on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law (see e.g., Judiciary Law, §255) may grant broad public access to those records. Even though other statutes may deal with access to court records, the procedural provisions associated with the Freedom of Information Law (i.e., those involving the designation of a records access officer or the right to appeal a denial) would not ordinarily be applicable.

It is suggested that you cite the appropriate provision of law when submitting your request to the court clerk.

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12769

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

June 28, 2001

Mr. Sean K. Dugan
93-B-1081
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. Dugan:

I have received your letter in which you sought assistance in obtaining your "case report" determining your hepatitis C status, and a "Hepatitis C Case Definition and Diagnostic Statement from the NYSDOH."

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.

First, with regard to your "case report" the Freedom of Information Law, in my view, may permit that some of those records can be withheld in whole or in part, depending upon their contents. For instance, medical records prepared by personnel at a government medical facility could be characterized as "intra-agency materials" that fall within the scope of §87(2)(g) of the Freedom of Information Law. It appears that the case report consists in part of staff comments relating to your medical conditions. The provision cited above permits an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

Second, insofar as you have requested medical records, a different statute, §18 of the Public Health Law, generally grants rights of access to medical records to the subjects of the records. As such, that statute may provide greater access to medical records than the Freedom of Information Law. It is suggested that you submit your request to the County Health Department and make specific reference to §18 of the Public Health Law when seeking medical records.

To obtain additional information concerning access to medical records and the fees that may be charged for searching and copying those records, you may write to:

Access to Patient Information Program
New York State Department of Health
Hedley Park Place
Suite 303
433 River Street
Troy, NY 12180

Lastly, while the federal Freedom of Information Act, which applies only to federal agencies, 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,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12770

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

June 29, 2001

Mr. Lamont Childers
W-63751
MCI-Norfolk Unit 6-3
P.O. Box 43
Norfolk, Mass 02056-0043

Dear Mr. Childers:

Your letter of June 25 addressed to the Secretary of State has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State, is authorized to offer advice and opinions concerning the Freedom of Information Law. Your letter consists of an appeal following an unanswered request made under the Freedom of Information Law for medical records pertaining to yourself maintained by St. John's Episcopal Hospital.

In this regard, 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, as a general matter, the Freedom of Information Law pertains to records maintained by entities of state and local government; it does not apply to private facilities. On the basis of its name, the hospital in question appears to be private and not part of the government. If that is so, the Freedom of Information Law would not apply.

Second, even if the Freedom of Information Law did apply, I note that this office does not determine appeals. 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."

Third, notwithstanding the foregoing, a different law, §18 of the Public Health Law, generally provides rights of access to medical records to the subjects of those records. Consequently, it is suggested that you resubmit your request to the hospital, citing §18 of the Public Health Law as the basis for the request.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1277

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

June 28, 2001

Mr. Anthony Russo
99-B-1842
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 facts presented in your correspondence.

Dear Mr. Russo:

I have received your letter in which you sought assistance in obtaining records from the Broome County Jail.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of your correspondence, I offer the following comments.

Whether records are accessible or deniable, an agency is required to respond to a request, and the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in

accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12772

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

June 28, 2001

Mr. Charlie Mixon
90-B-3069
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 facts presented in your correspondence.

Dear Mr. Mixon:

I have received your letter in which you sought assistance in obtaining records from the Erie County District Attorney.

First, you inquired as to whether the Freedom of Information Law sets forth a time limit for an agency to produce records after receipt of payment for such records.

You indicated that 2, 135 sheets of documents were identified in response to your request and over two months had passed after payment was sent to the district attorney. Upon your further inquiry to the Records Access Officer, you were notified that additional time was needed to review the records and make any necessary redactions.

Whether records are accessible or deniable, an agency is required to respond to a request, and the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time either after it acknowledges that a request has been received, or after receipt of payment, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of 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. Likewise, there is no specific time period within which an agency must produce records after receipt of payment. 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 and the like.

Second, you question whether you "can FOIL the District Attorney" to perform DNA testing regarding certain evidence in your case. In this regard, the Freedom of Information Law pertains only to rights of access to government records and provides no authority to compel agencies to take any action other than responding to requests for records.

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12773

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

June 29, 2001

Mr. Barry Berman
[redacted]

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. Berman:

I have received your letters in which you requested an advisory opinion related to your attempts to obtain records related to a "common fare menu"and explained that litigation had not been initiated in this matter.

In this regard, I offer the following comments.

First, whether records are accessible or deniable, an agency is required to respond to a request, and the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body,

> who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. State differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87 (2)(a) through (i) of the law.

Of potential 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.

Also of possible significance is §87 (2)(f), which permits an agency to withhold records to the extent that disclosure would "endanger the life or safety of any person."

Since I am unfamiliar with the events to which the record relates or the effects of its disclosure, the applicability of the above cited provision is conjectural.

I hope that I have been of assistance.

Sincerely,

David Treacy

David M. Treacy
Assistant Director

DMT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1277

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

June 29, 2001

Mr. Donald Fernet
93-B-0839
Washington Correctional Facility
72 Lock 11 Lane, P.O. Box 180
Comstock, NY 12821-180

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. Fernet:

I have received your letter in which you explained that the New York State Parole Board had not responded to your request for records under the Freedom of Information Law.

In this regard, I offer the following comments.

Whether records are accessible or deniable, an agency is required to respond to a request, and the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

For your information, the person designated at the Division of Parole to determine appeals under the Freedom of Information Law is Terrence X. Tracy, Counsel to the Division.

I hope that I have been of assistance.

Sincerely,

David Treacy

David M. Treacy
Assistant Director

DMT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12775

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

June 29, 2001

Mr. James Higgs
97-R-7993
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. Higgs:

I have received your letter in which you sought assistance on the appeals procedure under the Freedom of Information Law.

Whether records are accessible or deniable, an agency is required to respond to a request, and the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body,

> who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12776

41 State Street, Albany, New York 12231
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July 2, 2001

E-Mail

TO: Gerard Murello [redacted]

FROM: Robert J. Freeman, Executive Director

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Murello:

As you are aware, I received a communication from you in May concerning access to payroll records of the Town of Laurens. Most recently, you indicated that you asked that the records be copied onto a computer disk, but that Town's finance officer "claimed she did not know how to copy and then delete the confidential information, i.e., SSN's, HMO's, etc., even though she has been using this program for several years." Consequently, the Town Board contacted "an outside computer specialist to extract and provide [you] with the information....for a fee in excess of $200.00." You have questioned the propriety of the fee.

In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

I point out that, with certain exceptions, the Freedom of Information Law is does not require an agency to create records. Section 89(3) of the Law states in relevant part that:

> "Nothing in this article [the Freedom of Information Law] shall be construed to require any entity to prepare any record not in possession or maintained by such entity except the records specified in subdivision three of section eighty-seven..."

However, a payroll list of employees is included among the records required to be kept pursuant to "subdivision three of section eighty-seven" of the Law. Specifically, that provision states in relevant part that:

> "Each agency shall maintain...
>
> (b) a record setting forth the name, public office address, title and salary of every officer or employee of the agency... "

As such, a payroll record that identifies all officers or employees by name, public office address, title and salary must be prepared to comply with the Freedom of Information Law. Moreover, I believe that the payroll record and other related records identifying employees and their salaries must be disclosed.

Of relevance is §87(2)(b), which permits an agency to withhold record or portions of records when disclosure would result in "an unwarranted invasion of personal privacy." However, payroll information has been found by the courts to be available [see e.g., Miller v. Village of Freeport, 379 NYS 2d 517, 51 AD 2d 765, (1976); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NYS 2d 954 (1978)]. In Gannett, supra, the Court of Appeals held that the identities of former employees laid off due to budget cuts, as well as current employees, should be made available. In addition, this Committee has advised and the courts have upheld the notion that records that are relevant to the performance of the official duties of public employees are generally available, for disclosure in such instances would result in a permissible as opposed to an unwarranted invasion of personal privacy [Gannett, supra; Capital Newspapers v. Burns, 109 AD 2d 292, aff'd 67 NY 2d 562 (1986) ; Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980; Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975) ; and Montes v. State, 406 NYS 664 (Court of Claims 1978)]. As stated prior to the enactment of the Freedom of Information Law, payroll records:

> "...represent important fiscal as well as operational information. The identity of the employees and their salaries are vital statistics kept in the proper recordation of departmental functioning and are the primary sources of protection against employment favortism. They are subject therefore to inspection" Winston v. Mangan, 338 NYS 2d 654, 664 (1972)].

In short, a record identifying agency employees by name, public office address, title and salary must in my view be maintained and made available. Items that have no relevance to the performance of one's official duties, such as social security numbers, the deductions and the like may be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy.

Second, in my view, assuming that the items of your interest can be generated based on the Town's existing computer programs and copied onto a disk, I believe that the Town must do so. In that event, the fee would be based on the actual cost of reproduction. Following is an excerpt from an article that I prepared that deals with the issues that you raised:

"[W]hen information is maintained electronically, if the information sought is available under FOIL and may be retrieved by means of existing computer programs, an agency is required to disclose the information. In that kind of situation, the agency would merely be retrieving data that it has the capacity to retrieve. Disclosure may be accomplished either by printing out the data on paper or perhaps by duplicating the data on another storage mechanism, such as a computer tape or disk. 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 suggested 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 AD2d 218 (1991)].

"Often information stored electronically can be extracted by means of a few keystrokes on a keyboard. While some have contended that those kinds of minimal steps involve programming or reprogramming, so narrow a construction would tend to defeat the purposes of the FOIL. Morever, extracting information and creating it clearly involve different functions.

"If, for example, 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. On the other hand, if the applicant makes a second request, this time for items 7, 8 and 9, but the agency has no method of retrieving or extracting those items except by means of new programming, i.e., changing the means by which it may retrieve or extract data, the act of reprogramming would be the equivalent of creating a new record, and an agency would not be required to do so. Going back to the filing cabinet in which the records are maintained alphabetically, the analogy would involve a

request for the records filed, for example, between April and July of 1997. The agency knows that the items sought are kept within its files, but there may be no way of locating them, except by reviewing each individually. In that situation, the agency would not be required to alter its filing system, i.e., change it from alphabetical to chronological order, in an effort to accommodate the applicant. Based on the same logic, an agency would not be required to create a new program to extract that data that may be stored, but which cannot be retrieved or generated by means of its existing programs.

"Notwithstanding an agency's inability to retrieve information sought unless it modifies its programs or reprograms, it may often be relatively simple to alter a program to retrieve the information sought. Moreover, it may be more cost efficient to engage in reprogramming than to delete portions of a printout by hand, for example, or to engage in a physical search of paper records. Redactions made manually and extensive searches are time consuming and labor intensive, but minor reprogramming may often be done quickly.

Format: Paper, Disk or Tape?

"FOIL's statement of intent indicates that agencies are required to make records available 'wherever and whenever feasible.' What if the agency chooses disclose record by means of a computer printout, but the applicant has requested the record on a computer tape or disk? In Brownstone Publishers Inc. v. New York City Department of Buildings [166 AD2d 294 (1990)], the question involved an agency's obligation to transfer electronic information from one electronic storage medium to another when it had the technical capacity to do so and when the applicant was willing to pay the actual cost of the transfer. As stated by the Appellate Division:

> 'The files are maintained in a computer format that Brownstone can employ directly into its system, which can be reproduced on computer tapes at minimal cost in a few hours time-a cost Brownstone agreed to assume (see, POL [section] 87[1] [b] [iii]). The DOB, apparently intending to discourage this and similar requests, agreed to provide the information only in hard copy, i.e., printed out on over a million sheets of paper, at a cost of $10,000 for the paper alone, which would take five or six

> weeks to complete. Brownstone would then have to reconvert the data into computer-usable form at a cost of hundreds of thousands of dollars.
>
> 'Public Officers Law [section] 87(2) provides that, 'Each agency shall...make available for public inspection and copying all records...' Section 86(4) includes in its definition of 'record', computer tapes or discs. The policy underlying the FOIL is 'to insure maximum public access to government records' (Matter of Scott, Sardano & Pomerantz v. Records Access Officer, 65 N.Y.2d 294, 296-297, 491 N.Y.S.2d 289, 480 N.E.2d 1071). Under the circumstances presented herein, it is clear that both the statute and its underlying policy require that the DOB comply with Brownstone's reasonable request to have the information, presently maintained in computer language, transferred onto computer tapes" (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, Sup. Ct., 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. Under those conditions, production of the record would not involve creating a new record or reprogramming, but rather merely a transfer of information into a format usable to the applicant.

Fees

"Section 87(1)(b)(iii) of FOIL 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 its annual report to the Governor and the Legislature by the Committee on Open Government (created by the enactment of FOIL in 1974 and

reconstituted in the current statute), which was submitted in December of 1981 and which recommended the amendment that is now law:

> 'The problem is that the term 'law' may include regulations, local laws, or ordinances, for example. As such, state agencies by means of regulation or municipalities by means of local law may and in some instances have established fees in excess of twenty-five cents per photocopy, thereby resulting in constructive denials of access. To remove this problem, the word 'law' should be replaced by 'statute', thereby enabling an agency to charge more than twenty-five cents only in situations in which an act of the State Legislature, a statute, so specifies.'

"Therefore, prior to October 15, 1982, a local law, an ordinance, or a regulation for instance, establishing a search fee or a fee in excess of twenty-five cents per photocopy or higher than the actual cost of reproduction was valid. However, under the amendment, only an act of the State Legislature, a statute, would permit the assessment of a fee higher than twenty-five cents per photocopy, a fee that exceeds the actual cost of reproducing records that cannot be photocopied, 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.

"The specific language of FOIL 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.'
>
> "Based upon the foregoing, it is likely that a fee for reproducing electronic information would most often involve the cost of computer time, plus the cost of an information storage medium (i.e., a computer tape) to which data is transferred.
>
> "Although compliance with FOIL 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 NY2d 341, 347 (1979)]."

In an effort to enhance compliance with and understanding of the Freedom of Information Law, a copy of this response will be forwarded to the Town Board.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2777

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July 2, 2001

Mr. Howard Ostrander
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Ostrander:

I have received your letter and the correspondence attached to it. You have sought assistance concerning a request made under the Freedom of Information Law to the Town of Guilford.

The request involved a "copy of expenditures of the Borden Hose Fire Company for the years 1999-2000", and the Town Clerk responded by indicating that the Company, by contract, is required to submit its budget to the Town, and that records concerning the Company's expenditures are not maintained by the Town. You expressed the view that §181(3) of the Town Law requires that such records be submitted to the Town.

I have reviewed the provision to which you made reference, and it requires that the treasurer of a *fire district* prepare "a financial statement setting forth in detail the receipts and expenditures of such fire district", and that the statement must be filed with the town clerk. However, a fire district is different from a fire *company*. A fire district is a governmental entity and a public corporation. A fire company is most often a volunteer fire organization that is a not-for-profit corporation that contracts with one or more municipalities to provide firefighting services. I know of no requirement that a fire company provide a town with the kind of detailed statement of receipts and expenditures that a fire district must file. Nevertheless, I believe that the Company itself must grant access to the kinds of records in which you are interested.

By way of background, the Freedom of Information Law is applicable to agency records, and §86(3) of the Law defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council,

> office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

As such, the Freedom of Information Law generally pertains to records maintained by entities of state and local governments.

However, in Westchester-Rockland Newspapers v. Kimball [50 NYS 2d 575 (1980)], a case involving access to records relating to a lottery conducted by a volunteer fire company, the Court of Appeals, found that volunteer fire companies, despite their status as not-for-profit corporations, are "agencies" subject to the Freedom of Information Law. In so holding, the Court stated that:

> "We begin by rejecting respondent's contention that, in applying the Freedom of Information Law, a distinction is to be made between a volunteer organization on which a local government relies for performance of an essential public service, as is true of the fire department here, and on the other hand, an organic arm of government, when that is the channel through which such services are delivered. Key is the Legislature's own unmistakably broad declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (emphasis added; Public Officers Law, §84).
>
> "True, the Legislature, in separately delineating the powers and duties of volunteer fire departments, for example, has nowhere included an obligation comparable to that spelled out in the Freedom of Information statute (see Village Law, art 10; see, also, 39 NY Jur, Municipal Corporations, §§560-588). But, absent a provision exempting volunteer fire departments from the reach of article 6-and there is none-we attach no significance to the fact that these or other particular agencies, regular or volunteer, are not expressly included. For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objections cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" (id. at 579].

Moreover, although it was contended that documents concerning the lottery were not subject to the Freedom of Information Law because they did not pertain to the performance of the company's fire fighting duties, the Court held that the documents constituted "records" subject to the Freedom of Information Law [see §86(4)].

More recently, another decision confirmed in an expansive manner that volunteer fire companies are required to comply with the Freedom of Information Law. That decision, S.W. Pitts Hose Company et al. v. Capital Newspapers (Supreme Court, Albany County, January 25, 1988), dealt with the issue in terms of government control over volunteer fire companies. In its analysis, the Court states that:

> "Section 1402 of the Not-for-Profit Corporation Law is directly applicable to the plaintiffs and pertains to how volunteer fire companies are organized. Section 1402(e) provides:
>
> > '...a fire corporation, hereafter incorporated under this section shall be under the control of the city, village, fire district or town authorities having by law, control over the prevention or extinguishment of fires therein. Such authorities may adopt rules and regulations for the government and control of such corporations.'
>
> "These fire companies are formed by consent of the Colonie Town Board. The Town has control over the membership of the companies, as well as many other aspects of their structure, organization and operation (section 1402). The plaintiffs' contention that their relationship with the Town of Colonie is solely contractual is a mischaracterization. The municipality clearly has, by law, control over these volunteer organizations which reprovide a public function.
>
> "It should be further noted that the Legislature, in enacting FOIL, intended that it apply in the broadest possible terms. '...[I]t is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (Public Officers Law, section 84).
>
> "This court recognizes the long, distinguished history of volunteer fire companies in New York State, and the vital services they provide to many municipalities. But not to be ignored is that their existence is inextricably linked to, dependent on, and under the control of the municipalities for which they provide an essential public service."

Based upon the foregoing, it is clear that volunteer fire companies are subject to the Freedom of Information Law.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law.

Insofar as the kinds of records of your interest consist of statistical or factual information. I believe that they must generally be disclosed pursuant to §87(2)(g)(i). That provision requires that "statistical or factual tabulations or data" found with "intra-agency materials" must be disclosed.

Lastly, 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 is largely irrelevant to rights of access.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Borden Hose Fire Company
Hon. Jane Winchester, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12778

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July 2, 2001

Ms. Judy Braiman
Empire State Consumer Association
50 Landsdowne Lane
Rochester, NY 14618

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Braiman:

I have received your letter of May 24 and the materials relating to it. You have sought an opinion concerning a request made under the Freedom of Information Law on April 3 to Monroe County for "the dates, locations and names of the pesticides...which will be applied in Monroe County this season." Although you were informed on May 23 by the County's records access officer that no such records exist, you wrote that other County employees had previously indicated that the State Department of Transportation "was sending out a bid package" and that the County " would use the same pesticide applicator" as it had last year. In addition, in the May 25 edition of the daily Rochester newspaper, a classified ad for a herbicide applicator was published, indicating that herbicides would be sprayed "on guardrails, signposts and [illegible] on all Monroe County roads."

From my perspective, if the County maintained the records of your interest prior to its response to your request, they should have been disclosed. Records of that nature would appear to consist of factual information accessible under §87(2)(g)(i) of the Freedom of Information Law. Nevertheless, it is noted that that statute pertains to existing records. If the information sought did not exist in the form of a record or records during the pendency of your request, the Freedom of Information Law would not have applied, and the County would not have been required to create or prepare a new record in response to your request.

I note that when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

I point out that in Key v. Hynes [613 NYS 2d 926, 205 AD 2d 779 (1994)], it was found that a court could not validly accept conclusory allegations as a substitute for proof that an agency could not locate a record after having made a "diligent search". However, in another decision, such an allegation was found to be sufficient when "the employee who conducted the actual search for the documents in question submitted an affidavit which provided an adequate basis upon which to conclude that a 'diligent search' for the documents had been made" [Thomas v. Records Access Officer, 613 NYS 2d 929, 205 AD 2d 786 (1994)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: John Riley

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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July 2, 2001

Mr. Thomas J. Birkholz Sr.
Warren County Conservative Party
1 Pucker Street
Warrensburg, NY 12885

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Birkholz:

I have received your letter of June 26 and the materials attached to it. You referred to correspondence sent on May 6, but as explained to you by my assistant, it did not reach this office. It is noted that the address on your original letter is no longer accurate.

You have contended that the Warren County District Attorney has provided "both no information and misinformation" in response to your requests made under the Freedom of Information Law. Having reviewed your requests, I point out that the title of the Freedom of Information Law may be somewhat misleading, for it is not a vehicle that requires government agencies to provide information *per se*; rather, it is a vehicle that potentially requires that agencies grant access to existing records. Moreover, 89(3) of that statute states in relevant part that an agency is not required to create a record in response to a request.

Since you sought a variety of information concerning the activities of the Office of the District Attorney "by year" in conjunction with certain kinds of actions, if indeed that agency has not prepared and does not maintain the figures that you requested, it would not be required to create new records on your behalf in an effort to accommodate you or satisfy your request. Similarly, while agency staff may provide information in response to questions, it is not required to do so. Again, the responsibility of an agency involves granting access to existing records in response to a request made under the Freedom of Information Law.

It is recommended that you might follow the course of action suggested by Assistant District Attorney Marcy I. Flores. In a letter to you of April 4, Ms. Flores indicated that the Division of Criminal Justice Services and perhaps other agencies, such as the Office of Court Administration, prepare statistics concerning the activities of offices of district attorneys. It may be worthwhile to contact those agencies for the purpose of ascertaining the nature of statistics that they maintain.

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: Marcy I. Flores

STATE OF NEW YORK
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July 3, 2001

Ms. Lori Yoffe
[redacted]

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. Yoffe:

I have received your letters and the materials relating to them. You have complained with respect to the practices of the Mayor's Office of Film, Theatre and Broadcasting ("OFTB") in New York City.

You have sought an opinion concerning the ability of OFTB to deny you the right to review permits issued by OFTB "because you talked to a permit coordinator." "Guidelines" given to "guests" of OFTB state in part that "Guests may not interrupt the work of office employees. *All* questions must be directed to Joan Bennerson, at the front desk" (emphasis added by OFTB). The directive also states as follows: "Should an individual choose not to observe any one of the guidelines above, we reserve the right to terminate his or her privileges to review permits in our offices." You indicated that you spoke with an employee of OFTB while you and the employee were at a copy machine, and that your conversation with him "lasted about 30 seconds." Thereafter, Ms. Bennerson, who, according to your letter, had earlier rejected your attempt to ask her questions, "informed [you] that [you] could not view the permits" because you "interrupted the work of an office employee." You were then "escorted out of the Office by security", which you found to be "embarrassing and humiliating."

In this regard, first, the Freedom of Information Law confers rights of access to government records upon every member of the public, and that statute specifies that the public enjoys the right to inspect and copy records. Viewing records, in short, is not a matter of a privilege that an agency is empowered to revoke; on the contrary, public inspection of records is a matter of right.

Second, with respect to the implementation of the Freedom of Information Law, §89(1) requires the Committee on Open Government to promulgate general rules and regulations dealing with the procedural aspects of the law, and the Committee has promulgated such rules (21 NYCRR Part 1401). In turn, §87(1) requires the head or governing body of each agency to adopt rules and

regulations consistent with those adopted by the Committee, as well as the Freedom of Information Law. In New York City, the Mayor has issued uniform rules for all agencies under his aegis. The guidelines distributed by OFTB supplement the Mayor's rules, and from my perspective, those guidelines are valid only insofar as they are reasonable and implemented reasonably. Based on your description of the facts, it does not appear that they were carried out reasonably. Speaking with an employee for a half a minute in a manner that is not loud or disruptive would not, in my opinion, constitute a valid basis for your ejection from the Office.

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).

I point out 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)].While I am not suggesting that you do so, if an agency fails to inform you of the right to appeal a denial of access to records, you may initiate a proceeding under Article 78 of the Civil Practice Law and Rules to seek judicial review of the denial.

Lastly, you indicated that OFTB permits inspection of its records only on Fridays. As you aware, §1401.4 of the Committee's regulations, entitled "Hours for public inspection", states that:

> "(a) Each agency shall accept requests for public access to records and produce records during all hours they are regularly open for business."

Relevant to the matter is a decision rendered by the Appellate Division concerning 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, OFTB, in my view, cannot limit the right of the public to inspect records to a period less than its regular business hours.

I direct your attention §84 of the Freedom of Information Law, its statement of legislative intent, which specifies that"it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." As the Court of Appeals has asserted:

> "...the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as

> broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objectives cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" [Westchester News v. Kimball, 50 NY 2d 575, 579 (1980)].

In an effort to enhance compliance with and understanding of the Freedom of Information Law, a copy of this opinion will be forwarded to OFTB.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Patricia Reed Scott

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1278Z

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

July 3, 2001

Mr. Clarence Johnson
92-A-9802
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. Johnson:

I have received your letter in which you sought assistance in obtaining records from several agencies, as well as a court, that have not responded to your requests under the Freedom of Information Law.

In this regard, I offer the following comments.

First, the Freedom of Information Law, is applicable to agency records, and §86(3) defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines the term "judiciary" to mean:

> "the courts of the state, including any municipal or district court, whether or not of record."

As such, 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.

However, a State University hospital and a public housing authority are agencies that would be subject to 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..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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, a different statute, §18 of the Public Health Law, generally grants rights of access to medical records to the subjects of the records. As such, that statute may provide greater access to medical records than the Freedom of Information Law. It is suggested that you renew your request and make specific reference to §18 of the Public Health Law in any request for medical records.

To obtain additional information concerning access to medical records and the fees that may be charged for searching and copying those records, you may write to:

Access to Patient Information Coordinator
New York State Department of Health
Division of Public Health Protection
Corning Tower Building - Room 2517
Empire State Plaza
Albany, New York 12237

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12783

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

July 3, 2001

Mr. David E. Hagenbuch
98-B-1324
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 facts presented in your correspondence.

Dear Mr. Hagenbuch:

I have received your letter in which you sought assistance in obtaining records from the Division of Criminal Justice Services.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of your correspondence, I offer the following comments.

In response to your request for a variety of records, Ms. Valerie Friedlander, the Records Access Officer, wrote "[y]our request is under active review and you may expect a formal response to your inquiry within 45 days." You contend that the Division would thereby exceeds 30 day time limit within which an agency must provide records.

I note, however, that the Freedom of Information Law does not contain such a time limit for responding to requests for records. Whether records are accessible or deniable, an agency is required to respond to a request, and the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in

accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

In my opinion, by providing a written acknowledgement of the receipt of your request and statement of the approximate date when a response would be provided, the Records Access officer acted in compliance with the Freedom of Information Law. It is also my view that your appeal of the Record Access Officer's response prior to the expiration of 45 days was premature. However, if you still have not received a final response granting or denying access to the records requested, it is suggested that you direct an appeal to the appeals officer at the Division of Criminal Justice Services.

I hope that the foregoing serves to enhance your understanding of the Freedom of Information Law and that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12784

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

July 3, 2001

Mr. Charles A. Haver
[redacted]

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. Haver:

I have received your letter and the correspondence attached to it. You have sought guidance concerning a delay in response by the Smithtown Central School District to your request for records. It is your view that disclosure may be delayed because you are in litigation with the District.

In this regard, first, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

Based on the foregoing, an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date indicating when it can be anticipated that a request will be granted or denied. The person in receipt of your requests, the District Clerk, apparently did not respond or perhaps acknowledged the receipt of your requests without indicating the approximate date of a response.

I note that there is no precise time period within which an agency must grant or deny access to records. The time needed to do so may be dependent upon the volume of a request, the possibility that other requests have been made, the necessity to conduct legal research, the search and retrieval techniques used to locate the records and the like. In short, when an agency acknowledges the receipt of a request because more than five business days may be needed to grant or deny a request,

so long as it provides an approximate date indicating when the request will be granted or denied, and that date is reasonable in view of the attendant circumstances, I believe that the agency would be acting in compliance with law. Notwithstanding the foregoing, in my view, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, if records are clearly available to the public under the Freedom of Information Law, and if they are readily retrievable, there may be no basis for a lengthy delay in disclosure.

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Second, the possibility that the records sought might be pertinent to or used in litigation is, in my view, largely irrelevant. As stated by the Court of Appeals, the State's highest court, in a case involving a request made under the Freedom of Information Law by a person involved in litigation against an agency: "Access to records of a government agency under the Freedom of Information Law (FOIL) (Public Officers Law, Article 6) is not affected by the fact that there is pending or potential litigation between the person making the request and the agency" [Farbman v. NYC Health and Hospitals Corporation, 62 NY 2d 75, 78 (1984)]. Similarly, in an earlier decision, the Court of Appeals determined that "the standing of one who seeks access to records under the Freedom of Information Law is as a member of the public, and is neither enhanced...nor restricted...because he is also a litigant or potential litigant" [Matter of John P. v. Whalen, 54 NY 2d 89, 99 (1980)]. The Court in Farbman, supra, discussed the distinction between the use of the Freedom of Information Law as opposed to the use of discovery in Article 31 of the Civil Practice Law and Rules. Specifically, it was found that:

> "FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on governmental decision-making, its ambit is

> not confined to records actually used in the decision-making process (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request.
>
> "CPLR article 31 proceeds under a different premise, and serves quite different concerns. While speaking also of 'full disclosure' article 31 is plainly more restrictive than FOIL. Access to records under CPLR depends on status and need. With goals of promoting both the ascertainment of truth at trial and the prompt disposition of actions (Allen v. Crowell-Collier Pub. Co., 21 NY 2d 403, 407), discovery is at the outset limited to that which is 'material and necessary in the prosecution or defense of an action'" [see Farbman, supra, at 80].

Based upon the foregoing, the pendency of litigation would not, in my opinion, affect either the rights of the public or a litigant under the Freedom of Information Law.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this opinion will be forwarded to District officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education
Mary Buderman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12785

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

July 9, 2001

Mr. Dennis Rogha
91-A-7163
Attica Correctional Facility
149 Exchange Street Road
Attica, NY 14011

Dear Mr. Rogha:

I have received your letter in which you inquired about the process followed by the Superintendent at your facility to record the receipt of papers from a court and the delivery of such papers to an inmate. You also inquired about the length of time the Superintendent must maintain the records.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. Your questions are beyond the scope of the Freedom of Information Law and the capacity of staff at this office.

However, in an effort to assist you, I point out that minimum time limits pertaining to the retention of agency records are developed pursuant to the Arts and Cultural Affairs Law. Section 57.05 of that law provides that the Commissioner of Education is empowered :

> "[t]o authorize the disposal or destruction of state records including books, papers, maps, photographs, microphotographs or other documentary materials made, acquired or received by any agency. At least forty days prior to the proposed disposal or destruction of such records, the commissioner of education shall deliver a list of the records to be disposed of or destroyed to the attorney general, the comptroller and the state agency that transferred such records. No state records listed therein shall be destroyed if within thirty days after receipt of such list the attorney general, the comptroller or the agency that transferred such records shall notify the commissioner that in his opinion such state records should not be destroyed."

If you remain interested in obtaining a copy of a retention schedule, you may write to the State Archives and Records Administration, Cultural Education Center, Empire State Plaza, Albany, NY 12230.

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12786

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

July 9, 2001

Mr. William R. Phillips
75-A-0322
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. Phillips:

I have received your letter in which you requested "the intervention" of this office "at the administrative level" to resolve a matter pertaining to a Freedom of Information Law request for a tape recording admitted into evidence at your criminal trial.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of your correspondence, I offer the following comments.

First, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests and appeals. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in

accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Second, I point out that the Freedom of Information Law pertains to existing records, and that §89(3) of that statute states in part that an agency is not required to create a record in response to a request. Therefore, insofar as the records of your interest do not exist, the Freedom of Information Law would not apply.

Lastly, it is also possible that the requested tape was previously provided to you or your attorney. In this regard, based on a decision rendered in Moore v. Santucci [151 AD2d 677 (1989)], if a record maintained by an agency was submitted into evidence in a public proceeding, it is accessible under the Freedom of Information Law. However, it was also held that if a record was made available to you or your attorney, an agency may require a demonstration that neither you nor your attorney possess the record in order to successfully obtain a second copy.

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12787

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

July 9, 2001

Mr. Rigoberto Pacheco
96-A-2022
Elmira Correctional Facility
P.O. Box 500
Elmira, NY 14902

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Pacheco:

I have received your letter in which you sought an opinion as to whether your requests "reasonably described" the records sought as required by §89(3) of the Freedom of Information Law.

In this regard, I point out that it has been held by the Court of Appeals that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

The Court in Konigsberg found that the agency could not reject the request due to its breadth and also stated that:

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency'])" (id. at 250).

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping system. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number.

While I am unfamiliar with the Queens County District Attorney's recordkeeping systems, to the extent that the records sought can be located with reasonable effort, I believe that the requests would have met the requirement of reasonably describing the records. On the other hand, if the records are not maintained in a manner that permits their retrieval except by reviewing perhaps thousands of records individually in an effort to locate those falling within the scope of a request, to that extent, a request would not in my opinion meet the standard of reasonably describing the records.

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12788

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

July 9, 2001

Mr. Juan Vasquez
97-A-2907
Upstate Correctional Facility
Box 618
Auburn, NY 13201

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Vasquez:

I have received your letter and attached material indicating your request for copies of your medical records and the response granting access to such records upon the payment of twenty-five cents per page. You would like to receive such records, but are unable to pay for same.

In this regard, I point out that while the federal Freedom of Information Act, which applies only to federal agencies, 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)]. It is also noted, however, that the statute dealing specifically with patients' rights of access to medical records (Public Health Law, §18) states in part that a patient cannot be denied access solely due to his or her inability to pay. It is suggested that you discuss the matter with the Inmate Records Coordinator.

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12789

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

July 10, 2001

Mr. Gary L. Rhodes
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Rhodes:

I have received your letters and related documentation concerning a request for an "agricultural land assessment report" maintained by the Town of Henderson.

In consideration of the correspondence, the nature of the record sought is not entirely clear. If it is the form prepared by the New York State Board of Real Property Services entitled "Agricultural Assessment Application", and if the Town maintains the form in which you are interested, I believe that it should be made available following the deletion of various items.

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 may be applicable as a basis for withholding portions of the application.

Section 87(2)(b) permits an agency to withhold records or portions thereof insofar as disclosure would constitute "an unwarranted invasion of personal privacy." Personal information, such as a home telephone number and personal financial details, might properly be deleted under that exception. The other exception of possible significance, §87(2)(d), enables an agency to withhold records to the extent that disclosure would "cause substantial injury to the competitive position" of a commercial enterprise. That provision might be applicable with respect to sales and other financial information. Other aspects of the form, however, would generally appear to be accessible.

If you are seeking a different record, and Town officials have indicated that the Town does maintain such a record, you make seek a certification in writing pursuant to §89(3) of the Freedom of Information Law in which it is asserted that a "diligent search" for the record has been made but that the record could not be found.

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-12790

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

July 10, 2001

Mr. Robert J. Arkin
92-A-9397
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. Arkin:

I have received your letter in which you sought assistance in obtaining records from the Legal Aid Society and the 19th Police Precinct. You stated that your requests have not been answered.

In the regard to your request to the Legal Aid Society, the Freedom of Information Law pertains to records maintained by agencies. Section 86(3) of the Freedom of Information Law defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Therefore, in general, the Freedom of Information Law is applicable to entities of state and local government.

It is my understanding the there are a variety of entities within New York that use the name "Legal Aid Society". Some are a part of the federal Legal Services Corporation, some may be private not-for profit corporations, and some may be parts of units of local government. While legal aid societies which are agencies of local government may be subject to the Freedom of Information Law, most are not "agencies" as that term is defined in the Freedom of Information Law and, as such, are not subject to that statute.

I am not fully familiar with the specific status of the Legal Aid Society in question. However, I believe that it is a corporate entity separate and distinct from government, that it is not an "agency" subject to the Freedom of Information Law and that, therefore, the records in which you are interested are outside the scope of public rights of access.

In view of the foregoing, it is suggested that you discuss the matter with an attorney.

In regard to your request directed to the 19th Precinct, the Freedom of Information Law is clearly applicable to that agency and 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)].

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12791

41 State Street, Albany, New York 12231
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July 10, 2001

Mr. William Cook
01-A-0209
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. Cook:

I have received your letter in which you asked a variety of questions in relation to obtaining records under the Freedom of Information Law.

In this regard, I offer the following comments.

First, 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."

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of

the Law. While some aspects of the records sought might properly be withheld, relevant is a decision by the Court of Appeals concerning DD5's and police officers' memo books in which it was held that a denial of access based on their characterization as intra-agency materials would be inappropriate.

The provision at issue, §87(2)(g) of the Freedom of Information Law, enables an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

In its analysis of the matter, the decision states that:

> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)...
>
> "...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process

of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][i]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182).

"Against this backdrop, we conclude that the complaint follow-up reports contain substantial factual information available pursuant to the provisions of FOIL. Sections of the report are devoted to such purely factual data as: the names, addresses, and physical descriptions of crime victims, witnesses, and perpetrators; a checklist that indicates whether the victims and witnesses have been interviewed and shown photos, whether crime scenes have been photographed and dusted for fingerprints, and whether neighborhood residents have been canvassed for information; and a blank space denominated 'details' in which the officer records the particulars of any action taken in connection with the investigation.

"However, the Police Department argues that any witness statements contained in the reports, in particular, are not 'factual' because there is no assurance of the statements' accuracy and reliability. We decline to read such a reliability requirement into the phrase 'factual data', as the dissent would have us do, and conclude that a witness statement constitutes factual data insofar as it embodies a factual account of the witness's observations. Such a statement, moreover, is far removed from the type of internal government exchange sought to be protected by the intra-agency exemption (see, Matter of Ingram v. Axelod, 90 AD2d 568, 569 [ambulance records, list of interviews, and reports of interviews available under FOIL as 'factual data']). By contrast, any impressions, recommendations, or opinions recorded in the complaint follow-up report would not constitute factual data and would be exempt from disclosure. The holding herein is only that these reports are not categorically exempt as intra-agency material. Indeed, the Police Department is entitled to withhold complaint follow-up reports, or specific portions thereof, under any other applicable exemption, such as the law-enforcement exemption or the public-

> safety exemption, as long as the requisite particularized showing is made" [Gould, Scott and DeFelice v. New York City Police Department, __ NY2d __, November 26, 1996; emphasis added by the Court].

Based on the foregoing, a police departmentneither the Police Department nor an office of a district attorney cannot claim that DD5's can be withheld in their entirety on the ground that they constitute intra-agency materials. However, the Court was careful to point out that other grounds for denial might apply in consideration of those records, as well as others that you requested.

For instance, of potential significance is §87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". That provision might be applicable relative to the deletion of identifying details in a variety of situations, i.e., where a record identifies a confidential source or a witness, for example.

Often the most relevant provision concerning access to records maintained by law enforcement agencies is §87(2)(e), which permits an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in sub-paragraphs (i) through (iv) of §87(2)(e).

Another possible ground for denial is §87(2)(f), which permits withholding to the extent that disclosure "would endanger the life or safety of any person". The capacity to withhold on that basis is dependent upon the facts and circumstances concerning an event.

Additionally, in a decision concerning a request for records maintained by the office of a district attorney that would ordinarily be exempted from disclosure under the Freedom of Information Law, it was held that "once the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public" [see Moore

v. Santucci, 151 AD 2d 677, 679 (1989)]. Based upon that decision, it appears that records introduced into evidence or disclosed during a public judicial proceeding should be available.

However, in the same decision, it was also found that:

> "...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

Lastly, it is noted that although the courts and court records are not subject to the Freedom of Information Law [see definitions of "agency" , §86(3), and "judiciary", §86(1), many courts records are nonetheless accessible to the public under various statutes. For example, §255 of the Judiciary Law states 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 by 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."

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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July 10, 2001

Mr. Tyron Varra
99-A-5682
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. Varra:

I have received your letter in which you sought assistance in obtaining records from the New York City Police Department

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of your correspondence, I offer the following comments.

First, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been

constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. While some aspects of the records sought might properly be withheld, relevant is a decision by the Court of Appeals concerning DD5's and police officers' memo books in which it was held that a denial of access based on their characterization as intra-agency materials would be inappropriate.

The provision at issue, §87(2)(g) of the Freedom of Information Law, enables an agency to withhold records that:

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> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

In 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).
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> "Against this backdrop, we conclude that the complaint follow-up reports contain substantial factual information available pursuant to the provisions of FOIL. Sections of the report are devoted to such purely factual data as: the names, addresses, and physical descriptions of crime victims, witnesses, and perpetrators; a checklist that indicates whether the victims and witnesses have been interviewed and shown photos, whether crime scenes have been photographed and dusted for fingerprints, and whether neighborhood residents have been canvassed for information; and a blank space denominated 'details' in which the officer records the particulars of any action taken in connection with the investigation.

> "However, the Police Department argues that any witness statements contained in the reports, in particular, are not 'factual' because there is no assurance of the statements' accuracy and reliability. We decline to read such a reliability requirement into the phrase 'factual data', as the dissent would have us do, and conclude that a witness statement constitutes factual data insofar as it embodies a factual account of the witness's observations. Such a statement, moreover, is far removed from the type of internal government exchange sought to be protected by the intra-agency exemption (see, Matter of Ingram v. Axelod, 90 AD2d 568, 569 [ambulance records, list of interviews, and reports of interviews available under FOIL as 'factual data']). By contrast, any impressions, recommendations, or opinions recorded in the complaint follow-up report would not constitute factual data and would be exempt from disclosure. The holding herein is only that these reports are not categorically exempt as intra-agency material. Indeed, the Police Department is entitled to withhold complaint follow-up reports, or specific portions thereof, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" [Gould, Scott and DeFelice v. New York City Police Department, __ NY2d __, November 26, 1996; emphasis added by the Court].

Based on the foregoing, a police departmentneither the Police Department nor an office of a district attorney cannot 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.

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> ii. deprive a person of a right to a fair trial or impartial adjudication;

> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
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> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in sub-paragraphs (i) through (iv) of §87(2)(e).

Another possible ground for denial is §87(2)(f), which permits withholding to the extent that disclosure "would endanger the life or safety of any person". The capacity to withhold on that basis is dependent upon the facts and circumstances concerning an event.

Additionally, in a decision concerning a request for records maintained by the office of a district attorney that would ordinarily be exempted from disclosure under the Freedom of Information Law, it was held that "once the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public" [see Moore v. Santucci, 151 AD 2d 677, 679 (1989)]. Based upon that decision, it appears that records introduced into evidence or disclosed during a public judicial proceeding should be available.

However, in the same decision, it was also found that:

> "...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

Lastly, it is noted that although the courts and court records are not subject to the Freedom of Information Law [see definitions of "agency" , §86(3), and "judiciary", §86(1), many courts records are nonetheless accessible to the public under various statutes. For example, §255 of the Judiciary Law states 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 by 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."

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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July 10, 2001

Mr. William A. Evans
92-A-5030
Clinton Correctional Facility
Box 2001
Dannemora, NY 12929-2001

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Evans:

I have received your letter in which you sought assistance in obtaining records from the Nassau County Police Department and the County Attorney. You stated that they have refused to answer your requests.

In this regard, I offer the following comments.

The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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July 10, 2001

Hon. Eunice O. Esposito
Town Clerk
Town of Rotterdam
Town Hall
11 Sunrise Boulevard
Rotterdam, NY 12306

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence, unless otherwise indicated.

Dear Ms. Esposito:

I have received your letters of May 29 and June 14. In the first, you referred to the receipt of a subpoena to testify before a grand jury by the Town of Rotterdam Assessor's office and asked whether it is "foilable." In the second, you asked whether the documents requested in a grand jury subpoena are "foilable." You added that correspondence relating to the subpoena to testify might, if disclosed, "impede this federal investigation."

In this regard, based on news accounts, it is my understanding that the subpoenas to which you referred were disclosed to the news media, notwithstanding the admonition given by a federal agency. That being so, it appears that the question concerning access to the subpoena is moot. With respect to access to the records sought by means of a subpoena, I believe that they would be accessible or deniable depending on their nature, content and volume.

As a general matter, the Freedom of Information Law pertains to all agency records and is based on a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

From my perspective, the legislative history of a key provision is significant. While the New York Freedom of Information Law differs from the federal Freedom of Information Act (5 USC §552), the Court of Appeals, the state's highest court, has found that the New York statute is "patterned after" its federal counterpart [see Encore College Bookstores v. Auxiliary Service Corporation, 87 NY2d 410, 418 (1995)]. When the state's Freedom of Information Law was enacted

in 1974, it exempted "investigatory files compiled for law enforcement purposes" from rights of access [see original Freedom of Information Law, §88(7)]. That provision was based on similar language appearing in the original version of the federal Act. However, both statutes were amended, the federal Act late in 1974, and the state law in 1977. Both eliminated the phrase "investigatory files" and replaced it with an exception dealing with records "compiled for law enforcement purposes."

Since the records sought are maintained by the Town, an agency subject to the state Freedom of Information Law, relevant in determining rights of access in my view is the provision to which allusion was made above, §87(2)(e). That provision authorizes an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

Based on news articles and conversations with Town officials and others, I believe that the records sought by means of the subpoena involve assessment records that were prepared prior to any investigation and in the ordinary course of business. If that is so, in my opinion, they could not be characterized as records "compiled for law enforcement purposes." The Court of Appeals has held on several occasions that the exceptions to rights of access appearing in §87(2) "are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption be articulating a particularized and specific justification for denying access" [Capital Newspapers v. Burns, 67 NY 2d 562, 566 (1986); see also, M. Farbman & Sons v. New York City Health and Hospitals Corp., 62 NY 2d 75, 80 (1984); Fink v. Lefkowitz, 47 NY 2d 567, 571 (1979)]. Based upon the thrust of those decisions, §87(2)(e) should be construed narrowly in order to foster access.

Further, case law illustrates why §87(2)(e) should be construed narrowly, 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 under the Freedom of Information Law. In granting access to the minutes, the decision indicated that "the party resisting

disclosure has the burden of proof in establishing entitlement to the exemption," and the judge wrote that he:

> "must note in the first instance that the records sought were not compiled for law enforcement purposes (P.O.L. 87[2]e). Minutes of Village Board meetings serve a different function...These were public records, ostensibly prepared by the petitioner, so there can be little question of the disclosure of confidential material."

Often records prepared in the ordinary course of business, 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. In John Doe Corp. v. John Doe Agency, the United States Court of Appeals reached the same conclusion construing the federal Freedom of Information Act; 850 F2d 105 (1988)]. That court reviewed the legislative history of the federal Act, and in its discussion of the matter, wrote as follows:

> "The district court held that the documents were exempt under FOIA Subsection (b)(7), which exempts from disclosure 'matters that are...records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information[] could reasonably be expected to interest with enforcement proceedings.' Although the district court concluded that disclosure would 'jeopardize' the grand jury proceedings, it made no finding as to whether the records sought were 'compiled for law enforcement purposes.' Such a finding is essential to a valid claim of exemption under Subsection (b)(7). Indeed, the judicial precedent relied upon by the district court, *Hatcher v. United States Postal Service*, 556 F.Supp. 331 (D.D.C. 1982), expressly distinguished between exempted documents created pursuant to a criminal investigation and discloseable documents created as a matter of routine, prior to and independent of the investigation. *Id.* At 334-335.
>
> "In the instant case, the documents requested were generated by Agency independent of any investigation in the course of its routine monitoring of Corporation's accounting procedures with regard to

> Corporation's defense contracts. The records were compiled in 1978, seven years before the investigation began in 1985. They were thus not 'compiled for law enforcement purposes' and are not exempted by Subsection (b)(7).
>
> "The 1974 amendments to the FOIA make it clear that a governmental entity cannot withhold materials requested under the FOIA on the ground that materials that were not investigatory records when compiled have since acquired investigative significance. Originally, the FOIA exemption in question applied to 'investigatory files.' In 1974, however, Congress substituted the word 'records' for 'files' to insure that documents produced in the routine course of government operations would not be withheld under Subsection (b)(7) merely because they had been commingled with investigative materials generated later in the course of a law enforcement proceeding. *Robbins Tire & Rubber,* 437 U.S. at 227-30, 98 S.Ct. At 2319-21; *see also Abramson*, 456 U.S. at 626-27, 102 S.Ct. At 2061-62. The attempt in this instant case to withhold documents generated in the course of routine audits because they are now part of an investigatory file thus contravenes the obvious intent of the 1974 amendments to FOIA" (id., 108-109).

In short, if the records subject to the subpoena were prepared in the ordinary course of business, I do not believe that the §87(2)(e), the exception pertaining to records compiled for law enforcement purposes, would apply.

This is not to suggest that other grounds for denial may not be applicable. For instance, if the assessment records sought include personal income tax forms used to establish eligibility for senior citizens' exemptions, those forms could, in my view, be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see §87(2)(b)]. Similarly, if records sought pertain to employees of the Town and include items such as social security numbers or personal medical information relating to the employees or their dependents, the same provision could likely be asserted to withhold those portions of the records. If a subpoena focuses on the records of a particular employee in conjunction with certain actions, dates and the like, or due to its nature, involves intimate information, §87(2)(b) might properly be asserted to deny access. However, if the subpoena, as in the situation described in King, involves an array of records that had been available to the public as a matter of course, I believe that they would remain available and subject to disclosure.

Lastly, I am unaware of the volume of materials that may have been subpoenaed. However, I note that in a case in which the documents subpoenaed consisted of "several truckloads" of materials, it was found that the request was not sufficiently detailed to require "straining resources" of the agency (Collier County Publishing Company, Inc. v.Office of the District Attorney, Supreme Court, New York County, October 5, 2000).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1275

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

July 10, 2001

Mr. Pascacio Jimenez
98-A-2845
Shawangunk Correctional Facility
Box 700
Wallkill, NY 12589

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Jimenez:

I have received your letter in which you sought assistance in obtaining trial transcripts from the Nassau County District Attorney. You stated that your request has not been answered.

In this regard, the Freedom of Information Law pertains to agency records, and §86(3) of that statute defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines "judiciary" to mean:

> "the courts of the state, including any municipal or district court, whether or not of record."

In view of the foregoing, the courts and court records are not subject to the Freedom of Information Law.

I direct your attention to a decision, Moore v. Santucci [151 AD 2d 677 (1989)]. That decision specified that the respondent office of a district attorney "is not required to make available for inspection or copying any suppression hearing or trial transcripts of a witness' testimony in its possession, because the transcripts are court records, not agency records" (id. at 680).

The foregoing is not intended to suggest that the transcript cannot be obtained. Although the courts are not subject to the Freedom of Information Law, court records are generally available under other provisions of law (see e.g., Judiciary Law, §255). It is suggested that you request the transcript from the clerk of the court in which the proceeding was conducted, citing an applicable provision of law.

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12796

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

July 10, 2001

Mr. Tom Kackmeister
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Kackmeister:

I have received your letter of May 18, which did not reach this office until May 30. You have asked whether I can "get the [Greece School District] to comply" with your request made under the Freedom of Information Law. The request involves documentation that serves as the basis for statements made in a "budget document" distributed by the District.

In this regard, first, it is emphasized that the Committee on Open Government is authorized to offer advice and opinions concerning the Freedom of Information Law. The Committee is not empowered to enforce the law or compel an agency of government to grant or deny access to records.

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 new record in response to a request. However, insofar as records are maintained by or for an agency, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. To the extent that the information sought exists in the form of a record or records, I believe that it would be available. In short, statistical or factual information contained with internal government records must ordinarily be disclosed [see Freedom of Information Law, §87(2)(g)(i)].

Lastly, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record

> reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12797

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

July 11, 2001

Ms. June Maxam
The North Country Gazette
Box 408
Chestertown, NY 12817

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Maxam:

I have received your letters of May 30 and July 6 concerning your efforts in gaining access to records of the Warren County Sheriff's Department. The issues appear to involve the payment of fees relating to requests made under the Freedom of Information Law.

In response to your 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 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.

Second, it has been held that an agency may require payment of the requisite fee before it prepares copies of records (Sambucci v. McGuire, Supreme Court, New York County, November 4, 1982). Further, it has been advised that when an agency produces copies of records in response to a request but the applicant for the records has not paid the requisite fee, the agency can refuse to honor further requests until the fee is paid 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.

If I correctly understand the situation as you presented it, you paid for copies made available and have cancelled checks to prove that is so, but the Sheriff has sought to impose fees regarding records that do not exist or could not be found. In that circumstance, no fee could, in my opinion, be imposed. Under both §87(1)(b)(iii) of the Freedom of Information Law and the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), no fee may be charged for search, for personnel time or for any certification made or requested under the Freedom of Information Law. In short, a fee may be charged only when a copy of a record is made.

Lastly, as you are aware, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

While an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days, when such acknowledgement is given, there is no precise time period within which an agency must grant or deny access to records. The time needed to do so may be dependent upon the volume of a request, the possibility that other requests have been made, the necessity to conduct legal research, the search and retrieval techniques used to locate the records, 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. From my perspective, if an applicant has paid fees for copies of records, the agency is required to provide copies promptly and without delay.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Sheriff Larry Cleveland

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3335
FOIL-AO-12798

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

July 12, 2001

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./Ms. Worth:

I have received your letter in which you sought information concerning the "penalty phase for a municipality which is in violation of the Sunshine Law, as well as failure to provide information or a response when a Freedom of Information request form has been filed."

In this regard, the full text of the Freedom of Information and Open Meetings Laws is available on the Committee's website under "publications." The website also includes frequently asked questions and perhaps most importantly, thousands of advisory opinions rendered by this office. They are available through indices to opinions prepared in relation to both statutes.

With respect to "penalties", under the Freedom of Information Law, if an agency denies access to records in a manner inconsistent with law, a court may award attorney's fees to the person denied access under certain circumstances. Section 89(4)(c) states that:

> "The court in such a proceeding may assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed, provided, that such attorney's fees and litigation costs may be recovered only where the court finds that:
>
> i. the record involved was, in fact, of clearly significant interest to the general public; and
>
> ii. the agency lacked a reasonable basis in law for withholding the record.

It is also noted that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

With regard to the Open Meetings Law, under §107, any aggrieved person may bring an action, and a court in such proceeding has discretionary authority to nullify action taken by a public body in private in violation of that statute and may award attorney's fees to the successful party.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1279

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

July 12, 2001

Mr. Richard B. Meyer
Essex County Industrial Development Agency
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:

I appreciate having received a copy of your letter addressed to Mr. Edwin J. Shoemaker concerning his request that an exception from disclosure conferred under §89(5) of the Freedom of Information Law be continued.

In this regard, I point out the provision upon which you relied applies may be invoked only by a state agency; it would not apply, in my view, with respect to records maintained by a county industrial development agency created by the General Municipal Law. The introductory language of §89(5) states that:

> "A person acting pursuant to law or regulation who, subsequent to the effective date of this subdivision, submits any information *to any state agency* may, at the time of submission, request that the agency except such information from disclosure under paragraph (d) of subdivision two of section eighty-seven of this article"(emphasis mine).

Paragraph (a) of §87(4) refers to state agencies maintaining records containing trade secrets, and paragraph (b) defines "agency" or "state agency" as used in §89(5) to mean:

> "...only a state department board, bureau, division, council or office and any public corporation the majority of whose members are appointed by the governor."

While I do not believe that §89(5) is applicable, that is not to suggest that a municipal agency could not in appropriate circumstances deny access to records under §87(2)(d).

I hope that the foregoing serves to clarify your understanding of the Freedom of Information Law.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Jonathan Slosser

From: Robert Freeman
To: Internet[redacted]
Date: 7/12/01 10:53AM
Subject: Dear Mr. Casey:

Dear Mr. Casey:

I have received your letter concerning your request to the Department of Taxation and Finance under the Freedom of Information Law.

As a general matter, that statute pertains to existing records, and section 89(3) states in part that an agency is not required to create or prepare a record that it does not maintain, except in certain circumstances. One of those circumstances relates to the information in question. Specifically, section 87(3) provides 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..."

With respect to Ms. Mullins' response, I am unfamiliar with the phrase "postal stop." If a postal stop can be equated with an address, perhaps the information sought could be disclosed with postal stops, plus an indication of the addresses of those stops.

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

CC: Internet:jude_mullins@tax.state.ny.us

From: Robert Freeman
To: [redacted]
Date: 7/12/01 3:08PM
Subject: Dear Mr. Liebrand:

Dear Mr. Liebrand:

I have received your inquiry in which you asked whether you may obtain "copies of letters from individuals and organizations that slandered [you] to you [your] employer, a school district, when [you were] seeking a promotion."

It is likely that the records would be accessible in part under the Freedom of Information Law. In brief, that statute is based on a presumption of access. Stated differently, all government records are available, except to the extent that one or more grounds for denial of access may properly be asserted. From my perspective, two of the grounds for denial would be pertinent.

First, if another employee of the district, a board member, or any other government officer or employee prepared a letter relating to your promotion, those portions of the letter consisting of an opinion, advice, a recommendation and the like may be withheld. Documentation of that nature would consist of "inter-agency or intra-agency material" that may be withheld [see Freedom of Information Law, section 87(2)(g)].

Second, insofar as letters were transmitted by members of the public, I believe that those portions which if disclosed would identify the authors of those letters or students could be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see section 87(2)(b)]. If the deletion of personally identifying details precludes you from knowing the identities of the authors and others (i.e., students), the remainder of those letters would, in my view, be accessible. It is noted that the federal Family Educational Rights and Privacy Act essentially prohibits a school district from disclosing information that is personally identifiable to a student 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.

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-12802

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

July 13, 2001

Ms. Cheryl L. Dietzman
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Dietzman:

I have received your letter in which you questioned the propriety of a denial of access to records by Delaware County. The request involved "records pertaining to an investigation performed by John Trela with regard to sexual harassment by William R. Moon of female employees." The request was denied in its entirety under §87(2)(g) of the Freedom of Information Law.

From my perspective, rights of access would be dependent on the outcome of the investigation. In this regard, I offer the following comments.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, two of the grounds for denial would be pertinent to an analysis of rights of access.

Section 87(2)(b) states that an agency may withhold records insofar as disclosure would result in "an unwarranted invasion of personal privacy. Although the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public employees. It is clear that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. Further, the courts have found that, as a general rule, records that are relevant to the performance of a public employee's official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978);

Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

Several of the decisions cited above, for example, Farrell, Sinicropi, Geneva Printing, Scaccia and Powhida, dealt with situations in which determinations indicating the imposition of some sort of disciplinary action pertaining to particular public employees were found to be available. However, when allegations or charges of misconduct have not yet been determined or did not result in disciplinary action, the records relating to such allegations may, according to case law, be withheld, for disclosure would result in an unwarranted invasion of personal privacy [see e.g., Herald Company v. School District of City of Syracuse, 430 NYS 2d 460 (1980)].

In short, if there was no determination to the effect that an employee engaged in misconduct, I believe that a denial of access to the records based upon considerations of privacy would be consistent with law. I note, however, that there are several decisions indicating that the terms of settlement agreements reached in lieu of disciplinary proceedings must generally be disclosed [see Geneva Printing, supra; Western Suffolk BOCES v. Bay Shore Union Free School District, Appellate Division, Second Department, NYLJ, May 22, 1998, ___ AD2d ___; Anonymous v. Board of Education for Mexico Central School District, 616 NYS2d 867 (1994); and Paul Smith's College of Arts and Science v. Cuomo, 589 NYS2d 106, 186 AD2d 888 (1992)].

The exception pertaining to the protection of personal privacy could also be invoked in my opinion to shield the identities of alleged victims and perhaps others, such as witnesses.

The other provision of significance is that cited by the County, §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 sum, if there was a final determination indicating misconduct on the part of a public employee, based on judicial determinations, such a determination would be accessible. In that event, other aspects of the records consisting of factual information would be available, except to the extent that disclosure would constitute an unwarranted invasion of personal privacy. Again, however, if there was no finding of misconduct, it appears that the request could have been denied to protect personal privacy.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. James E. Eisel, Sr.
Christa Schafer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12803

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

July 16, 2001

Mr. Maurice Steel
92-A-9942
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 facts presented in your correspondence.

Dear Mr. Steel:

I have received your letter in which you explained that you brought an Article 78 proceeding against the Bronx County District Attorney for failing to locate your criminal file. The Supreme Court dismissed this proceeding and the Appellate Division, First Department affirmed the lower court ruling, finding that the District Attorney met the burden of demonstrating that the file could not be located.

You have questioned whether you may do anything else in an effort to have the records located, and whether you may seek to have sanctions imposed on the District Attorney's office for failing to locate the records.

In this regard, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. Insofar as your inquiry pertains to the availability of legal remedies beyond the scope of the Freedom of Information Law, this office has neither the jurisdiction nor the expertise to offer an opinion.

With respect to the Freedom of Information Law, 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."

When records cannot be located, the Freedom of Information Law does not provide for the imposition of sanctions or any other remedy beyond a review of the agency's determination pursuant to Article 78 of the Civil Practice Law and Rules.

You may wish to consider submitting another Freedom of Information Law request to the District Attorney in the future in the event that the file has been located since the conclusion of the court proceedings.

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12804

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

July 16, 2001

Mr. Steven Pappas
00-A-2447
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. Pappas:

I have received your letter in which you sought assistance in obtaining "case file" records from the Brooklyn County District Attorney.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of your correspondence, I offer the following comments.

First, pursuant to the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), each agency is required to designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests. While I believe that the person in receipt of your request should have responded in a manner consistent with the Freedom of Information Law or forwarded the request to the appropriate person, it is suggested that you resubmit your request to the records access officer.

Second, for future reference, I note that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person

> requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Third, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. While some aspects of the records sought might properly be withheld, relevant is a decision by the Court of Appeals concerning DD5's and police officers' memo books in which it was held that a denial of access based on their characterization as intra-agency materials would be inappropriate.

The provision at issue, §87(2)(g) of the Freedom of Information Law, enables an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

In its analysis of the matter, the decision states that:

> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)...
>
> "...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][i]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182).
>
> "Against this backdrop, we conclude that the complaint follow-up reports contain substantial factual information available pursuant to the provisions of FOIL. Sections of the report are devoted to such purely factual data as: the names, addresses, and physical descriptions

> of crime victims, witnesses, and perpetrators; a checklist that indicates whether the victims and witnesses have been interviewed and shown photos, whether crime scenes have been photographed and dusted for fingerprints, and whether neighborhood residents have been canvassed for information; and a blank space denominated 'details' in which the officer records the particulars of any action taken in connection with the investigation.
>
> "However, the Police Department argues that any witness statements contained in the reports, in particular, are not 'factual' because there is no assurance of the statements' accuracy and reliability. We decline to read such a reliability requirement into the phrase 'factual data', as the dissent would have us do, and conclude that a witness statement constitutes factual data insofar as it embodies a factual account of the witness's observations. Such a statement, moreover, is far removed from the type of internal government exchange sought to be protected by the intra-agency exemption (see, Matter of Ingram v. Axelrod, 90 AD2d 568, 569 [ambulance records, list of interviews, and reports of interviews available under FOIL as 'factual data']). By contrast, any impressions, recommendations, or opinions recorded in the complaint follow-up report would not constitute factual data and would be exempt from disclosure. The holding herein is only that these reports are not categorically exempt as intra-agency material. Indeed, the Police Department is entitled to withhold complaint follow-up reports, or specific portions thereof, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" [Gould, Scott and DeFelice v. New York City Police Department, 89 NY2d 267, 276-277 (1996); emphasis added by the Court].

Based on the foregoing, neither the Police Department nor an office of a district attorney can claim that DD5's can be withheld in their entirety on the ground that they constitute intra-agency materials. However, the Court was careful to point out that other grounds for denial might apply in consideration of those records, as well as others that you requested.

For instance, of potential significance is §87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". That provision might be applicable relative to the deletion of identifying details in a variety of situations, i.e., where a record identifies a confidential source or a witness, for example.

Often the most relevant provision concerning access to records maintained by law enforcement agencies is §87(2)(e), which permits an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in sub-paragraphs (i) through (iv) of §87(2)(e).

Another possible ground for denial is §87(2)(f), which permits withholding to the extent that disclosure "would endanger the life or safety of any person". The capacity to withhold on that basis is dependent upon the facts and circumstances concerning an event.

Lastly, in a decision concerning a request for records maintained by the office of a district attorney that would ordinarily be exempted from disclosure under the Freedom of Information Law, it was held that "once the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public" [see Moore v. Santucci, 151 AD 2d 677, 679 (1989)]. Based upon that decision, it appears that records introduced into evidence or disclosed during a public judicial proceeding should be available.

However, in the same decision, it was also found that:

> "...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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July 16, 2001

Mr. George Philips
00-A-2299
Five Points Correctional Facility
Caller Box 119
Romulus, NY 14541

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Philips:

I have received your letter in which you sought assistance in obtaining records from the Nassau County and New York City Police Departments and offices of district attorneys.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of your correspondence, I offer the following comments.

First, pursuant to the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), each agency is required to designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests. While I believe that the person in receipt of your request should have responded in a manner consistent with the Freedom of Information Law or forwarded the request to the appropriate person, it is suggested that you resubmit your request to the records access officer.

Second, for future reference, I note that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record

> reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Third, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. While some aspects of the records sought might properly be withheld, relevant is a decision by the Court of Appeals concerning DD5's and police officers' memo books in which it was held that a denial of access based on their characterization as intra-agency materials would be inappropriate.

The provision at issue, §87(2)(g) of the Freedom of Information Law, enables an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
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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).
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> 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.
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> "However, the Police Department argues that any witness statements contained in the reports, in particular, are not 'factual' because there is no assurance of the statements' accuracy and reliability. We decline to read such a reliability requirement into the phrase 'factual data', as the dissent would have us do, and conclude that a witness statement constitutes factual data insofar as it embodies a factual account of the witness's observations. Such a statement, moreover, is far removed from the type of internal government exchange sought to be protected by the intra-agency exemption (see, Matter of Ingram v. Axelrod, 90 AD2d 568, 569 [ambulance records, list of interviews, and reports of interviews available under FOIL as 'factual data']). By contrast, any impressions, recommendations, or opinions recorded in the complaint follow-up report would not constitute factual data and would be exempt from disclosure. The holding herein is only that these reports are not categorically exempt as intra-agency material. Indeed, the Police Department is entitled to withhold complaint follow-up reports, or specific portions thereof, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" [Gould, Scott and DeFelice v. New York City Police Department, 89 NY2d 267, 276-277 (1996); emphasis added by the Court].

Based on the foregoing, 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;
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> ii. deprive a person of a right to a fair trial or impartial adjudication;
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> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
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> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in sub-paragraphs (i) through (iv) of §87(2)(e).

Another possible ground for denial is §87(2)(f), which permits withholding to the extent that disclosure "would endanger the life or safety of any person". The capacity to withhold on that basis is dependent upon the facts and circumstances concerning an event.

Fourth, in a decision concerning a request for records maintained by the office of a district attorney that would ordinarily be exempted from disclosure under the Freedom of Information Law, it was held that "once the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public" [see Moore v. Santucci, 151 AD 2d 677, 679 (1989)]. Based upon that decision, it appears that records introduced into evidence or disclosed during a public judicial proceeding should be available.

However, in the same decision, it was also found that:

> "...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

Lastly, you also requested "sample copies of article 78 motion papers." This office does not maintain such documents. It is suggested that you seek the assistance of your attorney.

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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FOIL-AO-12806

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July 16, 2001

Ms. Sharon P. McLelland
[redacted]

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. McLelland:

I have received your letter of May 25, which reached this office on June 5. You have raised a series of issues relating to meetings held in the Town of Wilton, as well as the preparation and disclosure of records pertaining to those meetings. Based on your remarks and a review of the materials that you forwarded, I offer the following comments.

First, since you referred to the federal Government in the Sunshine Act, I point out that that statute is applicable to entities created by and operating within the federal government. In my view, it has no application in the situation that you described. It appears, however, that the state counterpart, the New York Open Meetings Law, is pertinent. That statute is applicable to meetings of "public bodies", and §102(2) defines the phrase "public body" to mean:

> "any entity, fir which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

In consideration of the foregoing, in brief, a public body is an entity consisting of at least two members that conducts public business and performs a governmental function, in this instance, for a municipality. A legislative body, such as a town board, clearly constitutes a public body. Similarly, assuming that the Parks and Recreation Commission consists of the components in the definition quoted above, I believe that it, too, would constitute a public body subject to the Open Meetings Law.

A "meeting" [see Open Meetings Law, §102(1)] is gathering of a majority, or quorum, of a public body for the purpose of conducting public business, and it has been held that any such gathering, irrespective of its characterization or the absence of an intent to take action, falls within the coverage of the Open Meetings Law [see e.g., Orange County Publications v. Council of the City of Newburgh, 60 AD2d 409, aff'd 45 NY2d 947 (1978)]. If less than a quorum is present, the Open Meetings Law does not apply. Further, a gathering of public officers or employees, such as employees of a town department who do not serve on a town board or other public body, would fall beyond the coverage of the Open Meetings Law.

Second, every meeting of a public body must be preceded by notice. Section 104 of Open Meetings Law states that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
>
> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
>
> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

Stated differently, if a meeting is scheduled at least a week in advance, notice of the time and place must be given to the news media and to the public by means of posting in one or more designated public locations, not less than seventy-two hours prior to the meeting. If a meeting is scheduled less than a week an advance, again, notice of the time and place must be given to the news media and posted in the same manner as described above, "to the extent practicable", at a reasonable time prior to the meeting. 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. While a public body may choose to provide notice to an individual having a particular interest in a meeting, there is no obligation to do so.

Third, the Open Meetings Law contains what might be characterized as minimum requirements concerning the contents of minutes of meetings. Specifically, §106 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 a verbatim transcript of a meeting need not be prepared to comply with the Open Meetings Law. So long as minutes include the items referenced above, a public body would be acting in compliance with law.

Next, with respect to access to notes of meetings, I direct your attention to 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. Therefore, if, for example, there is no record containing an explanation of the rationale for a certain action taken by a board or commission, there would be no requirement that a new record be prepared that includes an explanation. However, 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."

In consideration of the foregoing, notes of a meeting would constitute a "record" subject to rights of access. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Insofar as notes of a meeting have been prepared, of likely significance would be §87(2)(g). Although that provision represents a ground for a denial of access, due to its structure, it may require the disclosure of substantial portions of records. Section 87(2)(g) permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

I hope that the preceding serves to clarify your understanding of the Freedom of Information and Open Meetings Law and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. John E. Sweeney
Hon. Shirley Murray
Town Board
Parks and Recreation Commission

From: Robert Freeman
To: Internet:the [redacted]
Date: 7/16/01 1:16PM
Subject: Dear Mr. Healy:

Dear Mr. Healy:

I have received your communication in which you sought guidance concerning the means of requesting payroll and related records pertaining to the staff of Assemblywoman Nancy Calhoun.

In this regard, each entity subject to the Freedom of Information Law is required to adopt rules and regulations dealing with the procedural implementation of that statute. One aspect of those rules involves the designation of one or more persons as "records access officer." The records access officer has the duty of coordinating the entity's response to requests, and requests should ordinarily be made to that person. The Assembly's records access officer is Ms. Sharon Walsh, and it is suggested that you direct your request to her. Ms. Walsh can be reached by phone at (518)455-4218.

Section 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 staff to locate and identify the records. A fee of up to twenty-five cents per photocopy may be charged.

I note that the Freedom of Information Law applies differently to the State Legislature than it applies to agencies of state and local government (see section 88)

To obtain additional information on the subject, you might review materials on our website, which include the text of the Freedom of Information Law and "Your Right to Know", an explanatory guide to the law that contains a sample letter of request, under the heading of "publications."

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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Website - www.dos.state.ny.us/coog/coogwww.html

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

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July 16, 2001

Mr. Wayne Semple
96-A-2854
S-Block B-1 21
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. Semple:

I have received your letter in which you sought the name and address of the individual to whom you may direct an appeal. You explained that you had not received responses to the Freedom of Information requests submitted to an "assistant district attorney located in Brooklyn, New York."

In this regard, I offer the following comments.

First, by way of background, §89(1) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural implementation of that statute (21 NYCRR Part 1401). In turn, §87(1) requires the governing body of a public corporation to adopt rules and regulations consistent those promulgated by the Committee and with the Freedom of Information Law. Further, §1401.2 of the regulations provides in relevant part that:

> "(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so."

Based on the foregoing, I believe that the records access officer has the duty of coordinating responses to requests.

Section 1401.2(b) of the regulations describes the duties of a records access officer and states in part that:

> "The records access Officer is responsible for assuring that agency personnel:
>
> (1) Maintain an up-to-date subject matter list.
> (2) Assist the requester in identifying requested records, if necessary.
> (3) Upon locating the records, take one of the following actions:
> (i) make records promptly available for inspection; or
> (ii) deny access to the records in whole or in part and explain in writing the reasons therefor.
> (4) Upon request for copies of records:
> (i) make a copy available upon payment or offer to pay established fees, if any; or
> (ii) permit the requester to copy those records.
> (5) Upon request, certify that a record is a true copy.
> (6) Upon failure to locate the records, certify that:
> (i) the agency is not the custodian for such records; or
> (ii) the records of which the agency is a custodian cannot be found after diligent search."

As stated above, the records access officer must "coordinate" an agency's response to requests. Therefore, I believe that requests may be made to County officials generally. In my opinion, when an official receives a request, he or she, in accordance with the direction provided by the records access officer, must respond in a manner consistent with the Freedom of Information Law, or forward the request to the records access officer.

In the event you still have not received a response, it is suggested that you resubmit your Freedom of Information Law request directly to the "Records Access Officer" at the office of the Kings County District Attorney.

Second, the regulations also state that:

> "(a) The governing body of a public corporation or the head, chief executive or governing body of other agencies shall hear appeals or shall designate a person or body to hear appeals regarding denial of access to records under the Freedom of Information Law.
>
> (b) Denial of access shall be in writing stating the reason therefor and advising the person denied access of his or her right to appeal to the person or body established to hear appeals, and that person or body shall be identified by name, title, business address and business telephone number. The records access officer shall not be the appeals officer" (§1401.7).

It is also noted that the state's highest court has held that a failure to inform a person denied access to records of the right to appeal enables that person to seek judicial review of a denial. Citing the Committee's regulations and the Freedom of Information Law, the Court of Appeals in Barrett v. Morgenthau held that:

> "[i]nasmuch as the District Attorney failed to advise petitioner of the availability of an administrative appeal in the office (see, 21 NYCRR 1401.7[b]) and failed to demonstrate in the proceeding that the procedures for such an appeal had, in fact, even been established (see, Public Officers Law [section] 87[1][b], he cannot be heard to complain that petitioner failed to exhaust his administrative remedies" [74 NY 2d 907, 909 (1989)].

In sum, an agency's records access officer has the duty individually, or in that person's role of coordinating the response to a request, to inform a person denied access of the right to appeal as well as the name and address of the person or body to whom an appeal may be directed.

Lastly, whether records are accessible or deniable, an agency is required to respond to a request. The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of 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,

David M. Treacy
Assistant Director

DMT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12809

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

July 16, 2001

Mr. Edward Nelson
95-R-2256
Collins Correctional Facility
P.O. Box 490
Collins, NY 14034-0490

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. Nelson:

I have received your letter in which you questioned whether every state agency is required to maintain a subject matter index, and whether your medical records are available pursuant to the Freedom of Information Law.

In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law pertains to existing records, and an agency is not required to create a record in response to a request [see §89(3)]. Similarly, if records that once existed have legally been disposed of or destroyed, the Freedom of Information Law would not apply.

An exception to 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.

Second, Willard Drug Treatment Campus and Five Points Correction Facility are parts of the New York State Department of Correctional Services. Therefore, I believe that they are units of an agency required to comply with the Freedom of Information Law.

In terms of rights granted by the Freedom of Information Law, the Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

With regard to medical records, the Freedom of Information Law, in my view, likely permits that some medical records may be withheld in whole or in part, depending upon their contents. For instance, medical records prepared by Campus personnel could be characterized as "intra-agency materials" that fall within the scope of §87(2)(g) of the Freedom of Information Law. To the extent that such materials consist of advice, opinion, recommendation and the like, I believe that the Freedom of Information Law would permit a denial.

However, a different statute, §18 of the Public Health Law, generally 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. In the event that you are still interested in the records, it is suggested that you renew your request to the appropriate facility and make specific reference to §18 of the Public Health Law in any request for medical records.

To obtain additional information concerning access to medical records and the fees that may be charged for searching and copying those records, you may write to:

Access to Patient Information Coordinator
New York State Department of Health
Division of Public Health Protection
Corning Tower Building - Room 2517
Empire State Plaza
Albany, New York 12237

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1281O

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

July 17, 2001

Mr. Wayne Booth
Town of Newburgh
1496 Route 300
Newburgh, NY 12550

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Booth:

I have received your letter in which you raised a series of questions relating to the application of the Freedom of Information Law.

You indicated that you serve as Town Clerk for the Town of Newburgh, and that you were "brought up on ethics charges for releasing a document to a [sic] employee's attorney during a wrongful firing lawsuit." By way of background, you wrote that the Town's Superintendent of Highways in December of 1999 "was suspended without a hearing for allegedly shooting a dear [sic] on Town property" and fired less than a week later. He initiated a proceeding against the Town, and in March of 2000 you received a copy of a document "at your residence" and sent it to the former Highway Superintendent's attorney. The document, a copy of which you enclosed, is "an internal memo from our former Town Attorney to one of his associates", and you indicated that the memo was later sent to the former Town Supervisor and other Town officials. You have sought on opinion as to whether the memo is:

> "1) A classified or Attorney/Client document.
> 2) Is this considered to be a Town document at all.
> 3) If this Document were still filed with the Town would it be accessible to everyone."

Although I am not certain that I clearly understand your questions, I offer the following comments.

First, assuming that the document in question had not been disclosed in the manner that you described, I believe that it would ordinarily have been privileged.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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." Among the statutes that exempt records from disclosure are §§3101(c) and 4503 of the Civil Practice Law and Rules (CPLR). The former deals with the work product of an attorney; the latter is the codification of the attorney-client privilege.

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 narrow limitations on disclosure. One of those limitations, §3101(c), states that "[t]he work product of an attorney shall not be obtainable."

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)].

In consideration of the foregoing, again, assuming that the document had not been disclosed, it would, in my view, be exempt from disclosure on the ground that it consists of attorney work product or is subject to the attorney-client privilege.

Second, is the document a "Town document?" From my perspective, if the document had been sent or delivered to a private citizen with no connection to a government agency, it could not be characterized as an agency record. On the other hand, however, if the record came into your possession because you are a government officer, it would appear to be a Town document.

Section 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."

The Court of Appeals, the state's highest court, has construed the definition of "record" 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 f that the documents constituted "records" subject to rights of access granted by the Law. Moreover, the Court determined that:

> "The statutory definition of 'record' makes nothing turn on the purpose for which it relates. This conclusion accords with the spirit as well as the letter of the statute. For not only are the expanding boundaries of governmental activity increasingly difficult to draw, but in perception, if not in actuality, there is bound to be considerable crossover between governmental and nongovernmental activities, especially where both are carried on by the same person or persons" (id.).

The physical location where records are sent or kept is, in my view, not determinative of the application of the Freedom of Information Law. That the document at issue may have been sent or delivered to your residence does not, in my opinion, answer your second question. If it was sent or delivered to you because you are the Town Clerk, I believe that it would constitute a Town record.

Lastly, for reasons discussed earlier, if the document had not been disclosed, but rather had remained in Town files, based on the assertion of the attorney work product exception or the attorney-client privilege, I believe that it would be confidential. If, however, the privilege has been waived, in my view, there would no longer be a basis for a denial of access, and the document would be accessible to the public.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board
Richard Drake

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO-284
FOIL-AO-1281

Committee Members

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

July 17, 2001

Mr. Richard Weigand
98-A-3059
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. Weigand:

I have received your letter in which you sought assistance in obtaining your daughter's address from the Department of Correctional Services and requested "copies of the Freedom of Information Laws."

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law and the Personal Privacy Protection Law. The Committee is not empowered to enforce those statutes or to compel an agency to grant or deny access to records. However, based on a review of your correspondence, I offer the following comments.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Also pertinent under the circumstances is the Personal Privacy Protection Law, which deals in part with the disclosure of records or personal information by state agencies concerning data subjects. A "data subject" is "any natural person about whom personal information has been collected by an agency" [Personal Privacy Protection Law, §92(3)]. "Personal information" is defined to mean "any information concerning a data subject which, because of name, number, symbol, mark or other identifier, can be used to identify that data subject" [§92(7)]. For purposes of that statute, the term "record" is defined to mean "any item, collection or grouping of personal information about a data subject which is maintained and is retrievable by use of the name or other identifier of the data subject" [§92(9)].

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.

The Freedom of Information Law specifies that home addresses pertaining to public employees need not be disclosed [see §89(7)]. Further, it has been held that the home addresses of others, persons who are not public employees, may be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy [see American Broadcasting Companies, Inc. v. Siebert, 442 NYS 2d 855 (1981), Empire Realty Corp. v. NYS Division of the Lottery, 657 NYS 2d 504, 230 AD 2d 270 (1997), Joint Industry Board of Electrical Industry v. Nolan, 159 AD 2d 241 (1990)].

Lastly, enclosed please find the document you requested this office to return, and copies of the Freedom of Information Law and the Personal Privacy Protection Law.

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:tt
Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12812

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

July 17, 2001

Mr. Frank Rodriguez
93-A-9555
Green Have Correctional Facility
Drawer B F-4-177
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. Rodriguez:

I have received your letter in which you sought assistance in obtaining information from the Brooklyn District Attorney.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of your correspondence, I offer the following comments.

By way of background, the Freedom of Information Law pertains to existing records, and §89(3) states in part that an agency is not required to create a record in response to a request for information. Similarly, an agency is not required to provide "information" in response to questions; its obligation is to provide access to existing records to the extent required by law. Therefore, if a request is made for a public officer to answer a question and the agency does not maintain a record that contains an answer, it would not be obliged to create a document. In my view, that kind of inquiry would not constitute a request for records under the Freedom of Information Law.

Lastly, the proper mailing address for the Kings County District Attorney is:

Hon. Charles J. Hynes
District Attorney
Renaissance Plaza
350 Jay Street
Brooklyn, NY 11201

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1283

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

July 17, 2001

Mr. Anthony Bennett
96-B-1530
Attica Correctional Facility
P.O. Box 149
Attica, NY 14011

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Bennett:

I have received your letter in which you sought assistance in obtaining information from the Social Security Administration.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of your correspondence, I offer the following comments.

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."

While the Social Security Administration is an agency for the purposes of the federal Freedom of Information Act (5 U.S.C.§552) and its exceptions, it falls beyond the definition of "agency" as the term is defined in the state statute. It is suggested that you cite the federal Freedom of Information Act in requests for records directed to federal agencies. The Freedom of Information officer for the Social Security Administration is Darrell Blevins, Room 3-A-6 Operations, 6401 Security Blvd.., Baltimore, MD 21235.

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:tt

PPDL AO-283
FOIL-AO-1281

From: Robert Freeman
To: [redacted]
Date: 7/17/01 4:57PM
Subject: Dear Mr. Witt:

Dear Mr. Witt:

I have received your letter in which you asked whether your employer could legally have disclosed "payroll records, like a time card", without your consent.

In this regard, it is noted at the outset that the state's Freedom of Information Law is applicable to agency records, and that section 86(3) of the law defines the term "agency" to mean an entity of state or local government. Similarly, the Personal Privacy Protection Law is applicable to personal information maintained by a state agency (it does not apply to local governments).

If your employer is not a government agency, neither of the laws referenced above would be applicable. Further, there is no law of which I am aware that generally deals with records maintained by private employers pertaining to their employees. If that is so, I believe that the employer would likely have had the authority to disclose.

If your employer is a government agency and you are a public employee, the kinds of records to which you referred would generally be available to the public under the Freedom of Information Law. In short, records of payments made to public employees, such as those involving salary or overtime, are clearly public. Further, it has been held that attendance records indicating time in, time out, and the days and dates of leave time used or accrued are accessible to the public.

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-1285

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

July 19, 2001

Ms. Eileen M. O'Rourke
[redacted]

The staff of the Committee on Open 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'Rourke:

I have received your letter in which you questioned the nature of the distinction between the kind of "trust" described in an opinion letter of May 20, 1998 and a public employee union in relation to the coverage of the Freedom of Information Law.

As indicated in that opinion, the Freedom of Information Law 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."

Based upon the foregoing, it has consistently been advised that a public employee union is not subject to the Freedom of Information Law. Although that kind of entity may have a relationship with government, it clearly is not government. For that reason, I do not believe that a public employee union constitutes an agency that is required to comply with the Freedom of Information Law.

Having reviewed the opinion to which you referred, it was my understanding that the Pension Trust at issue performs functions analogous to those of a retirement system, such as the New York State Retirement System or the retirement systems that operate within New York City government. If that is so, the Trust in question would be a governmental entity and, therefore, subject to 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1281SA

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

July 19, 2001

Mr. Thomas Morrow
98-A-5413
Cape Vincent Correctional Facility
Rte 12E; P.O. Box 739
Cape Vincent, NY 13618

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Morrow:

I have received your letters in which you sought assistance in obtaining "records from an Office of Alcoholism and Substance Abuse - approved or licensed residential rehabilitation program entitled '820 River St., Inc.' (A.K.A. Altamont House, Peter Young Housing, Sutphin Blvd. Restabilization Program)." You indicated that this entity has not responded to your requests for records.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of your correspondence, I offer the following comments.

The extent to which "820 River St., Inc." must respond to your requests depends on whether it qualifies as an agency for the purpose of the Freedom of Information Law.

As you may be aware, the Freedom of Information Law pertains to agency records, and §86(3) of that statute defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, an "agency" generally is an entity of state or local government. Typically, a private entity or a not-for-profit corporation would not be a governmental entity. In consideration of the name of the facility, it likely is not an agency required to comply with the Freedom of Information Law.

When that statute applies, it provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1281b

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

July 20, 2001

Mr. C.B. Smith
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence, unless otherwise indicated.

Dear Mr. Smith:

I have received your letter of June 6, as well as a variety of materials relating to it. You have sought an opinion concerning your right to obtain a "vendor list" from Rensselaer County.

By way of background, as you are aware, §87(2)(b) of the Freedom of Information Law authorizes an agency to withhold records or portions thereof which "if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article..." One of those provisions, §89(2)(b)(iii), states that an unwarranted invasion of personal privacy includes "sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes."

In this regard, as a general matter, when records are accessible under the Freedom of Information Law, it has been held that they should be made equally available to any person, regardless of one's status, interest or the intended use of the records [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Moreover, the Court of Appeals has held that:

> "FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on government decision-making, its ambit is not confined to records actually used in the decision-making process. (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request" [Farbman v. New York City Health and Hospitals Corporation, 62 NY 2d 75, 80 (1984)].

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 fund-raising, 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.

Section 89(2)(b)(iii), however, represents what might be viewed as an internal conflict in the law. As indicated above, 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. Nevertheless, 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."

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.).

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. The County in this instance has sought written assurance from you that the list in question would not be used for a commercial or fund-raising purpose.

A key issue in my view involves the nature and content of the vendor list. The Assistant County Attorney indicated that the list includes not only persons or entities doing business with the County, for he wrote that:

> "County employees who seek expense reimbursement are included on the vendor list, due to the procedures followed by the county in making that reimbursement. All reference to those employees shall be redacted from the vendor list, because they are not 'doing business' with Rensselaer County in any sense of the phrase."

Before considering those portions of the list that identify County employees, I note that, in my view, the remainder would be accessible, for it would deal with commercial enterprises or persons acting in a business capacity. There are several judicial decisions, both New York State and federal, that pertain to records about individuals in their business or professional capacities and which indicate that the records are not of a "personal nature." For instance, one involved a request for the names and addresses of mink and ranch fox farmers from a state agency (ASPCA v. NYS Department of Agriculture and Markets, Supreme Court, Albany County, May 10, 1989). In granting access, the court relied in part and quoted from an opinion rendered by this office in which it was advised that "the provisions concerning privacy in the Freedom of Information Law are intended to be asserted only with respect to 'personal' information relating to natural persons". The court held that:

> "...the names and business addresses of individuals or entities engaged in animal farming for profit do not constitute information of a private nature, and this conclusion is not changed by the fact that a person's business address may also be the address of his or her residence. In interpreting the Federal Freedom of Information Law Act (5 USC 552), the Federal Courts have already drawn a distinction between information of a 'private' nature which may not be disclosed, and information of a 'business' nature which may be disclosed (see e.g., Cohen v. Environmental Protection Agency, 575 F Supp. 425 (D.C.D.C. 1983)."

In another decision, Newsday, Inc. v. New York State Department of Health (Supreme Court, Albany County, October 15, 1991)], data acquired by the State Department of Health concerning the performance of open heart surgery by hospitals and individual surgeons was requested. Although the Department provided statistics relating to surgeons, it withheld their identities. In response to a request for an advisory opinion, it was advised by this office, based upon the New York Freedom of Information Law and judicial interpretations of the federal Freedom of Information Act, that the names should be disclosed. The court agreed and cited the opinion rendered by this office.

Like the Freedom of Information Law, the federal Act includes an exception to rights of access designed to protect personal privacy. Specifically, 5 U.S.C. 552(b)(6) states that rights conferred by the Act do not apply to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." In construing that provision, federal courts have held that the exception:

> "was intended by Congress to protect individuals from public disclosure of 'intimate details of their lives, whether the disclosure be of personnel files, medical files or other similar files'. Board of Trade of City of Chicago v. Commodity Futures Trading Com'n supra, 627 F.2d at 399, quoting Rural Housing Alliance v. U.S. Dep't of Agriculture, 498 F.2d 73, 77 (D.C. Cir. 1974); see Robles v. EOA, 484 F.2d 843, 845 (4th Cir. 1973). Although the opinion in Rural Housing stated that the exemption 'is phrased broadly to protect individuals from a wide range of embarrassing disclosures', 498 F.2d at 77, the context makes clear the court's recognition that the disclosures with which the statute is concerned are those involving matters of an intimate personal nature. Because of its intimate personal nature, information regarding 'marital status, legitimacy of children, identity of fathers of children, medical condition, welfare payment, alcoholic consumption, family fights, reputation, and so on' falls within the ambit of Exemption 4. Id. By contrast, as Judge Robinson stated in the Chicago Board of Trade case, 627 F.2d at 399, the decisions of this court have established that information connected with professional relationships does not qualify for the exemption" [Sims v. Central Intelligence Agency, 642 F.2d 562, 573-573 (1980)].

In Cohen, the decision cited in ASPCA v. Department of Agriculture and Markets, supra, it was stated pointedly that: "The privacy exemption does not apply to information regarding professional or business activities...This information must be disclosed even if a professional reputation may be tarnished" (supra, 429). Similarly in a case involving disclosure of the identities of those whose grant proposals were rejected, it was held that:

> "The adverse effect of a rejection of a grant proposal, if it exists at all, is limited to the professional rather than personal qualities of the applicant. The district court spoke of the possibility of injury explicitly in terms of the applicants' 'professional reputation' and 'professional qualifications'. 'Professional' in such a context refers to the possible negative reflection of an applicant's performance in 'grantsmanship' - the professional competition among research scientists for grants; it obviously is not a reference to more serious 'professional' deficiencies such 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)].

In short, in my opinion and as suggested in the decisions cited above, the exception concerning privacy, including §89(2)(b)(iii), does not apply to a list of vendors doing business with the County.

With respect to portions of the list identifying County employees, their names, in my view, would clearly be accessible if those portions of the list fall within the scope of your request. The list indicates payments to public employees who are being paid or reimbursed in relation to the performance of their official duties. That being so, as in the case of commercial vendors, the inclusion of the names of public employees also pertains to those persons in relation to their governmental activities, and disclosure of their identities would, in my view, constitute a permissible rather than an unwarranted invasion of personal privacy. It is not clear which address of public employees is included in the list. If it is the work address, I believe that would also be public. There would be nothing personal or intimate about a public employee's work address, and although tangential to the matter, §87(3)(b) specifies that each agency must maintain a record that includes the "public office address" of every officer or employee of the agency. If, however, the address of a public employee included in the list is his or her home address, the home address could be withheld. Section 89(7) states that nothing in the Freedom of Information Law shall require the disclosure of the home address of a present or former public employee.

In sum, for the reasons discussed in the preceding commentary, because the list of vendors consists of information relating to persons or entities in relation to their business or governmental activities, I do not believe that §89(2)(b)(iii) concerning the use of a list of names and addresses for commercial or fund-raising purposes is applicable. Consequently, I do not believe that the County can condition disclosure on your assertion that you would not use the list for those purposes. However, insofar as the list identifies public employees and includes their home addresses, the home addresses, pursuant to §89(7) of the Freedom of Information Law, may be withheld. If the list does not contain public employees' home addresses, but rather their work addresses, I believe that the list would be available in its entirety.

A copy of this response will be forwarded to the County Attorney.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Robert A. Smith, County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT PPPL AO-285
FOIL AO-12817

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July 19, 2001

Mr. Natale Carbone
92-A-7828
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. Carbone:

I have received your letter in which you sought assistance in obtaining records from the Queens County District Attorney. In brief, you requested a variety of records relating to your arrest under the Personal Privacy Protection Law.

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 an office of a district attorney.

Second, 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. While some aspects of the records sought might properly be withheld, relevant is a decision by the Court of Appeals concerning "complaint

follow up reports" ("DD5's") and police officers' memo books in which it was held that a denial of access based on their characterization as intra-agency materials would be inappropriate.

The provision at issue, §87(2)(g) of the Freedom of Information Law, enables an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

In its analysis of the matter, the decision states that:

> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)...
>
> "...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers'

(Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][i]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182).

"Against this backdrop, we conclude that the complaint follow-up reports contain substantial factual information available pursuant to the provisions of FOIL. Sections of the report are devoted to such purely factual data as: the names, addresses, and physical descriptions of crime victims, witnesses, and perpetrators; a checklist that indicates whether the victims and witnesses have been interviewed and shown photos, whether crime scenes have been photographed and dusted for fingerprints, and whether neighborhood residents have been canvassed for information; and a blank space denominated 'details' in which the officer records the particulars of any action taken in connection with the investigation.

"However, the Police Department argues that any witness statements contained in the reports, in particular, are not 'factual' because there is no assurance of the statements' accuracy and reliability. We decline to read such a reliability requirement into the phrase 'factual data', as the dissent would have us do, and conclude that a witness statement constitutes factual data insofar as it embodies a factual account of the witness's observations. Such a statement, moreover, is far removed from the type of internal government exchange sought to be protected by the intra-agency exemption (see, Matter of Ingram v. Axelod, 90 AD2d 568, 569 [ambulance records, list of interviews, and reports of interviews available under FOIL as 'factual data']). By contrast, any impressions, recommendations, or opinions recorded in the complaint follow-up report would not constitute factual data and would be exempt from disclosure. The holding herein is only that these reports are not categorically exempt as intra-agency material. Indeed, the Police Department is entitled to withhold complaint follow-up reports, or specific portions thereof, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" [Gould, Scott and DeFelice v. New York City Police

> Department, 653 NYS2d 54, 89 NY2d 267 (1996); emphasis added by the Court].

Based on the foregoing, neither the Police Department nor an office of a district attorney can claim that complaint follow up reports can be withheld in their entirety on the ground that they constitute intra-agency materials. However, the Court was careful to point out that other grounds for denial might apply in consideration of those records, as well as others that you requested.

For instance, of potential significance is §87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". That provision might be applicable relative to the deletion of identifying details in a variety of situations, i.e., where a record identifies a confidential source or a witness, for example.

Often the most relevant provision concerning access to records maintained by law enforcement agencies is §87(2)(e), which permits an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in sub-paragraphs (i) through (iv) of §87(2)(e).

Another possible ground for denial is §87(2)(f), which permits withholding to the extent that disclosure "would endanger the life or safety of any person". The capacity to withhold on that basis is dependent upon the facts and circumstances concerning an event.

Third, in a decision concerning a request for records maintained by the office of a district attorney that would ordinarily be exempted from disclosure under the Freedom of Information Law, it was held that "once the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public" [see Moore v. Santucci, 151 AD 2d 677, 679 (1989)]. Based upon that decision, it appears that records introduced into evidence or disclosed during a public judicial proceeding should be available.

However, in the same decision, it was also found that:

> "...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

Lastly, I note that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a

challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12818

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July 19, 2001

Mr. Abdel Hamilton
99-A-1625
Upstate Correctional Facility
309 Bare Hill Road
Malone, NY 10953

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Hamilton:

I have received your letter in which you sought assistance in obtaining a videotape from the Upstate Correctional Facility that shows you falling down a set of steps.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of your correspondence, I offer the following comments.

First, you wrote that you requested the videotape of the incident one day after it occurred. You further indicated that videotapes are destroyed after fourteen days and expressed concern that the tape might be destroyed. In this regard, it may be contrary to law to destroy records sought under the Freedom of Information Law after the records have been requested. Section 89(8) of that statute provides that: "Any person who, with intent to prevent public inspection of a record pursuant to this article, willfully conceals or destroys such record shall be guilty of a violation" (see also, Penal Law, §240.65).

I note that agencies cannot merely destroy records when they have a desire to do so or when they run out of storage space. On the contrary, retention and disposal of records are governed by the Arts and Cultural Affairs Law. Specifically, §57.05 of that Law provides that the Commissioner of Education is empowered:

> "[t]o authorize the disposal or destruction of state records including books, papers, maps, photographs, microphotographs or other documentary materials made, acquired or received by any agency. At

> least forty days prior to the proposed disposal or destruction of such records, the commissioner of education shall deliver a list of the records to be disposed of or destroyed to the attorney general, the comptroller and the state agency that transferred such records. No state records listed therein shall be destroyed if within thirty days after receipt of such list the attorney general, comptroller, or the agency that transferred such records shall notify the commissioner that in his opinion such state records should not be destroyed."

Notwithstanding the foregoing, I point out that the Freedom of Information Law pertains only to existing records. If the record in question no longer exists, the Freedom of Information Law would not apply.

Lastly, while the federal Freedom of Information Act, which applies only to federal agencies, 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,

David Treacy

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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July 19, 2001

Mr. George Philips
00-A-2299
Five Points Correctional Facility
Caller Box 119
Romulus, NY 14541

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Philips:

I have received your letter in which you asked for an opinion with respect to your request for marriage records from the City Clerk of the City of New York.

From my perspective, the contents of those records must generally be disclosed. In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Second, with respect to marriage records, according to judicial decisions, rights of access must be determined on the basis of the Freedom of Information Law in conjunction with another statute, §19 of the Domestic Relations Law. That statute, which is entitled "Records to be kept by town and city clerks", states that:

> "Each town and city clerk hereby empowered to issue marriage licenses shall keep a book supplied by the state department of health in which such clerk shall record an index such information as is required therein, which book shall be kept and preserved as a part of the public records of his office."

I do not believe that it could be reasonably suggested that the language quoted above may be construed to mean that marriage records are confidential.

From an historical perspective, it is my understanding that certain kinds of activities have been licensed because of some significant governmental interest in whatever the area of activity might be. In general, the issuance of a license is intended to enable the public to know that an individual is qualified to engage in a certain kind of activity, such as practicing law or medicine, selling real estate, being an architect, possessing a firearm, or driving a car. In every instance, a record indicating that an individual is licensed, qualified to carry out a certain kind of activity, is public. The same is true according to the Domestic Relations Law, and the only judicial decision on the subject rendered within the past several years concerning those who apply for and are granted marriage licenses has so held [see Gannett Co., Inc. v. City Clerk's Office, City of Rochester, 596 NYS 2d 968, affirmed unanimously, 197 AD 2d 919 (1993)].

In its decision, the court referred to provisions in the Freedom of Information Law that enable agencies to withhold records when disclosure would constitute "an unwarranted invasion of personal privacy." In my view, disclosure of the names of applicants for marriage licenses or those who have been granted marriage licenses hardly rises to the level of an unwarranted invasion of personal privacy. The Court in Gannett referred to an opinion prepared by the Executive Director of the Committee on Open Government and found that such a disclosure "does not equate with the type of personal, confidential, or sensitive information precluding public access." The fact of the issuance of all those other licenses referenced above is a matter of public record, and I believe that the same conclusion must be reached in the context of your inquiry. Marriages are, in most instances, social events. To inform their communities about an upcoming or recent marriage, many people have an announcement published in the local newspaper, often with a photograph; the event is anything but a secret. Further, if a couple becomes divorced, a record indicating that they are divorced is available from a county clerk pursuant to §235 of the Domestic Relations Law. As the Court in the Gannett decision observed, it would be anomalous to suggest that a record reflective of a divorce must be disclosed, but that a record reflective of a marriage would, if disclosed, result in an unwarranted invasion of personal privacy.

Representatives of some agencies have suggested, since the request in Gannett involved only the names of applicants for marriage licenses, that only the names must be disclosed. While the Court focused on names of applicants, nowhere was it stated that other items are confidential. The issue, in my view, involves the extent to which disclosure of the records in question would constitute an unwarranted invasion of personal privacy. In Hanig v. State Department of Motor Vehicles (79 NY 2d 106), the issue involved a request for a driver license application that included reference to the existence of or treatment for certain medical disabilities. Even though those items were not medical records or medical histories, the Court affirmed the lower court's denial of access, stating that "it does capture the essence of the exemption in that it encompasses the very sort of detail about personal medical condition that would ordinarily and reasonably be regarded as intimate, private information" (id., 112). Based on the foregoing, the Court considered the nature of the information and whether it could be characterized as intimate. In a similar analysis, it was found that "an individual's educational background, i.e., the level of education attained and the particular institutions attended" must be disclosed, for the court was not "persuaded that a reasonable person of ordinary sensibilities would find if offensive and objectionable to have such information disclosed" [Ruberti, Girvin and Ferlazzo v. Division of State Police, 64 NYS 2d 411, 415 (A.D. 3 Dept. 1996)].

If, for instance, a special consent is noted on a marriage record, or if such a record includes medical or health information, social security numbers or names of family members, those types of items might justifiably be deleted. However, other items, such as dates of applications or marriages, could not, in my opinion, be characterized as intimate personal information that the courts have found to be deniable. Again, the fact of peoples' marriages and a variety of information about them are readily disclosed by most people via announcements, references in telephone books, the wearing of rings and a variety of other details commonly known in our society. In my view, those disclosures typify reasonable people of ordinary sensibilities, and other than information such as special consents or health related information referenced above, I believe that marriage records must be disclosed.

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

cc: City Clerk

From: Robert Freeman
To: internet:[redacted]
Date: 7/23/01 9:28AM
Subject: Dear Ms. Emerson:

Dear Ms. Emerson:

I have received your inquiry in which you asked whether a member of a board of education may "distribute a letter received as part of a board packet, to anyone they chose in the community....even if the letter contains comments or criticism of the sitting superintendent..."

In this regard, it is likely that the document in question or portions of it may be withheld under the Freedom of Information Law. However, in general, there is nothing in that law that would prohibit the disclosure of the letter. Stated differently, the Freedom of Information Law is permissive, for it states that an agency may withhold records or portions thereof in accordance with a series of grounds for denial, but that an agency is not required to do so. The only instance in my view in which an agency must withhold a records would involve a situation in which a different statute prohibits disclosure. For instance, if a packet includes materials relating to a particular student, in terms of an educational program, discipline, etc., a federal law (the Family Educational Rights and Privacy Act) would forbid disclosure to the public, unless a parent of the student consents to disclosure.

I am not suggesting that it would necessarily be wise or ethical for a board member to disclose the kind of record that you described, but rather that it likely would not be contrary to law.

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
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STATE OF NEW YORK
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July 23, 2001

Mr. Frank I. Ioli, 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, unless otherwise indicated.

Dear Mr. Ioli:

I have received your letter and a variety of related correspondence concerning your efforts in obtaining "the blueprints or drawings that detail the proposed conversion of an existing building that was once a contractors office and equipment storage site" in the Village of Mayville. The Village has denied your requests "because the drawings are the intellectual property of the architect and protected by U.S. Copyright Law." In addition, an attorney apparently representing the owner of the building expressed the view that:

> "disclosure by the Village of any information concerning the building project to Mr. Ioli would be inappropriate and unwarranted, even under the traditionally liberal provisions of the FOIL statute. It is my understanding that the Public Officers Law allows each municipality to formulate guidelines with respect to disclosure of information. I believe that it would be entirely appropriate for those guidelines to provide for non-disclosure where the FOIL process itself is being blatantly manipulated, as is clearly the case with Mr. Ioli. I appreciate the Village's position that it will not allow the statutes to be misused by Mr. Ioli to further his personal agenda with respect to Mr. Hunt.
>
> "I would ask that in the event Mr. Ioli does file a formal FOIL request, that the Village keep me apprised. If your position would change in that you would consider releasing any information, I would assist Mr. Hunt in taking whatever legal steps would be necessary and appropriate to prevent disclosure.".

In this regard, I offer the following comments.

First, I believe that the views expressed in the passage quoted above are inaccurate. The Freedom of Information Law, Article 6 of the Public Officers Law, requires municipalities to adopt rules and regulations concerning the procedural implementation of that statute [see §87(1)]; it does not, however, authorize municipalities to adopt guidelines or rules dealing with the ability to "provide for non-disclosure where the FOIL process itself is being blatantly manipulated."

In brief, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. As a general matter, when records are accessible under the Freedom of Information Law, it has been held that they should be made equally available to any person, regardless of one's status, interest or the intended use of the records [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Moreover, the Court of Appeals, the State's highest court, has held that:

> "FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on government decision-making, its ambit is not confined to records actually used in the decision-making process. (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request" [Farbman v. New York City Health and Hospitals Corporation, 62 NY 2d 75, 80 (1984)].

Farbman pertained to a situation in which a person involved in litigation against an agency requested records from that agency under the Freedom of Information Law. In brief, it was found that one's status as a litigant had no effect upon that person's right as a member of the public when using the Freedom of Information Law, irrespective of the intended use of the records. Similarly, unless there is a basis for withholding records in accordance with the grounds for denial appearing in §87(2), the use of the records and the motivation of the applicant are in my opinion irrelevant. Whether the owner of property consents to permit access to a building plan is irrelevant; if a record is available under the Freedom of Information Law, the subject of the record does not have the ability to control disclosure.

Second, access to plans and surveys that are marked with the seal of an architect or engineer has been the subject of several questions and substantial research. Professional engineers and architects are licensed by the Board of Regents (see respectively, Articles 145 and 147 of the Education Law,). While §7307 of the Education Law requires that an architect have a seal, and that state and local officials charged with the enforcement of provisions relating to the construction or alteration of buildings cannot accept plans or specifications that do not bear such a seal, I am unaware of any statute that would prohibit the inspection of such records under the Freedom of Information Law. Some have contended that an architect's seal, for example, represents the equivalent of a copyright. Having discussed the matter with numerous officials, including officials of the appropriate licensing boards, the seal does not serve as a copyright, nor does it restrict the right to inspect and copy.

Third, additional considerations become relevant in relation to copyright. In an effort to obtain guidance, 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 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.

Assuming that a work is subject to copyright protection, it is noted that such a work may "at any time during the subsistence of copyright" [17 U.S.C. §408(a)] be registered with the Copyright Office. No action for copyright infringement can be initiated until a copyright claim has been registered. As I understand the Act, if a work bears a copyright and is reproduced without the consent of the copyright holder, the holder may nonetheless register the work and later bring an action for copyright infringement.

In terms of the ability of a citizen to use an access law to assert the right to reproduce copyrighted material, the issue has been considered by the U.S. Department of Justice with respect to copyrighted materials, and its analysis as it pertains to the federal Freedom of Information Act is, in my view, pertinent to the issue as it arises under the state Freedom of Information Law.

The initial aspect of its review involved whether the exception to rights of access analogous to §87(2)(a) of the Freedom of Information Law requires that copyrighted materials be withheld. The cited provision states that an agency may withhold records that are "specifically exempted from disclosure by state or federal statute." Virtually the same language constitutes a basis for withholding in the federal Act [5 U.S.C. 552(b)(3)]. In the fall 1983 edition of FOIA Update, a publication of the Office of Information and Privacy at the U.S. Department of Justice, it was stated that:

> "On its face, the Copyright Act simply cannot be considered a 'nondisclosure' statute, especially in light of its provision permitting full public inspection of registered copyrighted documents at the Copyright Office [see 17 U.S.C. 3705(b)]."

Since copyrighted materials are available for inspection, I agree with the conclusion that records bearing a copyright could not be characterized as being "specifically exempted from disclosure...by...statute."

The next step of the analysis involves the Justice Department's consideration of the federal Act's exception (exemption 4) analogous to §87(2)(d) of the Freedom of Information Law in conjunction with 17 U.S.C. §107, which codifies the doctrine of "fair use". Section 87(2)(d) permits an agency to withhold records that "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise." Under §107, copyrighted work may be reproduced "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research" without infringement of the copyright. Further, the provision describes the factors to be considered in determining whether a work may be reproduced for a fair use, including "the effect of the use upon the potential market for or value of the copyrighted work" [17 U.S.C. §107(4)].

According to the Department of Justice, the most common basis for the assertion of the federal Act's "trade secret" exception involves "a showing of competitive harm," and in the context of a request for a copyrighted work, the exception may be invoked "whenever it is determined that the copyright holder's market for his work would be adversely affected by FOIA disclosure" (FOIA Update, supra). As such, it was concluded that the trade secret exception:

> "stands as a viable means of protecting commercially valuable copyrighted works where FOIA disclosure would have a substantial adverse effect on the copyright holder's potential market. Such use of Exemption 4 is fully consonant with its broad purpose of protecting the commercial interests of those who submit information to government... Moreover, as has been suggested, where FOIA disclosure would have an adverse impact on 'the potential market for or value of [a] copyrighted work,' 17 U.S.C. §107(4), Exemption 4 and the Copyright Act actually embody virtually congruent protection, because such an adverse economic effect will almost always preclude a 'fair use' copyright defense...Thus, Exemption 4 should protect such materials in the same instances in which copyright infringement would be found" (id.).

Conversely, it was suggested that when disclosure of a copyrighted work would not have a substantial adverse effect on the potential market of the copyright holder, the trade secret exemption could not appropriately be asserted. Further, "[g]iven that the FOIA is designed to serve the public interest in access to information maintained by government," it was contended that "disclosure of nonexempt copyrighted documents under the Freedom of Information act should be considered a 'fair use'" (id.).

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 might 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, that exception would not apply.

Lastly, the remaining provision of potential significance, §87(2)(f) of the Freedom of Information Law, permits an agency to withhold records insofar as disclosure could "endanger the life or safety of any person." It has been advised that the cited provision might properly be invoked insofar as the kinds of records at issue include information concerning alarms, security systems and the like.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Charles L. Kelsey, Village Clerk
Michael J. Bolender
Mary B. Schiller

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July 23, 2001

Mr. Tom Robbins
Staff Writer
Village Voice
36 Cooper Square
New York, NY 10003

The staff of the Committee 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. Robbins:

I have received your letter and the correspondence relating to it. You have sought my views concerning your request for records of the New York City Housing Development Corporation ("HDC"), particularly those involving expenses incurred by and reimbursements made to HDC's president covering the period of June, 1996 to the present. In its initial response to your request, which was made on February 6, you were informed that HDC "intended to provide access to most of the records within 'several weeks.'" Nevertheless, following an appeal based on your contention that HDC had engaged in a constructive denial of access, you were informed that the records were placed in "an off-site storage facility, were later moved and cannot be located."

In this regard, first, §653 of the Private Housing Finance Law specifies that HDC "shall be a corporate governmental agency, perpetual in duration, and shall constitute a public benefit corporation." Since the Freedom of Information Law is applicable to agencies, since §86(3) of that defines the term "agency" to include public corporations, and since a public benefit corporation is a kind of public corporation (see General Construction Law, §66), it is clear that HDC is required to comply with that statute.

Second, §89(3) of the Freedom of Information Law requires that an applicant must "reasonably describe" the records sought. Insofar as an agency has the ability to locate and identify the records sought, irrespective of the volume of the records, it has been held that an applicant has met the standard of reasonably describing the records [see Konigsberg v. Coughlin, 68 NY2d 245 (1986)]. In some circumstances, records of the same nature may be kept in different locations or by different means depending on the passage of time and changes in record-keeping practices. For instance, often records involving recent transactions must be readily retrievable, for they are needed

for guaranteeing payment and compliance with accounting standards. Following the consummation of the transactions, the records may be transferred to a different site for storage. Similarly, in some situations, records involving transactions occurring years ago were maintained in manual systems; the same kinds of records, however, might now be maintained on electronic information systems. The older records may be more difficult to locate than those pertaining to recent transactions.

Third, based on provisions dealing with the management, custody and preservation of records, I believe that HDC is required to maintain the records in question in a manner that permits their retrieval. By way of background, Article 57-A of the Arts and Cultural Affairs Law, the "Local Government Records Law", deals with records management, and §57.17(1) defines "local government" to include:

> "...any county, city, town, village, school district, board of cooperative educational services, district corporation, public benefit corporation, public corporation, or other government created under state law th at is not a state department, division, board, bureau, commission or other agency, heretofore or hereafter established by law."

While mayoral agencies of the City of New York are subject to provisions of the New York City Charter and, for purposes of records management, fall under the aegis of the New York City Department of Records and Information Services (DORIS), I was informed by that agency that HDC falls beyond its jurisdiction. I was also told, however, by a representative of the State Archives, which is authorized to implement Article 57-A, HDC is an "independent local government" and is, therefore, required to comply with the provisions of the Local Government Records Law.

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..." (emphasis added).

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 the State Archives, which is a unit of the State Education Department, and based on information provided by that agency, the records in question must be retained for a minimum of six years. That being so, I believe that it is the duty of HDC to ensure that the records sought be maintained in a manner that gives effect to the requirements of the Local Government Records Law. Stated differently, because, due to their significance, the law requires that they must be kept, preserved and protected for a minimum of six years, HDC should, in my view, clearly have the capacity to locate and retrieve the records of your interest and disclose them in accordance with the Freedom of Information Law.

Next, when an agency indicates that it cannot locate or does not maintain a record requested under the Freedom of Information Law, §89(3) enables the applicant for the record to seek a certification in which it is asserted by the agency "that it does not have possession of such record or that such record cannot be found after diligent search." In addition, while I am not suggesting that they apply, §89(8) of the Freedom of Information Law, which is Article Six of the Public Officers Law, and §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."

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.

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..."

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 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: Jerilyn Perine
David Boccio
Melissa Barkan

STATE OF NEW YORK
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July 23, 2001

Mr. James Motley
[redacted]

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. Motley:

I have received your letter in which you asked several questions pertaining to voter registration cards.

In this regard, I offer the following comments.

First, I believe that the records sought are available pursuant to §3-220 of the Election Law, which pertains to records maintained by county boards of elections. Subdivision (1) of that statute states in part that : "All registration records, certificates, lists and inventories referred to in, or required by, this chapter [the Election Law] shall be public records..." As such, registration records maintained by a county board of elections are clearly accessible to the public.

Second, I do not believe that registrants' occupations are indicated on voter registration cards. Section §5-210 of the Election Law, entitled "Registration and enrollment and change of enrollment upon application", includes reference to voter application forms and provides in paragraph (k) of subdivision (5) that the form must include:

> "(i) A space for the applicant to indicate whether or not he has ever voted or registered to vote before and, if so, the approximate year in which he last voted or registered and his name and address at the time.
>
> (ii) The name and residence address of the applicant including the zip code and apartment number, if any.
>
> (iii) The date of birth of the applicant."

(iv) A space for the applicant to indicate whether or not he is a citizen of the United States.

(v) The gender of the applicant (optional).

(vi) A space for the applicant to indicate his choice of party enrollment, with a clear alternative provided for the applicant to decline to affiliate with a party.

(vii) The telephone number of the applicant (optional).

(viii) A place for the applicant to execute the form on a line which is clearly labeled 'signature of applicant'..."

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,[see Freedom of Information Law, §87(2)(b)], the specific direction provided in the Election Law in my opinion requires disclosure of registration records, including those items.

Lastly, a request for a copy of a named individual's voter registration card under the Election Law should be directed to the county board of elections where the individual resides.

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:tt

STATE OF NEW YORK
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July 23, 2001

Mr. David Barnett
93-B-1594
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. Barnett:

I have received your letter in which you sought assistance in obtaining records from the Broome County District Attorney's Office, which denied your request because the records were previously sent to your attorney. You also requested advice pertaining to Freedom of Information Law requests submitted to your attorney, which have not been answered.

In this regard, I offer the following comments.

First, as you may be aware, the Freedom of Information Law pertains to agency records, and §86(3) of that statute defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, an "agency" generally is an entity of state or local government. Therefore, a private entity, such as your attorney's office, would not constitute an agency, for it would not be a governmental entity.

Second, in a decision concerning a request for records maintained by the office of a district attorney, it was found that:

> "...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" [Moore v. Santucci, 151 AD2d 677, 678 (1989)].

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
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July 23, 2001

Mr. Eddie Ortiz
92-A-7077
Southport Correctional Facility
Box 2000
Pine City, NY 14871

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Ortiz:

I have received your letter in which you requested an opinion regarding the availability of "investigative reports" of a grievance you have filed and "manuals used by disciplinary hearing officers."

In this regard, I offer the following comments.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, several of the grounds for denial may be pertinent.

One provision, §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.

Another provision of potential significance is §87(2)(b) which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy." That provision might be applicable relative to the deletion of identifying details in a variety of situations, i.e., where a record identifies a confidential source or a witness, for example.

Also of possible relevance is §87(2)(f), which permits withholding to the extent that disclosure "would endanger the life or safety of any person." The capacity to withhold on that basis is dependent upon the facts and circumstances concerning an event.

Lastly, §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."

In sum, while some aspects of the records might justifiably be withheld pursuant to the above mentioned provisions, in my view it is possible that other aspects must be disclosed.

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:tt

STATE OF NEW YORK
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July 23, 2001

Mr. George W. White
94-B-0605
Collins Correctional Facility
P.O. Box 340
Collins, NY 14034-0340

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. White:

I have received your letter in which you sought assistance in obtaining unidentified records from an attorney, who apparently has not responded to your requests.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of your correspondence, I offer the following comments.

It is not clear from your letter whether the attorney is in private practice or works for an "agency." As you may be aware, only agencies are subject to the Freedom of Information Law. Section 86(3) of that law defines an agency to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

If the attorney is not employed by or for an agency, the Freedom of Information Law would not apply. Assuming the attorney represents an "agency", I offer the following comments.

Whether records are accessible or deniable, an agency is required to respond to a request. The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of 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,

David M. Treacy
Assistant Director

DMT:tt

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July 24, 2001

Mr. Randy D. Johnston
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Johnston:

As you are aware, I have received your letter and a variety of materials relating to it. You have sought guidance concerning your efforts in gaining access to information pertaining to assessments and the assessment process in the Town of Canton. Having reviewed the materials, I offer the following comments.

First, for purposes of clarification, it is noted that the title of the Freedom of Information Law may be somewhat misleading, for that statute does not deal with access to information *per se*; rather, it deals with records. Further, §89(3) provides in part that an agency is not required to create a record in response to a request for information. In a similar vein, while agency officials may choose to supply information by answering questions, they are not required to do so to comply with the Freedom of Information Law. Their responsibility involves granting access to existing records to the extent required by law.

By means of example, in a letter of January 5, you asked that the Town Assessor "explain in detail" the basis for certain assessments. From my perspective, there is no requirement that she must do so. However, if you sought records indicating the basis for the assessment, any such records would have to be disclosed as required by law. In a request of May 17, you sought information in the nature of the "percentage increase" in a assessed value of certain parcels, the "total change in assessed value" relating to certain buildings, and similar information. If records exist containing the information sought, I believe that they would be accessible under the Freedom of Information Law. On the other hand, however, if no figures have been prepared indicating percentage increase or the total change in valuation, the Town would not be required to prepare new records on your behalf.

It has been suggested requests should not seek "totals" for the reason described above: if there is no total, an agency would not be required to prepare a new record containing a total on your

behalf. It has also been suggested that requests involve existing records. Rather than seeking a detailed explanation of an assessment, a request might be made, for example, for records maintained by or for the assessor that were used in arriving at an assessment. If no records exist indicating the total change in the assessed value of properties for which building permits were obtained, you could request building permits and then review the assessment roll in order to develop the information of interest on your own.

A second issue involves responses by attorneys for the Town indicating that a request "lacks specificity as required under the Freedom of Information Act." In short, the Freedom of Information Law does not require that a request contain "specificity." By way of historical background, when that statute was initially enacted in 1974, it required that an applicant seek "identifiable" records. That standard resulted in difficulty, for individuals in some instances could not name a particular record and, therefore, could not make a valid request. When the original version of the law was repealed and replaced with the current version, which became effective in 1978, the standard for making requests was altered. Since then, §89(3) has stated that an applicant must "reasonably describe" the records sought. In considering that standard, the State's highest court has found that requested records need not be "specifically designated", that to meet the standard, the terms of a request must be adequate to enable the agency to locate the records, and that an agency must "establish that 'the descriptions were insufficient for purposes of locating and identifying the documents sought'...before denying a FOIL request for reasons of overbreadth" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

Although it was found in the decision cited above that the agency could not reject the request due to its breadth, it was also stated that:

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency']" (id. at 250).

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping systems. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number.

In the context of your requests, by means of example, I believe that your requests for records indicating the assessed value of certain structures would fulfill the responsibility to reasonably

describe the records, as would your request for letters sent to all taxpayers as described in your letter of May 24.

Third, in a letter sent to you by the Town Attorney, reference was made to fees for copies of records being based in part on a certain amount per parcel. From my perspective, a fee determined on that basis would be inconsistent with law. Until October of 1982, §87(1)(b)(iii) of the Freedom of Information Law stated that an agency could charge up to twenty-five cents per photocopy or the actual cost of reproduction unless a different fee was prescribed by "law". Chapter 73 of the Laws of 1982 replaced the word "law" with the term "statute". As described in the Committee's fourth annual report to the Governor and the Legislature of the Freedom of Information Law, which was submitted in December of 1981 and which recommended the amendment that is now law:

> "The problem is that the term 'law' may include regulations, local laws, or ordinances, for example. As such, state agencies by means of regulation or municipalities by means of local law may and in some instances have established fees in excess of twenty-five cents per photocopy, thereby resulting in constructive denials of access. To remove this problem, the word 'law' should be replaced by 'statute', thereby enabling an agency to charge more than twenty-five cents only in situations in which an act of the State Legislature, a statute, so specifies."

Therefore, prior to October 15, 1982, a local law, an ordinance, or a regulation for instance, establishing a search fee or a fee in excess of twenty-five cents per photocopy or higher than the actual cost of reproduction was valid. However, under the amendment, only an act of the State Legislature, a statute, would in my view permit the assessment of a fee higher than twenty-five cents per photocopy, a fee that exceeds the actual cost of reproducing records that cannot be photocopied, (i.e., electronic information), or any other fee, such as a fee for search or overhead costs. In addition, it has been confirmed judicially that fees inconsistent with the Freedom of Information Law may be validly charged only when the authority to do so is conferred by a statute [see 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)."

With respect to the fee for reproducing data maintained electronically, 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."

I note, too, that although compliance with the Freedom of Information Law involves the use of public employees' time and perhaps other costs, the Court of Appeals, the state's highest court, has found that the Law is not intended to be given effect "on a cost-accounting basis", but rather that "Meeting the public's legitimate right of access to information concerning government is fulfillment of a governmental obligation, not the gift of, or waste of, public funds" [Doolan v. BOCES, 48 NY 2d 341, 347 (1979)].

Lastly, the nature of some of the comments offered by the Town Attorney was not, in my view, entirely clear. For purposes of clarification, I point out that the Freedom of Information Law pertains to all agency records, irrespective of their origin. Section 86(4) defines the term "record" expansively to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, if, for instance, the Town maintains data that it acquired from another source, it would be obliged to give effect to a request for that data. In short, if two or more government agencies maintain the same records, whether originals or copies, each would have the same responsibility to honor a request made under the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Nancy Blodgett
Charles B. Nash
Hon. Margaret J. Stacy

STATE OF NEW YORK
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July 24, 2001

E-Mail

TO: Nancy Tanner [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. Tanner:

I have received your inquiry in which you asked whether, in New York, a "custody agreement" may be reviewed by a family member who is not a party to the proceeding.

In this regard, access to records relating to matrimonial proceedings is governed by §235(1) of the Domestic Relations Law, which states that:

> "An officer of the court with whom the proceedings in a matrimonial action or a written statement of separation or an action or proceeding for custody, visitation or maintenance of a child are filed, or before whom the testimony is taken, or his clerk, either before or after the termination of the suit, shall not permit a copy of any of the pleadings, affidavits, findings of act, conclusions of law, judgment of dissolution, written agreement of separation or memorandum thereof, or testimony, or any examination of perusal thereof, to be taken by any other person than a party, or the attorney or counsel of a party, except by order of the court."

Based on the foregoing, as a general matter, the details of a matrimonial proceeding are considered confidential, and records reflective of the details of those proceedings are available as of right only to the parties and their attorneys. Any other person seeking those records could obtain them only by means of a court order.

I hope that I have been of assistance.

RJF:jm

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July 24, 2001

Ms. Janice Mortimer
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Mortimer:

I have received your letter of June 7, as well as the materials attached to it. You have sought an opinion concerning requests made under the Freedom of Information Law.

In brief, you attempted to obtain a photograph of an Erie County Associate Medical Examiner. The first request was made to the Erie County Medical Center, and in response, you were informed that the request should be directed to the Office the Erie County Medical Examiner. In response to that request, you were denied access under §5 of the Erie County Local Law that implements the Freedom of Information Law. You indicated that you could not find that law and expressed the belief that §677 of the County Law does not apply with respect to the record sought.

In this regard, by way of background, §89(1) of the Freedom of Information Law requires the Committee on Open Government to promulgate general rules and regulations designed to implement the procedural aspects of the Freedom of Information Law (see 21 NYCRR Part 1401). In turn, §87(1) requires the head or governing body of each unit of government to adopt similar rules and regulations consistent with the Freedom of Information Law and the regulations promulgated by the Committee. I believe that the local law to which you referred was enacted in accordance with §87(1). It is suggested that copies may be reviewed through either the Office of the County Attorney or perhaps the County Executive.

It is emphasized that the Committee's regulations and the local law can deal only with the procedural implementation of the Freedom of Information Law. Neither in my view may govern the extent to which records may be withheld. Provisions dealing with the capacity of government agencies in New York to deny access to records are found in §87(2) of 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.

From my perspective, in consideration of the nature of the record sought, a photograph of a public employee, only one of the grounds for denial would, under the circumstances, be pertinent. Section 87(2)(b) authorizes an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." In my opinion, there is nothing intimate or personal about a photograph of a public employee that is used for purposes of identification. Particularly in medical facilities, personnel often wear identification tags that include their photographs. That being so, there is nothing secret or confidential, in my view, regarding the photograph of a public employee.

The only instance in which it has been suggested that a photograph of a public employee might be withheld would involve the rare circumstance in which a law enforcement employee is involved undercover or similar work and disclosure would place that person in jeopardy. In that case, I believe that a photograph could be withheld under §87(2)(f), which authorizes an agency to deny access to records when disclosure would "endanger the life or safety of any person." I do not believe, however, that §87(2)(f) would be applicable or pertinent in the context of your request.

Next, §677 of the County Law pertains to "[t]he writing made by the coroner, or by the coroner and coroner's physician, or by the medical examiner, at the place where he takes charge of the body", and reports of autopsy and related records. Section 677 in my opinion does not include photographs of public employees taken for identification purposes within its coverage.

In sum, for the reasons discussed above, I believe that a photograph of an associate medical examiner should be disclosed under the Freedom of Information Law.

Lastly, I note that the denial of your request makes no reference to your right to appeal the denial. When a person is denied access to records, that person has the right to appeal. Section 89(4)(a) of the Freedom of Information Law states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Further, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), which govern the procedural aspects of the Law, state that:

> "(a) The governing body of a public corporation or the head, chief executive or governing body of other agencies shall hear appeals or shall designate a person or body to hear appeals regarding denial of access to records under the Freedom of Information Law.

> (b) Denial of access shall be in writing stating the reason therefor and advising the person denied access of his or her right to appeal to the person or body established to hear appeals, and that person or body shall be identified by name, title, business address and business telephone number. The records access officer shall not be the appeals officer" (§1401.7).

It is noted that the state's highest court has held that a failure to inform a person denied access to records of the right to appeal enables that person to seek judicial review of a denial. Citing the Committee's regulations and the Freedom of Information Law, the Court of Appeals in Barrett v. Morgenthau held that:

> "[i]nasmuch as the District Attorney failed to advise petitioner of the availability of an administrative appeal in the office (see, 21 NYCRR 1401.7[b]) and failed to demonstrate in the proceeding that the procedures for such an appeal had, in fact, even been established (see, Public Officers Law [section] 87[1][b], he cannot be heard to complain that petitioner failed to exhaust his administrative remedies" [74 NY 2d 907, 909 (1989)].

In short, an agency's records access officer has the duty individually, or in that person's role of coordinating the response to a request, to inform a person denied access of the right to appeal as well as the name and address of the person or body to whom an appeal may be directed.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Karen Biel-Costantino
County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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July 24, 2001

E-MAIL

TO: Donald Symer<[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. Symer:

I have received your letter in which you questioned the effect of a copyright notice appearing on site plans, maps, architectural drawings and similar records filed with or maintained by agencies of government. You referred, for example, to a statement indicating that "unauthorized alteration and/or duplication of this drawing is a violation of section 7209, provision w of the New York State Education 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. As a general matter, when records are accessible under the Freedom of Information Law, it has been held that they should be made equally available to any person, regardless of one's status, interest or the intended use of the records [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Moreover, the Court of Appeals, the State's highest court, has held that:

> "FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on government decision-making, its ambit is not confined to records actually used in the decision-making process. (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request" [Farbman v. New York City Health and Hospitals Corporation, 62 NY 2d 75, 80 (1984)].

Farbman pertained to a situation in which a person involved in litigation against an agency requested records from that agency under the Freedom of Information Law. In brief, it was found that one's status as a litigant had no effect upon that person's right as a member of the public when using the Freedom of Information Law, irrespective of the intended use of the records. Similarly, unless there is a basis for withholding records in accordance with the grounds for denial appearing in §87(2), the use of the records and the motivation of the applicant are in my opinion irrelevant. Whether the owner of property consents to permit access to a building plan is irrelevant; if a record is available under the Freedom of Information Law, the subject of the record does not have the ability to control disclosure.

Second, access to plans, drawings and surveys that are marked with the seal of an architect, a land surveyor or an 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 §§ 7209 and 7307 of the Education Law require that the licensees identified above 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; it merely indicates that a person is qualified as a licensee.

Third, additional considerations become relevant in relation to copyright. In an effort to obtain guidance, 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 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.

Assuming that a work is subject to copyright protection, it is noted that such a work may "at any time during the subsistence of copyright" [17 U.S.C. §408(a)] be registered with the Copyright Office. No action for copyright infringement can be initiated until a copyright claim has been registered. As I understand the Act, if a work bears a copyright and is reproduced without the

consent of the copyright holder, the holder may nonetheless register the work and later bring an action for copyright infringement.

In terms of the ability of a citizen to use an access law to assert the right to reproduce copyrighted material, the issue has been considered by the U.S. Department of Justice with respect to copyrighted materials, and its analysis as it pertains to the federal Freedom of Information Act is, in my view, pertinent to the issue as it arises under the state Freedom of Information Law.

The initial aspect of its review involved whether the exception to rights of access analogous to §87(2)(a) of the Freedom of Information Law requires that copyrighted materials be withheld. The cited provision states that an agency may withhold records that are "specifically exempted from disclosure by state or federal statute." Virtually the same language constitutes a basis for withholding in the federal Act [5 U.S.C. 552(b)(3)]. In the fall 1983 edition of FOIA Update, a publication of the Office of Information and Privacy at the U.S. Department of Justice, it was stated that:

> "On its face, the Copyright Act simply cannot be considered a 'nondisclosure' statute, especially in light of its provision permitting full public inspection of registered copyrighted documents at the Copyright Office [see 17 U.S.C. 3705(b)]."

Since copyrighted materials are available for inspection, I agree with the conclusion that records bearing a copyright could not be characterized as being "specifically exempted from disclosure...by...statute."

The next step of the analysis involves the Justice Department's consideration of the federal Act's exception (exemption 4) analogous to §87(2)(d) of the Freedom of Information Law in conjunction with 17 U.S.C. §107, which codifies the doctrine of "fair use". Section 87(2)(d) permits an agency to withhold records that "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise." Under §107, copyrighted work may be reproduced "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research" without infringement of the copyright. Further, the provision describes the factors to be considered in determining whether a work may be reproduced for a fair use, including "the effect of the use upon the potential market for or value of the copyrighted work" [17 U.S.C. §107(4)].

According to the Department of Justice, the most common basis for the assertion of the federal Act's "trade secret" exception involves "a showing of competitive harm," and in the context of a request for a copyrighted work, the exception may be invoked "whenever it is determined that the copyright holder's market for his work would be adversely affected by FOIA disclosure" (FOIA Update, supra). As such, it was concluded that the trade secret exception:

> "stands as a viable means of protecting commercially valuable copyrighted works where FOIA disclosure would have a substantial adverse effect on the copyright holder's potential market. Such use

> of Exemption 4 is fully consonant with its broad purpose of protecting the commercial interests of those who submit information to government... Moreover, as has been suggested, where FOIA disclosure would have an adverse impact on 'the potential market for or value of [a] copyrighted work,' 17 U.S.C. §107(4), Exemption 4 and the Copyright Act actually embody virtually congruent protection, because such an adverse economic effect will almost always preclude a 'fair use' copyright defense...Thus, Exemption 4 should protect such materials in the same instances in which copyright infringement would be found" (id.).

Conversely, it was suggested that when disclosure of a copyrighted work would not have a substantial adverse effect on the potential market of the copyright holder, the trade secret exemption could not appropriately be asserted. Further, "[g]iven that the FOIA is designed to serve the public interest in access to information maintained by government," it was contended that "disclosure of nonexempt copyrighted documents under the Freedom of Information act should be considered a 'fair use'" (id.).

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 might 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, that exception would not apply.

The remaining provision of potential significance, §87(2)(f) of the Freedom of Information Law, permits an agency to withhold records insofar as disclosure could "endanger the life or safety of any person." It has been advised that the cited provision might properly be invoked insofar as the kinds of records at issue include information concerning alarms, security systems and the like.

I note that there are no judicial decisions of which I am aware that have dealt directly with the issue that you raised. An approach different from that suggested in the preceding commentary might serve as the basis for considering access to copyrighted materials. Assuming that an agency cannot rely upon the grounds for denial discussed above, it may be required to permit an applicant to inspect and copy a copyrighted work. In that situation, the government agency that discloses the record should bear no liability or responsibility relating to the use of the work. Rather, if the holder of the copyright believes that the recipient of a copy of the work has in some manner violated the Copyright Act, that person or entity may initiate proceedings against the recipient for copyright infringement.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12831

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

July 24, 2001

Mr. Ivan Valentine
94-A-4594
Oneida Correctional Facility
6100 - School Road
P.O. Box 4580
Rome, NY 13440-4580

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. Valentine:

I have received your letter in which you sought assistance in obtaining records from the Fishkill Correctional Facility.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of your correspondence, I offer the following comments.

Whether records are accessible or deniable, an agency is required to respond to a request. The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges

that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of 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,

David Treacy

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12832

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

July 24, 2001

Mr. Steven Briecke
85-A-4706
Downstate Correctional Facility
Box F, Red Schoolhouse Road
Fishkill, NY 12524

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Briecke:

I have received your letter in which you sought assistance in obtaining records from the Fishkill Correctional Facility.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of your correspondence, I offer the following comments.

Whether records are accessible or deniable, an agency is required to respond to a request. The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges

that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of 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,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FPPL-AO-286
FOIL-AO-12833

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.htnl

July 24, 2001

Ms. Benora N. Winfield
[redacted]

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. Winfield:

I have received your letter and the materials attached to it. In brief, you requested records from the New York State Insurance Department pertaining to yourself and your minor children as data subjects under both the Freedom of Information Law and the Personal Privacy Protection Law. You were informed that you "failed to identify" the records of your interest and that you must "describe, with enough specificity, the exact documents you require..."

From my perspective, the issue involves the requirement imposed by both the Freedom of Information Law, §89(3), and the Personal Privacy Protection Law, §95(1), that an applicant must "reasonably describe" the records sought. Based on its judicial construction, a request does not require "specificity." By way of historical background, when that statute was initially enacted in 1974, it required that an applicant seek "identifiable" records. That standard resulted in difficulty, for individuals in some instances could not name a particular record and, therefore, could not make a valid request. When the original version of the law was repealed and replaced with the current version, which became effective in 1978, the standard for making requests was altered. Since then, §89(3) has stated that an applicant must "reasonably describe" the records sought. In considering that standard, the State's highest court has found that requested records need not be "specifically designated", that to meet the standard, the terms of a request must be adequate to enable the agency to locate the records, and that an agency must "establish that 'the descriptions were insufficient for purposes of locating and identifying the documents sought'...before denying a FOIL request for reasons of overbreadth" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

Although it was found in the decision cited above that the agency could not reject the request due to its breadth, it was also stated that:

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the

> Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency']" (id. at 250).

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping systems. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number.

I am unfamiliar with the nature of records maintained by the Insurance Department or the means by which its records are kept. It appears, however, that a request based on a name alone may not be adequate to enable staff to locate and identify the records sought. A review of the entry in the New York State agency directory indicates that, in addition to the typical units within an agency, such as administrative, personnel and finance offices, the Insurance Department has bureaus regarding licensing, property, consumer services, life, health, insurance frauds and insurance regulatory systems. If you or your family members have been involved in certain incidents, transactions or complaints, it is suggested that you might attempt to relate them to the functions of a bureau within the Department and provide as much detail as possible in a request (i.e., names, dates of birth, dates and descriptions of events) in an effort to enable Department staff to locate and identify the records of your interest.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: D. Monica Marsh

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1283

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

July 25, 2001

Mr. Larry McNair
97-A-7382
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. McNair:

I have received your letter in which you sought an opinion on the availability of a "log book on the day the mail supposedly arrived at the block, to find out who gave it out, and delivered it that day."

First, I point out that the Freedom of Information Law pertains to existing records. Section 89(3) of that statute provides in part that an agency is not required to prepare a record that is not maintained by the agency in response to a request. In short, if the record in question does not exist, the Freedom of Information Law would not apply.

While I am unfamiliar with the contents of the "log book", I offer the following comments.

Second, as a general matter the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, several of the grounds for denial may be pertinent.

One provision, §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.

Another provision of potential significance is §87(2)(b), which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy." That provision might be applicable relative to the deletion of identifying details in a variety of situations.

In sum, while some aspects of the records, if they exist, might justifiably be withheld pursuant to the above mentioned provisions, in my view it is possible that other aspects must be disclosed.

Lastly, you requested copies of opinions published by this office last year. In this regard, please note that this office does not publish its opinions.

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12835

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

July 24, 2001

Mr. Eddie Barrett
87-A-8102
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 facts presented in your correspondence.

Dear Mr. Barrett:

I have received your letter in which you requested an opinion involving records relating to a "protected custody" hearing from Woodbourne Correctional Facility.

In this regard, I offer the following comments.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, several of the grounds for denial may be pertinent.

One provision, §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.

Another provision of potential significance is §87(2)(b) which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy." That provision might be applicable relative to the deletion of identifying details in a variety of situations, i.e., where a record identifies a confidential source or a witness, for example.

Also of possible relevance is §87(2)(f), which permits withholding to the extent that disclosure "would endanger the life or safety of any person." The capacity to withhold on that basis is dependent upon the facts and circumstances concerning an event.

Lastly, §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."

In sum, while some aspects of the records might justifiably be withheld pursuant to the above mentioned provisions, in my view it is possible that other aspects must be disclosed.

I hope that I have been of assistance.

Sincerely,

David Treacy

David M. Treacy
Assistant Director

DMT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12836

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

July 25, 2001

Hon. Doris Millett
Town Clerk
Town of Coeymans
18 Russell Avenue
Ravena, NY 12143

Dear Ms. Millett:

I have received your note and the materials that accompany it. You have sought an advisory opinion concerning a request made under the Freedom of Information Law.

I note at the outset that the applicant for records, an inmate, indicated that he "is unable to afford the cost of copying and mailing of the things herein demanded", and he asked that the record be sent to him "without pre-payment of cost." In this regard, 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 a request is made by an indigent inmate [Whitehead v. Morgenthau, 552 NYS2d 518 (1990)]. It has also been held that an agency may require payment in advance of copying records [Sambucci v. McGuire, Supreme Court, New York County, November 4, 1982]. It is suggested that you might inform the applicant if your practice does not include the waiver of fees and if you intend to seek payment in advance of preparing copies.

If you do so and the applicant agrees to pay the requisite fees, I would be pleased to offer advice concerning rights of access to the records sought upon hearing from you. Alternatively, if you would want an opinion prepared immediately, I will do so.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12837

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

July 25, 2001

Mr. Luis Rosales
91-A-3067
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. Rosales:

I have received your letter in which you sought assistance in obtaining records from the Department of Correctional Services.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records.

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 and appeals. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

David Treacy

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12838

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

July 25, 2001

Mr. Charles Bressette
68-B-0038
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. Bressette:

I have received your letter in which you sought assistance in obtaining a copy of a warrant.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of your correspondence, I offer the following comments.

First, the Freedom of Information Law, the statute within the advisory jurisdiction of the Committee on Open Government, is applicable to agency records. Section 86(3) of that statute defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines the term "judiciary" to mean:

> "the courts of the state, including any municipal or district court, whether or not of record."

Based on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law (see e.g., Judiciary Law, §255) may grant broad public access to those records. It is recommended that 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 an office of a district attorney or a 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.

I hope that I have been of assistance.

Sincerely,

David Treacy

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12839

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

July 25, 2001

Mr. William A. Evans
92-A-5030
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. Evans:

I have received your letters in which you questioned the propriety of a denial of your request for records from the County of Nassau. The denial was based on an assertion that the records were previously provided to you in a civil action. You stated that this basis for denial is not included in the list of exemptions appearing in §87(2) of the Freedom of Information Law.

While you are correct in your assertion, there is case law that provides guidance on the matter. In a decision concerning a request for records maintained by the office of a district attorney that would ordinarily be exempted from disclosure under the Freedom of Information Law, it was held that "once the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public" [see Moore v. Santucci, 151 AD 2d 677, 679 (1989)]. Based upon that decision, it appears that records introduced into evidence or disclosed during a public judicial proceeding should be available.

However, in the same decision, it was also found that:

> "...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his

> counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12840

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

July 25, 2001

Mr. Derrick Caldwell
93-A-4157
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. Caldwell:

I have received your letters in which you sought assistance in obtaining records related to previous arrests from the New York City Police Department and the Supreme Courts of New York and Kings County.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of your correspondence, I offer the following comments.

First, the Freedom of Information Law, the statute within the advisory jurisdiction of the Committee on Open Government, is applicable to agency records. Section 86(3) of that statute defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines the term "judiciary" to mean:

> "the courts of the state, including any municipal or district court, whether or not of record."

Based on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law (see e.g., Judiciary Law, §255) may grant broad public access to those records. It is recommended that 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, with respect to records of the New York City Police Department, which is an "agency" subject to the Freedom of Information Law, I note that the Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Third, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. While some aspects of the records sought might properly be withheld, relevant is a decision by the Court of Appeals concerning DD5's (complaint follow-up reports) and police officers' memo books in which it was held that a denial of access based on their characterization as intra-agency materials would be inappropriate.

The provision at issue, §87(2)(g) of the Freedom of Information Law, enables an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

In its analysis of the matter, the decision states that:

> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)...
>
> "...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal

government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][i]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182).

"Against this backdrop, we conclude that the complaint follow-up reports contain substantial factual information available pursuant to the provisions of FOIL. Sections of the report are devoted to such purely factual data as: the names, addresses, and physical descriptions of crime victims, witnesses, and perpetrators; a checklist that indicates whether the victims and witnesses have been interviewed and shown photos, whether crime scenes have been photographed and dusted for fingerprints, and whether neighborhood residents have been canvassed for information; and a blank space denominated 'details' in which the officer records the particulars of any action taken in connection with the investigation.

"However, the Police Department argues that any witness statements contained in the reports, in particular, are not 'factual' because there is no assurance of the statements' accuracy and reliability. We decline to read such a reliability requirement into the phrase 'factual data', as the dissent would have us do, and conclude that a witness statement constitutes factual data insofar as it embodies a factual account of the witness's observations. Such a statement, moreover, is far removed from the type of internal government exchange sought to be protected by the intra-agency exemption (see, Matter of Ingram v. Axelrod, 90 AD2d 568, 569 [ambulance records, list of interviews, and reports of interviews available under FOIL as 'factual data']). By contrast, any impressions, recommendations, or opinions recorded in the complaint follow-up report would not constitute factual data and would be exempt from disclosure. The holding herein is only that these reports are not categorically exempt as intra-agency material. Indeed, the Police Department is entitled to withhold complaint follow-up reports, or specific portions thereof, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" [Gould, Scott and DeFelice v. New York City Police Department, 654 NYS2d 54, 89 NY2d 267 (1996); emphasis added by the Court].

Based on the foregoing, neither the Police Department nor an office of a district attorney can claim that DD5's can be withheld in their entirety on the ground that they constitute intra-agency materials. However, the Court was careful to point out that other grounds for denial might apply in consideration of those records.

For instance, of potential significance is §87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". That provision might be applicable relative to the deletion of identifying details in a variety of situations, i.e., where a record identifies a confidential source or a witness, for example.

Often the most relevant provision concerning access to records maintained by law enforcement agencies is §87(2)(e), which permits an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in sub-paragraphs (i) through (iv) of §87(2)(e).

Another possible ground for denial is §87(2)(f), which permits withholding to the extent that disclosure "would endanger the life or safety of any person". The capacity to withhold on that basis is dependent upon the facts and circumstances concerning an event.

Lastly, in a decision concerning a request for records maintained by the office of a district attorney that would ordinarily be exempted from disclosure under the Freedom of Information Law, it was held that "once the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public" [see Moore v. Santucci, 151 AD 2d 677, 679 (1989)]. Based upon that decision, it appears that records introduced into evidence or disclosed during a public judicial proceeding should be available.

However, in the same decision, it was also found that:

> "...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12841

41 State Street, Albany, New York 12231
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July 30, 2001

Mr. Vladymir Campos
98-A-6849
Coxsackie Correctional Facility
P.O. Box 999
Coxsackie, NY 12051

Dear Mr. Campos:

I have received your letter in which you appealed what you characterized as a denial of your request for records by the Kings County Office of the District Attorney.

In this regard, the primary function of the Committee on Open Government involves offering 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 a denial of access to records, section 89(4)(a) of the Freedom of Information Law, states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

It is suggested that you direct your appeal to the appropriate person at the Office of the District Attorney.

I hope that the foregoing serves to clarify your understanding of the matter and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12842

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

July 30, 2001

Mr. Charlie Mixon
90-B-3069
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. Mixon:

I have received your letter in which you requested an opinion regarding the receipt of requested documents from the Erie County District Attorney, which included 510 pages that were either blank, duplicate copies or illegible. You indicated that you paid twenty-five cents per page for the records. Additionally, you stated that you did not receive certain requested records.

In this regard, I offer the following comments.

First, as you are aware, §87(1)(b)(iii) of the Freedom of Information Law allows agencies to charge up to twenty-five cents per photocopy. That provision, as well as other provisions of law, should be construed, in my opinion, in a manner that gives reasonable effect to its language. Charging for illegible or duplicate copies, in my view, is contrary to the spirit of the Freedom of Information Law. It is recommended that you contact the person who responded at the District Attorney's office to request a refund for each blank or illegible page.

Second, you stated that the District Attorney's office has not provided certain records. In my opinion, the portion of the request involving those records may be considered to have been constructively denied. Whether records are accessible or deniable, an agency is required to respond to a request. The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record

> reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of 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,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1284B

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

July 30, 2001

Mr. Reynaldo Arroyo
94-A-2305
Collins Correctional Facility
P.O. Box 340
Collins, NY14034-0340

Dear Mr. Arroyo:

I have received your letter in which you appealed what you characterized as a denial of your request for records by the Collins Correctional Facility.

In this regard, the primary function of the Committee on Open Government involves offering 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 a denial of access to records, section 89(4)(a) of the Freedom of Information Law, states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

For your information, the person designated by the Department of Correctional Services to determine appeals is Anthony J. Annucci, Counsel.

I hope that the foregoing serves to clarify your understanding of the matter and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12844

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

July 31, 2001

E-MAIL

TO: Cheryl Jaffe [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 Ms. Jaffe:

Your letter 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 and opinions relating to the Freedom of Information Law. You asked why the Division of State Police can charge fifteen dollars for a report rather than "the prescribed 25 cents per page."

In this regard, §87(1)(b)(iii) of the Freedom of Information Law provides that agencies can charge up to twenty-five cents per photocopy up to nine by fourteen inches or the actual cost of reproducing other records (i.e., computer tapes or disks), unless a different is prescribed by statute. Therefore, in the context of your question, unless an act of the State Legislature authorizes an agency to charge in excess of twenty-five cents per photocopy, it would be limited to that fee.

One of the rare instances in which an agency may charge a fee different from that generally permitted by the Freedom of Information Law relates to the situation that you described. Specifically, §66-a of the Public Officers Law, a statute that deals with accident reports and certain other records maintained by the Division of State Police, provides in subdivision (2) that:

> "Notwithstanding the provisions of section twenty-three hundred seven of the civil practice law and rules, the public officers law, or any other law to the contrary, the division of state police shall charge fees for the search and copy of accident reports and photographs. A search fee of fifteen dollars per accident report shall be charged, with no additional fee for a photocopy. An additional fee of fifteen dollars shall be charged for a certified copy of any accident report. A fee of twenty-five dollars per photograph or contact sheet shall be charged.

> The fees for investigative reports shall be the same as those for accident reports."

Based on the foregoing, it is clear that a statute separate from the Freedom of Information Law authorizes the Division of State Police to charge fifteen dollars for the search and copy of accident reports.

I hope that the foregoing serves to clarify your understanding of the matter and that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1284

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

July 31, 2001

Mr. Keith Maguire
01-A-1234
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. Maguire:

I have received your letters and, as requested, enclosed are copies of the opinions to which you referred.

Having reviewed your correspondence, I note that the New York Freedom of Information Law is applicable to agency records, and that §86(3) of that statute defines the term "agency" to 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, rights of access are conferred with respect to records maintained by entities of state and local government. Similarly, the federal Freedom of Information Act applies to records of federal agencies, such as one of the entities that you cited, the Federal Bureau of Investigation.

Banks and other private organizations that are not governmental entities are not subject to either the state or federal freedom of information statutes, and the state Freedom of Information Law would not apply to any of the entities that you cited.

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
encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12846

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

July 31, 2001

E-MAIL

TO: Noelle McKenna, [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 Ms. McKenna:

I have received your letter in which you asked whether certain records relating to an adoption are subject to the Freedom of Information Law.

In this regard, first, the Freedom of Information Law is applicable to agency records, and the term "agency" is defined, in brief, to mean entities of state and local government in New York; a private facility would not fall within the coverage of that statute.

Second, when it is applicable, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 to records, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §114 of the Domestic Relations Law, which generally requires that adoption records be sealed and confidential. As such, the Freedom of Information Law would not be applicable to those records. Section 114 states in part that:

> "No person, including the attorney for the adoptive parents shall disclose the surname of the child directly or indirectly to the adoptive parents except upon order of the court. No person shall be allowed access to such sealed records and order and any index thereof except upon an order of a judge or surrogate of the court in which the order was made or of a justice of the supreme court. No order for

> disclosure or access and inspection shall be granted except on good cause shown and on due notice to the adoptive parents and to such additional persons as the court may direct."

Based on the foregoing, only a court by means of an order could unseal records relating to an adoption.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12847

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

July 30, 2001

Mr. Theodore Grange
93-R-3798
Collins Correctional Facility
P.O. Box 340
Collins, NY 14034-0340

Dear Mr. Grange:

I have received your letter in which you appealed what you characterized as a denial of your request for records from the NYS Division of Parole.

In this regard, the primary function of the Committee on Open Government involves offering 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 a denial of access to records, section 89(4)(a) of the Freedom of Information Law, states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

For your information, the person designated by the Division of Parole is Terrence Tracy, Counsel to the Division, whose address is 97 Central Avenue, Albany, NY 12206.

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-1284

Committee Members

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 1, 2001

Mr. Ray Fleischhacker
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Fleischhacker:

I have received your letter of June 11 and the materials relating to it. It appears that your letter and my last response to you, which was sent to you on the same date, crossed in the mail. Those aspects of your latest letter dealing with records considered in my earlier responses need not be reconsidered. The remaining areas of inquiry involve access to data from which monies representing an "incentive" to tenants were derived, records that "reveal any budget allocation of the EDC for payments of incentives to tenants at 45 Wall Street", and the obligation of the EDC to comply with certain provisions in the "Rules of the City of New York."

In this regard, it is emphasized that the Freedom of Information Law pertains to existing records, and that §89(3) of that statute provides in part that an agency is not required to create a record in response to a request. In a letter addressed to you on June 8 by Judy E. Fensterman, EDC's FOIL Appeals Officer, she wrote that "EDC does not have a specific budget allocation for the payment of incentives to tenants; it is merely a part of the larger New York Stock Exchange ('NYSE') project budget. Also, there are no currently executed agreements between EDC and ESDC regarding tenant relocation at 45 Wall Street." If indeed there are no records indicating the source of payments to tenants or a budget allocation from which such payments were derived, the EDC would not in my opinion be required to prepare new records containing the information sought on your behalf. Insofar as any such records might exist now or in the future, I believe that they would be available under §87(2)(g)(i) of the Freedom of Information Law. That provision generally requires the disclosure of statistical or factual information found within internal governmental communications.

Lastly, the Committee on Open Government is authorized to offer advice and opinions concerning public access to government information. Consequently, the matter of the status of EDC under the Rules of the City of New York falls beyond the jurisdiction of this office.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Judy E. Fensterman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12849

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 1, 2001

Mr. Peter Danziger
O'Connell and Aronowitz
100 State Street
Albany, NY 12207-1885

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Danziger:

I have received your letter of June 11 and the correspondence attached to it.

By way of background, you have requested records relating to counties' lead poisoning prevention programs, and in your requests you indicated that they are intended to include records "of every employee" associated with a lead poisoning prevention program, those involving "the environmental management, environmental investigations and exposure assessment, lead inspections, lead abatement, sampling for lead, environmental testing and reporting, notice and demand of discontinuance of conditions conducive to lead poisoning, environmental intervention and abatement, and environmental enforcement of dwelling units relating to" certain properties inspected by county agencies, as well as other records relating to the inspection of properties. In your requests, you specified that you are not seeking the names of children or their parents or guardians, and in those instances in which records were sought from a county's "nursing division", you wrote that you "provide a child specific authorization." Additionally, you asked that county employees preserve all records falling within the scope of a request, for you are "concerned that counties may destroy records after a FOIL request is made.".

You have sought an advisory opinion pertaining to your requests concerning:

"1. right to access and then copying of voluminous records;
2. right to 'computer disc' and printouts;
3. destroying records after request;
4. files 'kept' by employee."

In this regard, a key issue in my view involves the extent to which your request has "reasonably described" the records as required by §89(3) of the Freedom of Information Law. It has been held that a request reasonably describes the records when the agency can locate and identify the records based on the terms of a request, and that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

The decision cited above involved thousands of records, and although it was found that the agency could not reject the request due to its breadth, it was also stated that:

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency'])" (id. at 250).

In my opinion, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping 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 nature of the filing or recordkeeping systems employed by the agencies to which your requests were made. However, from my perspective, insofar as records can be located with reasonable effort, a request meets the requirement of reasonably describing the records. On the other hand, insofar as records cannot be located except by means of a review of what may be hundreds or thousands of records individually, the request in my opinion would not reasonably describe the records.

With respect to rights of access, as you are aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. 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 and 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, the 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.).

In consideration of the nature of the records sought, it appears that two of the grounds for denial may 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." In my opinion, names of children or other family members could, under the circumstances, be withheld. However, that issue appears to have been rendered moot, for you indicated that you have no objection to the redaction of those items or have received consent to disclose from the subjects of the records.

The other provision of significance, §87(2)(g), permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

I point out that in Gould, supra, one of the contentions was that certain reports could be withheld because they were not final and because they related to incidents for which no final determination had been made. The Court rejected that finding and stated that:

> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)..." [Gould et al. v. New York City Police Department, 87 NY2d 267, 276 (1996)].

In short, that records do not relate to final action or determination would not represent an end of an analysis of rights of access or an agency's obligation to review the entirety of their contents 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).

Some aspects of records prepared by the staff of an agency, such as internal memoranda, might include advice, recommendations or opinions, for example. To that extent, I believe that the records sought may be withheld. However, I would conjecture that the contents of the records consist largely of statistical or factual information that must be disclosed, again, perhaps following the deletion or redaction of names or other personally identifying details pertaining to members of the public in relation to lead poisoning.

With respect to the ability to acquire information on "computer discs" or "printouts", 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 language quoted above, if information is maintained in some physical form, it would constitute a "record" subject to rights of access conferred by the Law. Further, the definition of "record" includes specific reference to computer tapes and discs, and it was held more than twenty years ago that "[i]nformation is increasingly being stored in computers and access to such data should not be restricted merely because it is not in printed form" [Babigian v. Evans, 427 NYS 2d 688, 691 (1980); aff'd 97 AD 2d 992 (1983); see also, Szikszay v. Buelow, 436 NYS 2d 558 (1981)].

When information is maintained electronically, 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 disc. On the other hand, if information sought can be generated only through the use of new programs, so doing would in my opinion represent the equivalent of creating a new record.

Questions and issues have arisen in relation to information maintained electronically concerning §89(3) of the Freedom of Information Law, which states in part that an agency is not required to create or prepare a record in response to a request. In this regard, often information stored electronically can be extracted by means of keystrokes or queries entered 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. Transferring the data from one electronic storage medium to another involved relatively little effort and cost; preparation of a printout, however, involved approximately a million pages and a cost of ten thousand dollars for paper alone. 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)].

In another decision which 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).

Perhaps most pertinent and timely is a decision rendered less than three weeks ago concerning a request for records, data and reports maintained by the New York City Department of

Health regarding "childhood blood-level screening levels" (New York Public Interest Research Group v. Cohen and the New York City Department of Health, Supreme Court, New York County, July 16, 2001; hereafter "NYPIRG"). The agency maintained much of the information in its "LeadQuest" database. I am unaware whether the LeadQuest system is used by other counties in the state. Nevertheless, the principles enunciated in that decision would likely be applicable with respect to information maintained electronically in the context of your requests.

In NYPIRG, the Court described the facts, in brief, as follows:

> "...the request for information in electronic format was denied on the following grounds:
>
> > '[S]uch records cannot be prepared in an electronic format with individual identifying information redacted, without the Department creating a unique computer program, which the Department is not required to prepare pursuant to Public Officer's Law §89(3).'
>
> "Instead, the agency agreed to print out the information at a cost of twenty-five cents per page, and redact the relevant confidential information by hand. Since the records consisted of approximately 50,000 pages, this would result in a charge to petitioner of $12,500."

It was conceded by an agency scientist that:

> "...several months would be required to prepare a printed paper record with hand redaction of confidential information, while it would take only a few hours to program the computer to compile the same data. He also confirmed that computer redaction is less prone to error than manual redaction."

In consideration of the facts, the Court wrote that:

> "The witnesses at the hearing established that DOH would only be performing queries within LeadQuest, utilizing existing programs and software. It is undisputed that providing the requested information in electronic format would save time, money, labor and other resources - maximizing the potential of the computer age.
>
> "It makes little sense to implement computer systems that are faster and have massive capacity for storage, yet limit access to and dissemination of the material by emphasizing the physical format of a record. FOIL declares that the public is entitled to maximum access to public records [Fink v. Lefkowitz, 47 NY2d 567, 571

> (1979)]. Denying petitioner's request based on such little inconvenience to the agency would violate this policy."

Based on the foregoing, it was concluded that:

> "To sustain respondents' positions would mean that any time the computer is programmed to provide less than all the information stored therein, a new record would have been prepared. Here all that is involved is that DOH is being asked to provide less than all of the available information. I find that in providing such limited information DOH is providing data from records 'possessed or maintained' by it. There is no reason to differentiate between data redacted by a computer and data redacted manually insofar as whether or not the redacted information is a record 'possessed or maintained' by the agency.
>
> "Moreover, rationality is lacking for a policy that denies a FOIL request for data in electronic form when to redact the confidential information would require only a few hours, whereas to perform the redaction manually would take weeks or months (depending on the number of employees engaged), and probably would not be as accurate as computer generated redactions."

Assuming that your requests involve similar considerations, in my opinion, responses to those requests, based on the precedent offered in NYPIRG, must involve the disclosure of data stored electronically for which there is no basis for a denial of access.

Next, you questioned the propriety of "destroying records after [a] request" is made. Potentially applicable may be §89(8) of the Freedom of Information Law and §240.65 of the Penal Law, which contain 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.

I note that the Freedom of Information Law does not provide direction concerning 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.

Lastly, I believe that files "kept" by employees that fall within the scope of your request would, based on the definition of "record" appearing in §86(4) of the Freedom of Information Law, constitute agency records subject to rights of access, irrespective of their characterization as

personal, unofficial, draft or otherwise. In a case in which an agency claimed, in essence, that it could choose which documents it considered to be "records" for purposes of the Freedom of Information Law, the state's highest court rejected that contention. As stated by the Court of Appeals:

> "...respondents' construction -- permitting an agency to engage in a unilateral prescreening of those documents which it deems to be outside the scope of FOIL -- would be inconsistent with the process set forth in the statute. In enacting FOIL, the Legislature devised a detailed system to insure that although FOIL's scope is broadly defined to include all governmental records, there is a means by which an agency may properly withhold from disclosure records found to be exempt (see, Public Officers Law §87[2]; §89[2],[3]. Thus, FOIL provides that a request for access may be denied by an agency in writing pursuant to Public Officers Law §89(3) to prevent an unwarranted invasion of privacy (see, Public Officers Law §89[2]) or for one of the other enumerated reasons for exemption (see, Public Officers Law §87[2]). A party seeking disclosure may challenge the agency's assertion of an exemption by appealing within the agency pursuant to Public Officers Law §89(4)(a). In the event that the denial of access is upheld on the internal appeal, the statute specifically authorizes a proceeding to obtain judicial review pursuant to CPLR article 78 (see, Public Officers Law §89[4][b]). Respondents' construction, if followed, would allow an agency to bypass this statutory process. An agency could simply remove documents which, in its opinion, were not within the scope of the FOIL, thereby obviating the need to articulate a specific exemption and avoiding review of its action. Thus, respondents' construction would render much of the statutory exemption and review procedure ineffective; to adopt this construction would be contrary to the accepted principle that a statute should be interpreted so as to give effect to all of its provisions...
>
> "...as a practical matter, the procedure permitting an unreviewable prescreening of documents -- which respondents urge us to engraft on the statute -- could be used by an uncooperative and obdurate public official or agency to block an entirely legitimate FOIL request. There would be no way to prevent a custodian of records from removing a public record from FOIL's reach by simply labeling it 'purely private'. Such a construction, which could thwart the entire objective of FOIL by creating an easy means of avoiding compliance, should be rejected" [Capital Newspapers v. Whalen, 69 NY 2d 246, 253-254 (1987)].

In short, so long as records are maintained by or for an agency, I believe that they fall within the framework of the Freedom of Information Law. As indicated previously, an issue relative to

records kept by employees may involve whether or the extent to which the request reasonably describes the records; another would deal with the content of the records, particularly in consideration of §87(2)(g) pertaining to inter-agency and intra-agency materials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12850

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August 2, 2001

Mr. Michael A. Kless
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Kless:

I have received your letter in which you complained that you were given "a blank sheet of paper" in response to your request for notes taken at a meeting that you had with representatives of the Erie County Department of Civil Service.

I am unaware of the nature or content of any such notes, and it is possible that a blank sheet was sent to you in error. Nevertheless, insofar as notes continue to exist, I believe that they would constitute "records" that fall within the scope of the Freedom of Information Law [see §86(4)]. 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.

Any such notes would fall within one of the exceptions, §87(2)(g). That provision permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. Therefore, insofar as the notes in question consist of opinions, recommendations or questions, for example, I believe that they may 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:tt

cc: Leonard Lenihan
Frederick A. Wolf

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August 2, 2001

Ms. Michele Worsnop
[redacted]

Dear Ms. Worsnop:

As you are aware, I have received your letter in which you indicated that you had been informed that you could review court records pertaining to your divorce only in the presence of your attorney. You have questioned whether there is such a requirement.

In this regard, the Committee on Open Government is authorized to provide advice and guidance concerning public access to government records, primarily under the Freedom of Information Law. That statute pertains to agency records, and §86(3) of that statute defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines the term "judiciary" to mean:

> "the courts of the state, including any municipal or district court, whether or not of record."

As such, the Freedom of Information Law does not apply to the courts or court records.

Frequently, however, court records are available under other provisions of law, and access to records relating to matrimonial proceedings is governed by §235(1) of the Domestic Relations Law, which states that:

> "An officer of the court with whom the proceedings in a matrimonial action or a written statement of separation or an action or proceeding for custody, visitation or maintenance of a child are filed, or before whom the testimony is taken, or his clerk, either before or after the termination of the suit, shall not permit a copy of any of the pleadings, affidavits, findings of act, conclusions of law, judgment of dissolution, written agreement of separation or memorandum thereof, or testimony, or any examination of perusal thereof, to be taken by any other person than a party, or the attorney or counsel of a party, except by order of the court."

Based on the foregoing, as a general matter, the details of a matrimonial proceeding are considered confidential with respect to the public. However, near the end of the provision quoted above is language indicating that "a party" to a matrimonial proceeding, "*or* the attorney or counsel of a party" may view such records. As I understand that provision, a party to a matrimonial proceeding enjoys rights of access to records of such a proceeding, and there is no requirement that a party's attorney be present while a party reviews records pertaining to a proceeding in which he or she is involved.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
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August 2, 2001

Mrs. Theresa Denny
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Denny:

I have received your letter and the correspondence attached to it. You have sought assistance concerning a request for records of the Town of New Windsor.

First, since you indicated that your request had not been answered as of the date of your letter to this office, 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)].

Second, having reviewed your request, 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. Similarly, while agency officers or employees may respond to questions and often do so, the Freedom of Information Law does not require that they do so; their obligation under that law involves providing access to existing records. Rather than asking a question, i.e., "which veterinarian did the euthanizing", or "how many hours per week does the ACO expend on this matter", it is suggested that you request existing records. For example, you might seek a record identifying the veterinarian who euthanized dogs during a certain period, or records indicating the amount of time expended by the Animal Control Officer in carrying out certain duties.

Third, insofar as records exist and are maintained by or for the 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, to the extent that the information sought exists in the form of a record or records, it must be disclosed. In short, it does not appear that any of the grounds for denial of access would be applicable.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Deborah Green

STATE OF NEW YORK
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August 2, 2001

Ms. Eleanor Kapsiak
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Kapsiak:

I have received your letters of June 13 and June 14 concerning the propriety of responses to your requests for records by the Kenmore-Town of Tonawanda Union Free School District.

The first involves a response to your request for "legal billings" that you indicated were "associated with [your] last FOIL appeal." In particular, you questioned why your name appears to have been deleted. I agree that if your name was deleted, the deletion would have been inconsistent with law. Although the Freedom of Information Law permits an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy" [§87(2)(b)], you could not invade your own privacy, and I believe that those portions of the records naming you should have been disclosed.

For future reference and for purposes of completeness, however, most pertinent in my view with respect to access to attorney bills and similar records is the decision rendered in Orange County Publications v. County of Orange [637 NYS2d 596 (1995)], which involved a request for the amount of money paid in 1994 to a particular law firm for legal services rendered in representing the County in a landfill expansion suit, as well as "copies of invoices, bills, vouchers submitted to the county from the law firm justifying and itemizing the expenses for 1994" [Orange County Publications v. County of Orange, 637 NYS2d 596, 599 (1995)]. Although monthly bills indicating amounts charged by the firm were disclosed, the agency redacted "'the daily descriptions of the specific tasks' (the description material) 'including descriptions of issues researched, meetings and conversations between attorney and client'" (id.). The County offered several rationales for the redactions; nevertheless, the court rejected all of them, in some instances fully, in others in part.

The first contention was that the descriptive material is specifically exempted from disclosure by statute in conjunction with §87(2)(a) of the Freedom of Information Law and the assertion of the attorney-client privilege pursuant to §4503 of the Civil Practice Law and Rules (CPLR). The court found that the mere communication between the law firm and the County as its client does not necessarily involve a privileged communication; rather, the court stressed that it is the content of the communications that determine the extent to which the privilege applies. Further, the court distinguished between actual communications between attorney and client and descriptions of the legal services provided, stating that:

> "Thus, respondent's position can be sustained only if such descriptions rise to the level of protected communications.
>
> "In this regard, the Court recognizes that not all communications between attorney and client are privileged. Matter of Priest v. Hennessy, supra, 51 N.Y.2d 68, 69, 409 N.E.2d 983, 431, N.Y.S.2d 511. In particular, 'fee arrangements between attorney and client do not ordinarily constitute a confidential communication and, thus, are not privileged in the usual case' (Ibid.). Indeed, '[a] communication concerning the fee to be paid has no direct relevance to the legal advice to be given', but rather "[i]s a collateral matter which, unlike communications which relate to the subject matter of the attorney's professional employment, is not privileged' Matter of Priest v. Hennessy, supra, 51 N.Y.2d at 69, 409 N.E.2d 983, 431 N.Y.S.2d 511.
>
> "Consequently, while billing statements which 'are detailed in showing services, conversations, and conferences between counsel and others' are protected by the attorney-client privilege (Licensing Corporation of America v. National Hockey League Players Association, 153 Misc.2d 126, 127-128, 580 N.Y.S.2d 128 [Sup. Ct. N.Y.Co. 1992]; see, De La Roche v. De La Roche, 209 A.D.2d 157, 158-159 [1st Dept. 1994]), no such privilege attaches to fee statements which do not provide 'detailed accounts' of the legal services provided by counsel..." (id., 602).

It was also contended that the records could be withheld on the ground that they constituted attorney work product or material prepared for litigation that are exempted from disclosure by statute [see CPLR, §3101(c) and (d)]. In dealing with that claim, it was stated by the court that:

> "Respondent's denial of the FOIL request cannot be upheld unless the descriptive material is uniquely the product of the professional skills of respondent's outside counsel. The preparation and submission of a bill for fees due and owing, not at all dependent on legal expertise, education or training, cannot be 'attribute[d]...to the unique skills of an attorney' (Brandman v. Cross & Brown Co., 125 Misc.2d 185, 188

> 479 N.Y.S.2d 435 [Sup. Ct. Kings Ct. 1984]). Therefore, the attorney work product privilege does not serve as an absolute bar to disclosure of the descriptive material. (See, id.).
>
> "Nevertheless, depending upon how much information is set forth in the descriptive material, a limited portion of that information may be protected from disclosure, either under the work product privilege, or the privilege for materials prepared for litigation, as codified in CPLR 3101(d)...
>
> "While the Court has not been presented with any of the billing records sought, the Court understands that they may contain specific references to: legal issues researched, which bears upon the law firm's theories of the landfill action; conferences with witnesses not yet identified and interviewed by respondent's adversary in that lawsuit; and other legal services which were provided as part of counsel's representation of respondent in that ongoing legal action...Certainly, any such references to interviews, conversations or correspondence with particular individuals, prospective pleadings or motions, legal theories, or similar matters, may be protected either as work product or material prepared for litigation, or both" (emphasis added by the court) (id., 604).

Finally, it was contended that the records consisted of intra-agency materials that could be withheld under §87(2)(g) of the Freedom of Information Law. That provision permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

The court found that much of the information would likely consist of factual information available under §87(2)(g)(i) and stated that:

> "...the Court concludes that respondent has failed to establish that petitioner should be denied access to the descriptive material as a whole. While it is possible that some of the descriptive material may fall within the exempted category of expressions of opinion, respondent has failed to identify with any particularity those portions which are not subject to disclosure under Public Officers Law §87(2)(g). See, Matter of Dunlea v. Goldmark, supra, 54 A.D.2d 449, 389 N.Y.S.2d 423. Certainly, any information which merely reports an event or factual occurrence, such as a conference, telephone call, research, court appearance, or similar description of legal work, and which does not disclose opinions, recommendations or statements of legal strategy will not be barred from disclosure under this exemption. See, Ingram v. Axelrod, supra" (id., 605-606).

In short, although it was found that some aspects of the records in question might properly be withheld based on their specific contents, a blanket denial of access was clearly inconsistent with law, and substantial portions of the records were found to be accessible.

In the context of a school district's duties, insofar as the records identify or could identify particular students, I believe that they must be withheld. Another statute that exempts records from disclosure is the Family Education Rights and Privacy Act ("FERPA", 20 U.S.C. §1232g). In brief, FERPA applies to all educational agencies or institutions that participate in grant programs administered by the United States Department of Education. As such, FERPA includes within its scope virtually all public educational institutions and many private educational institutions. The focal point of the Act is the protection of privacy of students. It provides, in general, that any "education record," a term that is broadly defined, that is personally identifiable to a particular student or students is confidential, unless the parents of students under the age of eighteen waive their right to confidentiality, or unless a student eighteen years or over similarly waives his or her right to confidentiality. Further, the federal regulations promulgated under FERPA define the phrase "personally identifiable information" to include:

"(a) The student's name;
(b) The name of the student's parents or other family member;
(c) The address of the student or student's family;
(d) A personal identifier, such as the student's social security number or student number;
(e) A list of personal characteristics that would make the student's identity easily traceable; or
(f) Other information that would make the student's identity easily traceable" (34 CFR Section 99.3).

Based upon the foregoing, references to students' names or other aspects of records that would make a student's identity easily traceable must in my view be withheld in order to comply with federal law. Similarly, references to employees involved in disciplinary proceedings when such proceedings have not resulted in any final determination reflective of misconduct could be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see Herald Company v. School District of the City of Syracuse, 430 NY 2d 460 (1980)].

In a decision dealing specifically with bills involving services rendered by attorneys for a school district, that matter involved an applicant ("petitioner") who sought billing statements for legal services provided to the Board ("respondents") by a law firm. Since the statements made available included "only the time period covered and the total amount owed for services and disbursements", petitioner contended that "she is entitled to that billing information which would detail the fee, the type of matter for which the legal services were rendered and the names of the parties to any current litigation". In its discussion of the issue, the court found that:

> "The difficulty of defining the limits of the attorney client privilege has been recognized by the New York State Court of Appeals. (Matter of Priest v. Hennessy, 51 NY2d 62, 68.) Nevertheless, the Court has ruled that this privilege is not limitless and generally does not extend to the fee arrangements between an attorney and client. (Matter of Priest v. Hennessy, supra.) As a communication regarding a fee has no direct relevance to the legal advice actually given, the fee arrangement is not privileged. (Matter of Priest v. Hennessy, supra. at 69.)
>
> "There appear to be no New York cases which specifically address how much of a fee arrangement must be revealed beyond the name of the client, the amount billed and the terms of the agreement. However, the United States Court of Appeals, in interpreting federal law, has found that questions pertaining to the date and general nature of legal services performed were not violative of client confidentiality. (Cotton v. United States, 306 F.2d 633.) In that Court's analysis such information did not involve the substance of the matters was not privileged...
>
> "...Respondents have not justified their refusal to obliterate any and all information which would reveal the date, general nature of service rendered and time spent. While the Court can understand that in a few limited instances the substance of a legal communication might be revealed in a billing statement, Respondents have failed to come forward with proof that such information is contained in each and every document so as to justify a blanket denial of disclosure. Conclusory characterizations are insufficient to support a claim of privilege. (Church of Scientology v. State of New York, 46 NY 2d 906, 908.)...Therefore, Petitioner's request for disclosure of the fee,

type of matter and names of parties to pending litigation on each billing statement must be granted" (Knapp v. Board of Education, Supreme Court, Steuben County, November 13, 1990).

Your second letter, as I understand the matter, involves your request for the resume of the District's newly designated superintendent. Although significant portions of that document were disclosed, you questioned the propriety of the deletion of his residence address and his age, for both of those items were published in a local newspaper.

As indicated earlier, the Freedom of Information Law enables an agency to withhold records insofar as disclosure would result in an unwarranted invasion of personal privacy. In this regard, based on the judicial interpretation of the Freedom of Information Law, it is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that those individuals are required to be more accountable than others. The courts have found that, as a general rule, records that are relevant to the performance of the official duties of a public officer or employee are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that items relating to public officers or employees are irrelevant to the performance of their official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977, dealing with membership in a union; Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1981, involving the back of a check payable to a municipal attorney that could indicate how that person spends his/her money; Selig v. Sielaff, 200 AD 2d 298 (1994), concerning disclosure of social security numbers].

Neither a home address nor a person's age would ordinarily be relevant to the performance of his or her official duties as a public employee, and it has been advised that those items may be withheld to protect personal privacy. Further, §89(7) specifies that an agency is not required to disclose the home address of a current or former public employee. In my view, those items would have been properly withheld, unless the District disclosed them to the news media. Since the news media has no greater legal rights of access to school district records than the public generally, if they were disclosed by the District to the news media, I believe that they should be disclosed to you or any person. If the news media obtained those items from a source or sources other than the District, I do not believe that their publication would require the District to disclose those items in response to a request made under the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: David Paciencia
Karen E. Oliver

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 2, 2001

Ms. Barbara Elmore
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Elmore:

I have received your letter and the materials attached to it. You have sought advice concerning a variety of issues relating to your requests for records of the Town of Davenport. Based on a review of the correspondence, I offer the following comments.

First, with respect to the delay in disclosure, I note that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

While an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days, when such acknowledgement is given, there is no precise time period within which an agency must grant or deny access to records. The time needed to do so may be dependent upon the volume of a request, the possibility that other requests have been made, the necessity to conduct legal research, the search and retrieval techniques used to locate the records and the like. In short, when an agency acknowledges the receipt of a request because more than five business days may be needed to grant or deny a request, so long as it provides an approximate date indicating when the request will be granted or denied, and that date is reasonable in view of the attendant circumstances, I believe that the agency would be acting in compliance with law.

Second, it has been held that an agency may seek payment of fees for copies of records prior to preparing copies sought under the Freedom of Information Law (Sambucci v. McGuire, Supreme Court, New York County, November 4, 1982).

Among the records sought were payroll records pertaining to certain town "officials" during a particular time period, and the Town Clerk denied access on the basis of §89(2)(b) of the Freedom of Information Law. Although that provision permits an agency to withhold records insofar as disclosure would result in "an unwarranted invasion of personal privacy", I believe that those portions of the records sought indicating payments made to or wages earned by a public officer or employee must be disclosed.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Although tangential to your inquiry, I point out that §87(3)(b) of the Freedom of Information Law states in relevant part that:

> "Each agency shall maintain...
>
> (b) a record setting forth the name, public office address, title and salary of every officer or employee of the agency... "

As such, a payroll record that identifies all officers or employees by name, public office address, title and salary must be prepared to comply with the Freedom of Information Law. Moreover, payroll information has been found by the courts to be available [see e.g., Miller v. Village of Freeport, 379 NYS 2d 517, 51 AD 2d 765, (1976); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NYS 2d 954 (1978)]. In Gannett, supra, the Court of Appeals held that the identities of former employees laid off due to budget cuts, as well as current employees, should be made available. In addition, this Committee has advised and the courts have upheld the notion that records that are relevant to the performance of the official duties of public employees are generally available, for disclosure in such instances would result in a permissible as opposed to an unwarranted invasion of personal privacy [Gannett, supra; Capital Newspapers v. Burns, 109 AD 2d 292, aff'd 67 NY 2d 562 (1986) ; Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980; Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975) ; and Montes v. State, 406 NYS 664 (Court of Claims 1978)]. As stated prior to the enactment of the Freedom of Information Law, payroll records:

> "...represent important fiscal as well as operational information. The identity of the employees and their salaries are vital statistics kept in the proper recordation of departmental functioning and are the primary sources of protection against employment favortism. They are subject therefore to inspection" Winston v. Mangan, 338 NYS 2d 654, 664 (1972)].

Based on the foregoing, a record identifying agency employees by name, public office address, title and salary must in my view be maintained and made available.

In conjunction with the previous commentary concerning the ability to protect against unwarranted invasions of personal privacy, I believe that portions of payroll records 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 public officers' or employees' names and gross wages must in my view be disclosed.

Lastly, you requested drafts of meetings of the Town Board and were informed that "rough drafts...are not permanent records of the town and are not retained." In this regard, the Freedom of Information Law pertains to existing records. Therefore, if drafts no longer exist, that statute would not apply. Insofar as they continue to exist, I believe that they would be subject to rights of access.

The Freedom of Information Law is applicable to all agency records, and §86(4) defines the term "record" expansively to mean:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, rough drafts or notes, if they exist, would constitute "records."

In my view, any such records would fall within the scope of §87(2)(g). That provision permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that

are reflective of opinion, advice, recommendation and the like could in my view be withheld. Therefore, to the extent that draft minutes consist of a factual rendition of what transpired at an open meeting, I believe that they would be available. If, however, they include the opinions or conjecture of the writer, those portions could, in my view, be withheld.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Hon. Margaret Bonney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 2, 2001

E-Mail

TO: Mary Neagle Smith [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. Smith:

As you are aware, I have received your letter concerning your "FOIA request to the Tuckahoe Schools regarding minutes pertaining to the redesignation of the LIFE Skills Special Education Class from 12:1:1 to a 15:1." Your request was denied on the ground that the District maintains no records containing the information sought. You expressed the belief, however, that minutes should have been prepared to "memorialize" the action take to change the class size.

In this regard, it would seem that determination to alter a program or a class would have involved the creation of some sort of a record. If any such record was created, I believe that it would be accessible under the Freedom of Information Law. In this regard, I offer the following comments.

If the action taken involved the duties of the Board of Education and could have only been taken by the Board, its action, in my view, could only have been accomplished at a meeting held in accordance with the Open Meetings Law. Section 102(1) of the Open Meetings Law defines the term "meeting" to mean "the official convening of a public body for the purpose of conducting public business". Based upon an ordinary dictionary definition of "convene", that term means:

"1. to summon before a tribunal;

2. to cause to assemble syn see 'SUMMON'" (Webster's Seventh New Collegiate Dictionary, Copyright 1965).

In view of that definition and others, I believe that a meeting, i.e., the "convening" of a public body, involves the physical coming together of at least a majority of the total membership of the Commission. While nothing in the Open Meetings Law refers to the capacity of a member to participate or vote at a remote location by telephone or mail, it has consistently been advised that a member of a public body cannot cast a vote unless he or she is physically present at a meeting of the body.

It is noted, too, that the definition of "public body" [see Open Meetings Law, §102(2)] refers to entities that are required to conduct public business by means of a quorum. In this regard, the term "quorum" is defined in §41 of the General Construction Law, which has been in effect since 1909. The cited provision states that:

> "Whenever three of more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons or officers, at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such board of body, or at any duly adjourned meeting of such meeting, or at any meeting duly held upon reasonable notice to all of them, shall constitute a quorum and not less than a majority of the whole number may perform and exercise such power, authority or duty. For the purpose of this provision the words 'whole number' shall be construed to mean the total number which the board, commission, body or other group of persons or officers would have were there no vacancies and were none of the persons or officers disqualified from acting."

Based upon the language quoted above, a public body cannot carry out its powers or duties except by means of an affirmative vote of a majority of its total membership taken at a meeting duly held upon reasonably notice to all of the members. As such, it is my view that a public body has the capacity to carry out its duties only at meetings during which a majority of the total membership has convened.

In short, if the action to which you referred was taken by the Board of Education, I believe that it should have been taken at a meeting. Further, in consideration of the subject, I do not believe that there would have been any basis for discussing the matter in private in an executive session.

When action is taken by a public body, it must be memorialized in minutes, for §106 of the Open Meetings Law provides that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.

> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.
>
> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

In view of the foregoing, it is clear in my opinion that minutes must include reference to action taken by a public body.

Moreover, if a public body reaches a consensus upon which it relies, I believe that minutes reflective of decisions reached must be prepared and made available. In Previdi v. Hirsch [524 NYS 2d 643 (1988)], the issue involved access to records, i.e., minutes of executive sessions held under the Open Meetings Law. Although it was assumed by the court that the executive sessions were properly held, it was found that "this was no basis for respondents to avoid publication of minutes pertaining to the 'final determination' of any action, and 'the date and vote thereon'" (id., 646). The court stated that:

> "The fact that respondents characterize the vote as taken by 'consensus' does not exclude the recording of same as a 'formal vote'. To hold otherwise would invite circumvention of the statute.
>
> "Moreover, respondents' interpretation of what constitutes the 'final determination of such action' is overly restrictive. The reasonable intendment of the statute is that 'final action' refers to the matter voted upon, not final determination of, as in this case, the litigation discussed or finality in terms of exhaustion or remedies" (id. 646).

Therefore, if the Board reached a "consensus" that is reflective of its 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."

If Board action was not required and the action could have been taken administratively, again, it would be reasonable, in my view, to assume that some sort of record would have been prepared to reflect the action taken. Here 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.

If a record containing the information sought does exist, I believe that it would be available 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.

Relevant under the circumstances would be §87(2)(g). Although that provision potentially serves as a ground for a denial of access, due to its structure, it often requires disclosure. 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.

From my perspective, a record indicating action taken or a change in class size would be accessible, for it would consist of factual information accessible under subparagraph (i), or it would be reflective a final agency policy or determination accessible under subparagraph (iii).

In an effort to enhance compliance with and understanding of open government laws, copies of this opinion will be forwarded to District officials.

I hope that I have been of assistance.

RJF:jm
cc: Board of Education
Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 3, 2001

Mr. Christopher Pettit
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Pettit:

I have received your letter, which you characterized as an "appeal of the fees" sought to be charged by the Department of Motor Vehicles. From my perspective, the fees in question are proper.

In this regard, as you are aware, the Freedom of Information Law generally authorizes an agency to charge up to twenty-five cents per photocopy when it prepares copies of records. Ordinarily an agency cannot charge a higher fee or a fee for search or other administrative functions. The only instance in which agencies may charge higher or different fees involves those cases in which such fees are authorized by statutes other than the Freedom of Information Law [see Freedom of Information Law, §87(1)(b)(iii)].

One such statute, which pertains solely to the Department of Motor Vehicles, is §202 of the Vehicle and Traffic Law. Subdivision (2) of §202 is entitled "Fees for searches of records" and states in part that: "The fee for a search which is made manually by the department shall be five dollars". Additionally, subdivision (3), entitled "Fees for copies of documents", provides that:

> "The fees for copies of documents, other than accident reports, shall be one dollar per page. A page shall consist of either a single or double side of any document. The fee for a copy of an accident report shall be fifteen dollars. All copies of documents shall be certified at no additional fee. Whenever search of records of the department is required in conjunction with a request for a copy of a document, the fee for such search shall be the fee provided in paragraph (a) of subdivision two of this section. The result of such search will be the locating of the document to be copied, or if no document can be located, a certification to that effect will be the result of the search."

Based on the foregoing, the Department of Motor Vehicles may assess fees, pursuant to a statute, that exceed fees that could be charged if the Freedom of Information Law applied.

I hope the foregoing serves to enhance your understanding of the matter and that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Alexandra Sussman

STATE OF NEW YORK
DEPARTMENT OF STATE
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August 3, 2001

Ms. Frances Genovese
Association of Southampton Neighborhoods
P.O. Box 724
Southampton, NY 11969

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. Genovese:

I have received your letter in which you sought an opinion concerning "complaints petitions and letters to and about the Town of Southampton Building Department [that] were deleted from the relevant files, not to protect personal privacy, but to protect the business complained about and the regulatory performance of the Building Department."

In this regard, the use of the term "deleted" is unclear. If it is intended to refer to a situation in which records are sought under the Freedom of Information Law and withheld by means of their removal from a file, that kind of activity would in my view constitute a denial of access to records. Pursuant to the Freedom of Information Law, §89(3), and the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), a denial of access must be indicated in writing, and the applicant would have the right to appeal pursuant to §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person 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."

Additionally, 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).

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)].

If the use of the term "deleted" is intended to indicate that the Town disposed of records, other statutes may be pertinent. 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. To carry out the provisions quoted above, a unit of the State Education Department, the State Archives, has developed schedules indicating minimum retention periods for various kinds of records. A schedule applicable to towns may be obtained from the State Archives or the Town Clerk, who serves as "records management officer" under Article 57-A of the Arts and Cultural Affairs Law.

Next, while I am not suggesting that they apply, §89(8) of the Freedom of Information Law and §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."

From my perspective, the preceding may be applicable in two circumstances: first, when an agency employee receives a request for a record and indicates that the agency does not maintain the record even though he or she knows that the agency does maintain the record; or second, when an agency employee destroys a record following a request for that record in order to prevent public disclosure of the record. I do not believe that §240.65 applies when an agency denies access to a record, even though the basis for the denial may be inappropriate or erroneous.

Lastly, you asked if "it is policy to send a copy of all opinions requested of [this office] by private citizens to Town Supervisors." In this regard, based on considerations of fairness, and because the primary function of an advisory opinion involves an intent to educate, persuade, and to

enhance compliance with law, copies of opinions are sent to the units of government involved when they are known.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Supervisor
Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12858

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August 6, 2001

E-MAIL

TO: Maria Cudequest [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 Ms. Cudequest:

As you are aware, I have received your letter in which you questioned the propriety of a response to your request for records under the Freedom of Information Law by Richard Herbek, Village Manager of the Village of Croton on Hudson. In the request you sought:

> "...all files, correspondence, internal, external reports, statements, insertions, documents, etc. detailing discussions occurring the year 2000, as referenced in APPENDIX II1, NYS COASTAL ZONE MANAGEMENT POLICY CONSISTENCY DETERMINATION PREPARED BY LAWLER, MATUSKY ET AL, dated June 2000, and included in the March 2001 Millennium Pipeline SDEIS."

In response to the request, Mr. Herbek wrote that:

> "...there are three transfile boxes of information regarding the Millennium Pipeline project in my office. You are welcome to come in and look through these files and request copies of any of this material in which you are interested.. You may call my office...to schedule a mutually convenience [sic] appointment."

In this regard, although you indicated in your letter to me that you requested "very specific items", based on the terms of your request, while it might have been specific, I note that you sought "all" records relating to a particular project. If indeed the entirety of three transfile boxes consist of the records falling within the scope of your request, I believe that Mr. Herbek's response would have been appropriate. In that circumstance, your options in my view would involve inspecting the records in the manner suggested by Mr. Herbek, or alternatively, seeking copies that could be sent

to you or picked up at a convenient time. In that latter event, an agency may ask that fees for copies be paid in advance (see Sambucci v. McGuire, Supreme Court, New York County, November 4, 1982).

On the other hand, if the records sought are kept in three transfile boxes along with other records, insofar as those that you requested can be located and retrieved with reasonable effort, I believe that the Village would be required to do so to comply with the Freedom of Information Law.

Section 89(3) of that statute provides that an applicant must "reasonably describe" the records sought, and it has been held that the applicant has met that standard when, based on the terms of a request, an agency has the ability to locate and identify the records, irrespective of the breadth or volume of the request [Konigsberg v. Coughlin, 68 NY2d 245 (1986)]. Therefore, again, if the entirety of the three boxes consists of the records that you requested, you would have met the responsibility of reasonably describing the records, but at the same time, the Village's response, in my opinion, would have been fully consistent with law. One of the points in the case cited above involved a finding that the nature of an agency's filing or record-keeping system may have a bearing on whether or the extent to which a request reasonably the records. Assuming that the three boxes include materials other than those that you requested, to the extent, based on the filing system used in relation to the contents of the boxes, that the Village is able to locate and identify the records of your interest with reasonable effort, I believe that it would be required retrieve them for the purpose of enabling you to inspect and/or copy them. In that instance, I believe that Village staff, rather than you, would be obliged to review and retrieve the records. However, if the records are mixed in with others and cannot be found except by reviewing thousands of pages of material one at a time, the Court in Konigsberg indicated that, despite what may be a specific request, the request in that instance would not meet the standard of reasonably describing the records. In that event, an agency may in my view reject a request on the ground that it does not reasonably describe the records, or in the alternative, authorize the applicant to review the records in order to enable the applicant to locate the records of interest on his or her own.

In sum, the facts associated with your inquiry would determine the propriety of Mr. Herbek's response.

I hope that the foregoing serves to clarify your understanding of the matter and that I have been of assistance.

RJF:tt

cc: Richard Herbek

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 6, 2001

E-MAIL

TO: Paul Brown <[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. Brown:

I have received your letter in which you sought an opinion concerning your ability to obtain "the written documentation of a police traffic radar to include any documentation originally packaged with the radar device such as the operations manual, training manual, setup manual, calibration manual and any documentation that describes known problems with the accuracy of such a device under any circumstance."

Based on a recent judicial decision, Capruso v. New York State Police (Supreme Court, New York County, NYLJ, July 11, 2001), I believe that the records in question must be disclosed in great measure, if not in their entirety. In this regard, I offer the following comments.

Perhaps most importantly, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. It is emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In my view, the phrase quoted in the preceding sentence evidences a recognition on the part of the Legislature that a single record or report, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld. That being so, I believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

The state's highest court, the Court of Appeals, reiterated and expressed its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department [87 NY 2d 267 (1996)], stating that:

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see,* Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" (id., 275).

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the agency contended that complaint follow up reports, also known as "DD5's", could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g), an exception separate from those cited in response to your request. The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276). The Court then stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, directing that:

> "...to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents (*Matter of Fink v. Lefkowitz, supra*, 47 N.Y.2d, at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material (*see, Matter of Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 133, 490 N.Y.S. 2d, 488, 480 N.E.2d 74; *Matter of Farbman & Sons v. New York City Health & Hosps. Corp., supra*, 62 N.Y.2d, at 83, 476 N.Y.S.2d 69, 464 N.E.2d 437)" (id.).

In Capruso, supra, the request involved the "operator's manual for any radar speed detection device used" by the New York State Police and the New York City Police Department. The Division of State Police contended that disclosure would interfere with the ability to effectively enforce the law concerning speeding. Nevertheless, following an *in camera* inspection of the records, a private review by the judge, it was found that the Division could not meet it burden of proving that the harmful effects of disclosure appearing in the exceptions to rights of access would in fact arise.

In its attempt to deny access to the records, the Division relied upon §87(2)(e)(i) and (iv) of the Freedom of Information Law as a means of justifying its denial. Those provisions permit an

agency to withhold records that are "compiled for law enforcement purposes" to the extent that disclosure would "i. interfere with law enforcement investigations or judicial proceedings" or "iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

From my perspective, records prepared by manufacturer of a radar device could not be characterized as having been "compiled for law enforcement purposes. If my contention is accurate, §87 (2)(e) would not be applicable as a means of withholding those records.

Even if that provision is applicable, the court in Capruso determined that a denial of access would not be sustained. The leading decision dealing with law enforcement manuals and similar records detailing investigative techniques and procedures is Fink v. Lefkowitz [47 NY2d 567 (1979)], which was cited in Gould, supra, and] involved access to a manual prepared by a special prosecutor that investigated nursing homes in which the Court of Appeals held that:

> "The purpose of this exemption is obvious. Effective law enforcement demands that violators of the law not be apprised the nonroutine procedures by which an agency obtains its information (see Frankel v. Securities & Exch. Comm., 460 F2d 813, 817, cert den 409 US 889). However beneficial its thrust, the purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution.
>
> "To be distinguished from agency records compiled for law enforcement purposes which illustrate investigative techniques, are those which articulate the agency's understanding of the rules and regulations it is empowered to enforce. Records drafted by the body charged with enforcement of a statute which merely clarify procedural or substantive law must be disclosed. Such information in the hands of the public does not impede effective law enforcement. On the contrary, such knowledge actually encourages voluntary compliance with the law by detailing the standards with which a person is expected to comply, thus allowing him to conform his conduct to those requirements (see Stokes v. Brennan, 476 F2d 699, 702; Hawkes v. Internal Revenue Serv., 467 F2d 787, 794-795; Davis, Administrative Law [1970 Supp], section 3A, p 114).
>
> "Indicative, but not necessarily dispositive of whether investigative techniques are nonroutine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel (see Cox v. United States Dept. of Justice, 576 F2d 1302, 1307-1308; City of Concord v. Ambrose, 333 F Supp 958)."

In applying those criteria to specific portions of the manual, which was compiled for law enforcement purposes, the Court found that:

> "Chapter V of the Special Prosecutor's Manual provides a graphic illustration of the confidential techniques used in a successful nursing home prosecution. None of those procedures are 'routine' in the sense of fingerprinting or ballistic tests (see Senate Report No. 93-1200, 93 Cong 2d Sess [1974]). Rather, they constitute detailed, specialized methods of conducting an investigation into the activities of a specialized industry in which voluntary compliance with the law has been less then exemplary.
>
> "Disclosure of the techniques enumerated in those pages would enable an operator to tailor his activities in such a way as to significantly diminish the likelihood of a successful prosecution. The information detailed on pages 481 and 482 of the manual, on the other hand, is merely a recitation of the obvious: that auditors should pay particular attention to requests by nursing homes for Medicaid reimbursement rate increases based upon projected increase in cost. As this is simply a routine technique that would be used in any audit, there is no reason why these pages should not be disclosed" (id. at 573).

As the Court of Appeals has suggested, to the extent that the records in question include descriptions of investigative techniques which if disclosed would enable potential lawbreakers to evade detection or endanger the lives or safety of law enforcement personnel or others [see also, Freedom of Information Law, §87(2)(f)], a denial of access would be appropriate.

In consideration the direction given by the state's highest court in Fink, the court in Capruso rejected the contentions offered by the law enforcement agencies and determined that:

> "These arguments fail to establish a casual link as to how release of the information in the manufacturers' operational manual would enable a speeding driver to avoid detection. Similarly, absent from the affidavits is an explanation as to how the knowledge of the testing procedures used by the police to ensure the device is functioning properly would enable such driver to escape detection. Furthermore, the affidavits lack proof as to how the information in the manual would enable the use of a jamming device which could not otherwise be used. Thus, the claim that the release of these manuals would result in drivers engaging in dangerous behavior solely to avoid detection is speculative.
>
> The State also objects to the release of the State Police Radar and Aerial Speed Enforcement Training Manuals as they contain

> 'operational and legal considerations.' However, as the Court of Appeals stated in Fink v. Lefkowitz, supra at 571, '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.' The Court explained, the question 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,' (citations omitted) Id.
>
> Thus, after an in camera review, the City and State have failed to establish that the release of these manuals would allow motorists who are violating traffic laws to tailor their conduct to evade detection."

Based on the foregoing, I believe that the records in question must be disclosed.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 6, 2001

Mr. Tim Tenaglia
[redacted]

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. Tenaglia:

I have received a variety of materials from you since responding to your last series of inquiries. As I understand their thrust, you have sought guidance concerning requests made to the Shoreham-Wading River School District for purchase orders, receipts and similar records relating to school sponsored trips made by the lacrosse team. Payments were made at the direction of the District's coaches by parents of students, and you enclosed copies of checks, front and back, made out to the "SWR Lacrosse Club." In responses to the requests, the District's records access officer responded by indicating that "no documents [are] available in business office."

In my view, a response indicating that the records in question may not be maintained at the District's business office is inadequate. I believe that any such are subject to rights of access conferred by the Freedom of Information Law, irrespective of where they may be kept. In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to agency records, and §86(4) of that statute defines the term "record" expansively to mean:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes".

The Court of Appeals, the state's highest court, has construed the definition as broadly as its specific language suggests. The first such decision that dealt squarely with the scope of the term "record" involved a case cited earlier concerning documents pertaining to a lottery sponsored by a fire department. Although the agency contended that the documents did not pertain to the performance

of its official duties, i.e., fighting fires, but rather to a "nongovernmental" activity, the Court rejected the claim of a "governmental versus nongovernmental dichotomy" (see Westchester Rockland, supra, 581) and found that the documents constituted "records" subject to rights of access granted by the Law. Moreover, the Court determined that:

> "The statutory definition of 'record' makes nothing turn on the purpose for which it relates. This conclusion accords with the spirit as well as the letter of the statute. For not only are the expanding boundaries of governmental activity increasingly difficult to draw, but in perception, if not in actuality, there is bound to be considerable crossover between governmental and nongovernmental activities, especially where both are carried on by the same person or persons" (id.).

The point made in the final sentence of the passage quoted above appears to be especially relevant, for there appears to be "considerable crossover" in the activities of District staff in carrying out their duties for the District and those activities involving the "SWR Lacrosse Club."

In another decision, it was found that records maintained by an attorney retained by an industrial development agency were subject to the Freedom of Information Law, even though an agency did not possess the records and the attorney's fees were paid by applicants before the agency. The Court determined that the fees were generated in his capacity as counsel to the agency, that the agency was his client, that "he comes under the authority of the Industrial Development Agency" and that, therefore, records of payment in his possession were subject to rights of access conferred by the Freedom of Information Law (see C.B. Smith v. County of Rensselaer, Supreme Court, Rensselaer County, May 13, 1993).

It has also been found that materials received by a corporation providing services for a branch of the State University that were kept on behalf of the University constituted "records" falling with the coverage of the Freedom of Information Law. I point out that the Court rejected "SUNY's contention that disclosure turns on whether the requested information is in the physical possession of the agency", for such a view "ignores the plain language of the FOIL definition of 'records' as information kept or held 'by, with or for an agency'" [see Encore College Bookstores, Inc. v. Auxiliary Services Corporation of the State University of New York at Farmingdale, 87 NY 2d 410, (1995)].

In sum, if a document is produced for an agency i.e., the District, it constitutes an agency record, even if it is not in the physical possession of the agency or, in this case, the business office. If the records sought are kept by a coach or other District staff, irrespective of the physical location of the records, I believe that they would be District records subject to rights of access.

Second, 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 persons as "records access officer." The records access officer has the duty of "coordinating" the agency's response to requests for records. Therefore, in the context of your inquiry, the District's records access officer in my opinion is required to direct the person in possession of the records sought to disclose them

to you as required by law, or to obtain them so that he or she may review and disclose the records in a manner consistent with law.

Lastly, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, the records sought should be made available in great measure, if not in their entirety. In short, it does not appear that any of the grounds for denial would be applicable.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education
Andrew Miller
Patrick Perpignano

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 6, 2001

Mr. Bernard J. Blum
Friends of Rockaway, 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 dated May 22, which did not reach this office until June 25th. You sought assistance in obtaining from the New York City Department of Health "court orders to penetrate property for rat control using sanitation equipment."

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of your correspondence, I offer the following comments.

Without knowledge of the contents of the records in which you are interested, I could not conjecture as to the extent to which the records in question might justifiably be withheld. However, I point out that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully

explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

For your information, the person designated by the New York City Department of Health to determine appeals under the Freedom of Information Law is Wilfredo Lopez, Counsel to the Department.

I hope that I have been of assistance.

Sincerely,

David Treacy

David M. Treacy
Assistant Director

DMT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 6, 2001

Mr. Henry J. Bartosik
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Bartosik:

I have received your letter of June 24, in which you sought assistance in obtaining records from a local public access television station which is apparently operated by or for the Ellenville School District.

You sought a videotape of a program that aired on PEG Channel 8. The station informed you verbally that the requested tape "was being prepared", but did not reply in writing to your Freedom of Information Law request.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of your correspondence, I offer the following comments.

Whether records are accessible or deniable, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully

explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of 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,

David M. Treacy
Assistant Director

DMT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12863

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 6, 2001

Mr. Barry L. Nelson
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Nelson:

I have received your letter of June 26th in which you sought assistance in obtaining records from the Town of Guilderland. You wrote that you were verbally informed by the Town Clerk that the requested records are unavailable and that a written denial would not be sent to you.

You requested the number of tickets issued by the Guilderland Police Department for various types of infractions in 2000. In this regard, it is noted at the outset that the Freedom of Information Law pertains to existing records, and that §89(3) states in relevant part that an agency, such as the Town, is not required to create a record in response to a request. If the Department has not prepared records containing the information sought, the request would not involve existing records and the Freedom of Information Law would not apply.

Notwithstanding the foregoing, the Town must, in my opinion, respond to any 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)].

Next, a second request involved access to tickets issued for specific violations. An issue in that context in my view involves whether or 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. If staff can locate the records sought with reasonable effort, I believe that the request would meet the standard of reasonably describing the records. On the other hand, if locating the records would involve a page by page search of hundreds or thousands of records, that standard would not be met.

Lastly, since you sought records indicating "how many tickets were issued", I point out that there is a distinction in terms of rights of access between those situations in which a person has been found to have engaged in a violation of law, and those in which charges against an individual have been dismissed in his or her favor. In the latter case, records relating to an event that did not result in a conviction ordinarily become sealed pursuant to §160.50 and perhaps other provisions of the Criminal Procedure Law. However, if it is determined that a person has engaged in a violation, i.e., for speeding or parking in a prohibited area, the records would be available from the courts in which the proceedings occurred. Further, the Court of Appeals determined in 1984 that traffic tickets issued and lists of violations of the Vehicle and Traffic Law compiled by the State Police during a certain period in a county must be disclosed, unless charges were dismissed and the records sealed pursuant to provisions of the Criminal Procedure Law [see Johnson Newspaper Corp. v. Stainkamp, 61 NY2d 958).

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1286

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August 7, 2001

Mr. Thomas J. Costello
Personnel Officer
County of Ulster
P.O. Box 1800
Kingston, NY 12402-1800

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Costello:

I have received your letter and the attached "Ulster County Government Performance Appraisal Form", which is completed by the County Administrator regarding each department head. The form includes the name, title and department of the person being evaluated, the supervisor's name, and the time period and date of completion of the appraisal. At the end of the form is a sheet in which the person evaluated indicates that he or she agrees or disagrees with the evaluation; the employ may offer comments, signs the evaluation, and specifies whether he or she seeks a "procedural review." The appraisal is prepared through response to questions concerning an employee's performance. Examples of the questions are: "To what extent does this individual possess the knowledge of procedures, techniques and disciplines required by the job?"; "To what extent is this individual dependable?"; "How effectively does this individual meet position demands....?"; "How skillful is this person in devising ways and means of getting things done? Are resources effectively used to achieve planned results?": "Is he or she flexible?"

You wrote that "Several of the thirty-three legislators would like access to one or the other of these evaluations", and you asked whether, "as elected members of the Legislature would they be entitled to request and receive each evaluation." In this regard, I offer the following comments.

First, I believe that the evaluations could be withheld in great measure from the public if requested 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 under the circumstances is §87(2)(g), which permits an agency, such as a county, to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those 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 substance of the form consists of the County Administrator's expression of opinion concerning how well or poorly an individual performs his or her duties, I believe that it may be withheld under the Freedom of Information Law.

Second, from my perspective, the Freedom of Information Law is intended to enable the public to request and obtain accessible records. Further, it has been held that accessible records should be made equally available to any person, without regard to status or interest [see e.g., Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976) and M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)]. Nevertheless, if it is clear that records are requested in the performance of one's official duties, the request might not be viewed as having been made under the Freedom of Information Law. In such a situation, if a request is reasonable, and in the absence of a rule or policy to the contrary, it has been suggested that a member of a legislative 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 county legislature, as the governing body of a public corporation, generally acts by means of motions carried by an affirmative vote of a majority of its total membership (see General Construction Law, §41). In my view, in most instances, a member acting unilaterally, without the consent or approval of a majority of the total membership of the governing body, has the same rights as those accorded to a member of the public. In such a case, a member seeking records could presumably be treated in the same manner as the public generally.

I am unaware of any local law or similar provision that confers a right of access to the records in question upon members of the Ulster County Legislative Board separate from rights conferred by the Freedom of Information Law. In the absence of such provision, a member or members could bring the matter before the Board pursuant to §153 of the County Law and seek approval of a resolution granting them access to the records in question. Similarly, members of the Board could prepare and seek approval of a local law or policy under which members would gain rights of access to certain records that ordinarily would not be available to the public under the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
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August 7, 2001

P.N. Prentice
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr./Ms. Prentice:

I have received your letter in which you asked that this office seek to compel the Kingston City School District to comply with the Freedom of Information Law.

In a request made to the District on June 21, you indicated that the local newspaper reported that a contract between the District and the Kingston Teachers' Federation was ratified, and you sought information as to whether the percentage increase conferred by the agreement "included the step increase." You were informed by phone prior to your written request that the contract had not been signed and the information was "unavailable." As of the date of your letter to this office, you had received no response to your request.

In this regard, it is noted at the outset that the Committee on Open Government is authorized to provide opinions and advice concerning rights of access to government information; the Committee is not empowered to "compel" an agency, such as a school district, to comply with law or to grant or deny access to records. Nevertheless, in an effort to enhance compliance with law, I offer the following comments.

First, it appears that there has been an agreement between the parties but that no final contract has been produced or signed. While that may be so, any record maintained by or for the District containing the elements of the agreement would, in my view, be subject to rights of access and must be disclosed. 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, even if there is no final contract, documentary materials in possession of the District or kept for the District, i.e., by its negotiators, that include the terms of the agreement would constitute "records" that fall within the framework of the Freedom of Information Law.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, since the agreement has been ratified, none of the grounds for denial would be applicable. I note that §87(2)(c) permits an agency to withhold records insofar as disclosure would "impair present or imminent contract awards or collective bargaining negotiations." As I understand the situation, the negotiations have ended and the parties have reached an accord. That being so, I do not believe that the cited provision would be relevant or applicable.

Lastly, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a

challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FPPL AO-
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August 7, 2001

Ms. Nancy Kramer
Special Counsel
New York State Trial
Lawyers Association, Inc.
132 Nassau Street
New York, NY 10038

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Kramer:

As you are aware, I have received your letter of June 29 and the materials attached to it. You have sought an advisory opinion concerning rights of access to certain records that have been withheld by the New York City Department of Transportation ("DOT").

You wrote that you requested "copies of all requests received by the DOT in the calendar year 2000 for maps showing sidewalk, curb, crosswalk, pothole and obstruction problems." In response, you were informed that the records were being withheld under §§87(2)(b) and 89(2)(b)(iii) of the Freedom of Information Law. The former authorizes an agency to withhold records or portions thereof which "if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article..."; the latter states that an unwarranted invasion of personal privacy includes "sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes."

By way of background, you wrote that:

> "The New York State Trial Lawyers Association runs a project known as the Big Apple Pothole & Sidewalk Protection Committee (Big Apple). Big Apple contracts with an independent surveying firm which conducts an annual survey of the streets and curbs of New York City and annotates templates of maps used by the City of New York to show pavement defects. Big Apple files copies of these annotated maps with the DOT, thereby furnishing the City with the 'notice' required by General Municipal Law Section 50-g and Section 7-201 of the Administrative Code of the City of New York.

> "Big Apple also furnishes such information and provides other assistance to trial lawyers who are bringing lawsuits or considering bringing lawsuits against the City for accidents suffered on its streets and curbs. Big Apple charges the trial lawyers for these services. Sometimes trial lawyers request and receive copies under the Freedom of Information Law. It is the copies of requests filed by those lawyers to which NYSTLA is seeking access in this FOIL request."

You noted further that:

> "NYSTLA is not seeking information about private citizens. Rather we are seeking information that will contain the names of certain attorneys and law firms who request copies of the maps filed by its Big Apple project from the DOT. The original request spoke in terms of requests, as it is known to all involved that the overwhelming majority of those requests are made by attorneys (or the law firms in which they practice). It is unlikely that very many non-attorneys know of the existence of such maps, their significance to a lawsuit and their availability under FOIL. The names of the very few, if any, private individuals who may appear on the list could easily be redacted from the copies."

You have contended that requests for maps by attorneys or law firms involve activities that those persons or entities carry out in their capacities as professionals, not as private citizens, and that, therefore, DOT had no basis for denying access to those records. I agree, and in this regard, I offer the following comments.

First, as a general matter, when records are accessible under the Freedom of Information Law, it has been held that they should be made equally available to any person, regardless of one's status, interest or the intended use of the records [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Moreover, the Court of Appeals has held that:

> "FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on government decision-making, its ambit is not confined to records actually used in the decision-making process. (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request" [Farbman v. New York City Health and Hospitals Corporation, 62 NY 2d 75, 80 (1984)].

Farbman pertained to a situation in which a person involved in litigation against an agency requested records from that agency under the Freedom of Information Law. In brief, it was found that one's status as a litigant had no effect upon that person's right as a member of the public when using the Freedom of Information Law, irrespective of the intended use of the records. Similarly, unless there is a basis for withholding records in accordance with the grounds for denial appearing in §87(2), the use of the records, including the potential for commercial use or fund-raising, is in my opinion irrelevant; when records are accessible, once they are disclosed, the recipient may do with the records as he or she sees fit.

Second, §89(2)(b)(iii) represents what might be viewed as an internal conflict in the law. As indicated above, 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. Nevertheless, 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."

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.).

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.

Third, based on the language of the Freedom of Information Law, as well as other statutes and their judicial construction, it is clear in my view that the provisions dealing with the protection of personal privacy are intended to deal with natural persons, rather than entities, such as corporations, or individuals acting in business or professional capacities. The Personal Privacy Protection Law, although only applicable to state agencies, when read in conjunction with the Freedom of Information Law makes clear that the protection of privacy as envisioned by those statutes is intended to pertain to *personal* information about natural persons [see Public Officers Law, §§92(3), 92(7), 96(1) and 89(2-a). Therefore, insofar as the information at issue would identify entities, such as law firms, I do not believe that the information could be withheld based upon considerations of privacy. In a decision rendered by the Court of Appeals cited earlier that focused upon the privacy provisions, the Court referred to the authority to withhold "certain personal information about private citizens" (see Federation of New York State Rifle and Pistol Clubs, Inc. supra). In another decision rendered by the Court of Appeals and a discussion of "the essence of the exemption" concerning privacy, the Court referred to information "that would ordinarily and reasonably regarded as intimate, private information" [Hanig v. State Dept. of Motor Vehicles, 79 NY 2d 106, 112 (1992)]. In view of the direction given by the state's highest court, again, I believe that the authority to withhold the information based upon considerations of privacy is restricted to those situations in which records contain *personal* information about natural persons, as opposed to information identifiable to those acting in a business capacity.

Several judicial decisions, both New York State and federal, pertain to records about individuals in their business or professional capacities and indicate that the records are not of a "personal nature." For instance, one involved a request for the names and addresses of mink and ranch fox farmers from a state agency (ASPCA v. NYS Department of Agriculture and Markets, Supreme Court, Albany County, May 10, 1989). In granting access, the court relied in part and quoted from an opinion rendered by this office in which it was advised that "the provisions concerning privacy in the Freedom of Information Law are intended to be asserted only with respect to 'personal' information relating to natural persons". The court held that:

> "...the names and business addresses of individuals or entities engaged in animal farming for profit do not constitute information of a private nature, and this conclusion is not changed by the fact that a person's business address may also be the address of his or her residence. In interpreting the Federal Freedom of Information Law Act (5 USC 552), the Federal Courts have already drawn a distinction between information of a 'private' nature which may not be disclosed, and information of a 'business' nature which may be disclosed (see e.g., Cohen v. Environmental Protection Agency, 575 F Supp. 425 (D.C.D.C. 1983)."

In another decision, Newsday, Inc. v. New York State Department of Health (Supreme Court, Albany County, October 15, 1991)], data acquired by the State Department of Health concerning the

performance of open heart surgery by hospitals and individual surgeons was requested. Although the Department provided statistics relating to surgeons, it withheld their identities. In response to a request for an advisory opinion, it was advised by this office, based upon the New York Freedom of Information Law and judicial interpretations of the federal Freedom of Information Act, that the names should be disclosed. The court agreed and cited the opinion rendered by this office.

Like the Freedom of Information Law, the federal Act includes an exception to rights of access designed to protect personal privacy. Specifically, 5 U.S.C. 552(b)(6) states that rights conferred by the Act do not apply to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." In construing that provision, federal courts have held that the exception:

> "was intended by Congress to protect individuals from public disclosure of 'intimate details of their lives, whether the disclosure be of personnel files, medical files or other similar files'. Board of Trade of City of Chicago v. Commodity Futures Trading Com'n supra, 627 F.2d at 399, quoting Rural Housing Alliance v. U.S. Dep't of Agriculture, 498 F.2d 73, 77 (D.C. Cir. 1974); see Robles v. EOA, 484 F.2d 843, 845 (4th Cir. 1973). Although the opinion in Rural Housing stated that the exemption 'is phrased broadly to protect individuals from a wide range of embarrassing disclosures', 498 F.2d at 77, the context makes clear the court's recognition that the disclosures with which the statute is concerned are those involving matters of an intimate personal nature. Because of its intimate personal nature, information regarding 'marital status, legitimacy of children, identity of fathers of children, medical condition, welfare payment, alcoholic consumption, family fights, reputation, and so on' falls within the ambit of Exemption 4. Id. By contrast, as Judge Robinson stated in the Chicago Board of Trade case, 627 F.2d at 399, the decisions of this court have established that information connected with professional relationships does not qualify for the exemption" [Sims v. Central Intelligence Agency, 642 F.2d 562, 573-573 (1980)].

In Cohen, the decision cited in ASPCA v. Department of Agriculture and Markets, supra, it was stated pointedly that: "The privacy exemption does not apply to information regarding professional or business activities...This information must be disclosed even if a professional reputation may be tarnished" (supra, 429). Similarly in a case involving disclosure of the identities of those whose grant proposals were rejected, it was held that:

> "The adverse effect of a rejection of a grant proposal, if it exists at all, is limited to the professional rather than personal qualities of the applicant. The district court spoke of the possibility of injury explicitly in terms of the applicants' 'professional reputation' and 'professional qualifications'. 'Professional' in such a context refers to

> the possible negative reflection of an applicant's performance in 'grantsmanship' - the professional competition among research scientists for grants; it obviously is not a reference to more serious 'professional' deficiencies such 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)].

In short, in my opinion and as suggested in the decisions cited above, the exception concerning privacy does not apply to a record identifying entities, such as law firms, or individuals acting in their business or professional capacities.

With respect private citizens who may have made requests for maps, as you suggested and as §89(2)(b) states, personally identifying details may be deleted prior to the disclosure of the remainder of those records.

Lastly, I note that the courts have consistently found that the exceptions to rights of access granted by the Freedom of Information Law should be construed narrowly. The Court of Appeals expressed its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department [87 NY 2d 267 (1996)], stating that:

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see,* Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" (id., 275).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Seth Cummin
Susan A. Spector

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12867

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August 7, 2001

Mr. Ronald E. DeShields
99-A-2852
Adirondack Correctional Facility
Box 110
Raybrook, NY 12977-0110

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. DeShields:

I have received your letter in which you sought assistance relating to the review of your case. You also wrote that the Inspector General's Office denied your request for records.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of your correspondence, I offer the following comments.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. 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.

Perhaps the most relevant provision concerning access to records maintained by law enforcement agencies is section 87(2)(e), which permits an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;

ii. deprive a person of a right to a fair trial or impartial adjudication;

iii" identify a confidential source or disclose confidential information relating to a criminal investigation; or

iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in sub-paragraphs (i) through (iv) of 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.

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 o the public" [see Moore

v. Santucci, 151 AD 2d 677, 679 (1989)]. Based upon that decision, it appears that records introduced into evidence or disclosed during a public judicial proceeding should be available.

I hope that I have been of some assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 7, 2001

Mr. Vincent Baker
94-R-0113
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. Baker:

I have received your letter in which you sought assistance in obtaining records from the New York City Police Department.

In this regard, I offer the following comments.

First, I note that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. While some aspects of the records sought might properly be withheld, relevant is a decision by the Court of Appeals concerning "complaint follow up reports" and police officers' memo books in which it was held that a denial of access based on their characterization as intra-agency materials would be inappropriate.

The provision at issue, §87(2)(g) of the Freedom of Information Law, enables an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

In its analysis of the matter, the decision stated that:

> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal

intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)...

"...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][i]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182).

"Against this backdrop, we conclude that the complaint follow-up reports contain substantial factual information available pursuant to the provisions of FOIL. Sections of the report are devoted to such purely factual data as: the names, addresses, and physical descriptions of crime victims, witnesses, and perpetrators; a checklist that indicates whether the victims and witnesses have been interviewed and shown photos, whether crime scenes have been photographed and dusted for fingerprints, and whether neighborhood residents have been canvassed for information; and a blank space denominated 'details' in which the officer records the particulars of any action taken in connection with the investigation.

"However, the Police Department argues that any witness statements contained in the reports, in particular, are not 'factual' because there is no assurance of the statements' accuracy and reliability. We decline

> to read such a reliability requirement into the phrase 'factual data', as the dissent would have us do, and conclude that a witness statement constitutes factual data insofar as it embodies a factual account of the witness's observations. Such a statement, moreover, is far removed from the type of internal government exchange sought to be protected by the intra-agency exemption (see, Matter of Ingram v. Axelrod, 90 AD2d 568, 569 [ambulance records, list of interviews, and reports of interviews available under FOIL as 'factual data']). By contrast, any impressions, recommendations, or opinions recorded in the complaint follow-up report would not constitute factual data and would be exempt from disclosure. The holding herein is only that these reports are not categorically exempt as intra-agency material. Indeed, the Police Department is entitled to withhold complaint follow-up reports, or specific portions thereof, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" [Gould, Scott and DeFelice v. New York City Police Department, 653 NYS 2d 54, 89 NY2d 267 (1996); emphasis added by the Court].

Based on the foregoing, the Police Department cannot claim that complaint follow up reports or similar documents can be withheld in their entirety on the ground that they constitute intra-agency materials. However, the Court was careful to point out that other grounds for denial might apply in consideration of those records, as well as others that you requested.

For instance, of potential significance is §87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". That provision might be applicable relative to the deletion of identifying details in a variety of situations, i.e., where a record identifies a confidential source or a witness, for example.

Often the most relevant provision concerning access to records maintained by law enforcement agencies is §87(2)(e), which permits an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or

> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in sub-paragraphs (i) through (iv) of §87(2)(e).

Another possible ground for denial is §87(2)(f), which permits withholding to the extent that disclosure "would endanger the life or safety of any person". The capacity to withhold on that basis is dependent upon the facts and circumstances concerning an event.

Lastly, in a decision concerning a request for records maintained by the office of a district attorney that would ordinarily be exempted from disclosure under the Freedom of Information Law, it was held that "once the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public" [see Moore v. Santucci, 151 AD 2d 677, 679 (1989)]. Based upon that decision, it appears that records introduced into evidence or disclosed during a public judicial proceeding should be available.

However, in the same decision, it was also found that:

> "...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
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August 7, 2001

Mr. Harold Rubin
[redacted]

[redacted] staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Rubin:

I have received your letter of July 16 in which you questioned whether handwritten inspection reports prepared by a city code inspector are available under the Freedom of Information Law.

In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to agency records, and §86(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."

In view of the foregoing, the form of a record (i.e., handwritten or typed) does not affect its coverage within or availability 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. It is likely in my view the reports in question must be disclosed in great measure, if not in their entirety.

Perhaps most relevant to an analysis of the matter is §87(2)(g). 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;

iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those 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 report consists of facts regarding a premises, such as findings of code violations, based on the observations of an inspector, I believe that those portions would be available under §87(2)(g)(i) and that findings of violations would represent final agency determinations available under §87(2)(g)(iii).

Also potentially relevant is §87(2)(b), which authorizes an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." If the notes include the name or other identifying details pertaining to the complainant, I believe that those details may be deleted.

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

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August 9, 2001

Mr. John Daniels
86-C-0867
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. Daniels:

I have received your letter in which you sought assistance in obtaining records from the Orleans Correctional Facility. According to your correspondence, you have been denied access to records related to your parole board hearing.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of your correspondence, I offer the following comments.

First, as a general matter the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. 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.

While some portions of the records may be available, several provisions of the Freedom of Information Law may provide grounds for denying access to the records. For instance, records identifying sources of information obtained upon a promise of confidentiality could likely be withheld under §87(2)(b) or (e)(iii); information which if disclosed would endanger the life or safety of any person could be withheld pursuant to §87(2)(f); and pre-sentence reports and memoranda are exempt from disclosure pursuant to §390.50 of the Criminal Procedure Law and, therefore, §87(2)(a) of the Freedom of Information Law.

Also of potential significance is §87(2)(g), which permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

If, for example, a district attorney offered an opinion or recommendation to the Parole Board concerning the possibility of parole, a record reflective of that kind of advice or opinion could in my view be withheld under §87(2)(g).

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
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August 9, 2001

Mr. David Seamon
[redacted]

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. Seamon:

I have received your letter of July 3, which you characterized as a "complaint"against Greene County and its attorney concerning your inability to gain access to certain records.

According to your letter, you requested a variety of records pertaining to the County's plans to construct a new office building in the Village of Catskill. Although the County granted access to voluminous materials, you wrote that the County Attorney "was unwilling to provide...two of the most important sets of materials" that you requested, specifically:

> "1. All reports, site plans, building designs, and other informative and evaluative materials prepared for the Green County office building by Robinson, Strong, and Agpar Architects;
>
> 2. All reports on the 'potential for archeological, cultural and historic resources in the vicinity of the project site' [i.e.,... the Green County office building site] as described in a letter from Crawford & Associates, dated June 12, 2001, and included as exhibit 10 in the Greene County office building SEQR report of June 2001; this report is said to have been prepared for Crawford & Associates by Hartgen Archeological Associates of Rensselaer, NY;"

You indicated that the County Attorney informed you that the documentation in question could not be found.

In this regard, I offer the following comments.

First, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89 (3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

Second, the Freedom of Information Law pertains to agency records. Section 86(4) of that statute defines the term "record" expansively to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

The Court of Appeals, the state's highest court, has construed the definition as broadly as its specific language suggests. of potential relevance to the matter to which you referred os a decision rendered by that court in which 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 with the coverage of the Freedom of Information Law. I point out that the Court rejected "SUNY's contention that disclosure turns on whether the requested information is in the physical possession of the agency", for such a view "ignores the plain language of the FOIL definition of 'records' as information kept or held 'by, with or for an agency'" [see Encore College Bookstores, Inc. v. Auxiliary Services Corporation of the State University of New York at Farmingdale, 87 NY 2d 410, (1995)]. Therefore, if a document is produced for an agency, as in the case of a report prepared for the County by an engineer or firm, it constitutes an agency record, even if it is not in the physical possession of the agency.

Third, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

It appears that the records in question were prepared by persons or firms retained as consultants. If that is so, based upon the judicial interpretation of the Freedom of Information Law, records prepared for an agency by a consultant may be treated as "intra-agency" materials that fall within the scope of §87(2)(g). That provision permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

In a discussion of the issue of consultant reports, the Court of Appeals has stated that:

> "Opinions and recommendations prepared by agency personnel may be exempt from disclosure under FOIL as 'predecisional materials, prepared to assist an agency decision maker***in arriving at his decision' (McAulay v. Board of Educ., 61 AD 2d 1048, aff'd 48 NY 2d 659). Such material is exempt 'to protect the deliberative process of government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers (Matter of Sea Crest Const. Corp. v. Stubing, 82 AD 2d 546, 549).
>
> "In connection with their deliberative process, agencies may at times require opinions and recommendations from outside consultants. It would make little sense to protect the deliberative process when such reports are prepared by agency employees yet deny this protection when reports are prepared for the same purpose by outside consultants retained by agencies. Accordingly, we hold that records may be considered 'intra-agency material' even though prepared by an outside consultant at the behest of an agency as part of the agency's deliberative process (see, Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD 2d 546, 549, supra; Matter of 124 Ferry St. Realty Corp. v. Hennessy, 82 AD 2d 981, 983)" [Xerox Corporation v. Town of Webster, 65 NY 2d 131, 132-133 (1985)].

Based upon the foregoing, a report prepared by a consultant for an agency may be withheld or must be disclosed based upon the same standards as in cases in which records are prepared by the staff of an agency. It is emphasized that the Court in Xerox specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

> "While the reports in principle may be exempt from disclosure, on this record - which contains only the barest description of them - we cannot determine whether the documents in fact fall wholly within the scope of FOIL's exemption for 'intra-agency materials,' as claimed by respondents. To the extent the reports contain 'statistical or factual tabulations or data' (Public Officers Law section 87[2][g][i], or other material subject to production, they should be redacted and made available to the appellant" (id. at 133).

Therefore, a record prepared by a consultant for an agency would be accessible or deniable, in whole or in part, depending on its contents.

It has also been held that factual information appearing in narrative form, as well as those portions appearing in numerical or tabular form, is available under §87(2)(g)(i). For instance, in Ingram v. Axelrod, the Appellate Division held that:

> "Respondent, while admitting that the report contains factual data, contends that such data is so intertwined with subject analysis and opinion as to make the entire report exempt. After reviewing the report in camera and applying to it the above statutory and regulatory criteria, we find that Special Term correctly held pages 3-5 ('Chronology of Events' and 'Analysis of the Records') to be disclosable. These pages are clearly a 'collection of statements of objective information logically arranged and reflecting objective reality'. (10 NYCRR 50.2[b]). Additionally, pages 7-11 (ambulance records, list of interviews) should be disclosed as 'factual data'. They also contain factual information upon which the agency relies (Matter of Miracle Mile Assoc. v Yudelson, 68 AD2d 176, 181 mot for lve to app den 48 NY2d 706). Respondents erroneously claim that an agency record necessarily is exempt if both factual data and opinion are intertwined in it; we have held that '[t]he mere fact that some of the data might be an estimate or a recommendation does not convert it into an expression of opinion' (Matter of Polansky v Regan, 81 AD2d 102, 104; emphasis added). Regardless, in the instant situation, we find these pages to be strictly factual and thus clearly disclosable" [90 AD 2d 568, 569 (1982)].

In short, even though statistical or factual information may be "intertwined" with opinions or recommendations that may be withheld, 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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Donald G. Olson
Charles Brown

STATE OF NEW YORK
DEPARTMENT OF STATE
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August 9, 2001

Mr. Jerry Brixner
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Brixner:

I have received your letter of July 7 and the materials relating to it.

You wrote that you submitted a request to Monroe County under the Freedom of Information Law for records indicating the cost of demolishing a certain County owned building. In response to the request, you were informed no such records exist because the demolition "was performed by in-house support services of the Department of Parks." You were also informed that you could appeal to Richard J. Mackey, and you expressed the belief that you should appeal to an elected official, the County Executive.

In this regard, I offer the following comments:

First, it is emphasized that the Freedom of Information Law pertains to existing records and that §89(3) of that statute states in part that an agency is not required to create or prepare a record in response to a request.

In the context of the issue that you raised, if employees of the Department of Parks demolished the facility as part of their duties, it is unlikely in my view that records would have been prepared indicating the cost of its activities. There is no record, for example, indicating the cost of the preparation of this response to you. I have done so, without any extra or specific compensation, as part of my routine and official duties. In contrast would be a situation in which agency an agency contracts with a private entity to perform a certain function. In that instance, the contract would indicate the cost to the taxpayer.

Second, the provision dealing with the right to appeal, §89(4)(a) of the Freedom of Information Law, states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In the context of your comment, it appears that the County Executive has, in accordance with §89(4)(a), designated Mr. Mackey to determine appeals.

I hope that the foregoing serves to clarify your understanding of the matter and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: John Riley

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 9, 2001

Mr. Donald J. Risalek
01-B-0922
Wyoming Correctional Facility
P.O. Box 501
Attica, NY 14011-0501

Dear Mr. Risalek:

I have received your letter of August 3 and an appeal of the same date concerning a denial of access to records by K-Mart.

In this regard, first, the Freedom of Information Law is applicable to agency records, and the term "agency" is defined in §86(3) of that statute to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, in general, the Freedom of Information Law applies to entities of state and local government in New York; it does not apply to private companies, such as K-Mart.

Second, the Committee on Open Government is authorized to advise with respect to public access to government information. It is not empowered to determine appeals or compel an agency to grant or deny access to records. When an agency subject to the Freedom of Information Law denies a request for records, the person denied access may appeal pursuant to §89(4)(a) of that 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."

Lastly, even if the Freedom of Information Law applied in the context of your request, I believe that home addresses of employees could be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see §87(2)(b)].

I hope that the foregoing serves to enhance your understanding of the Freedom of Information Law and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 9, 2001

Mr. Danny Anderson
[redacted]

Dear Mr. Anderson:

I have received your letter of June 29 in which you raised a series of issues concerning an advisory opinion prepared at your request on June 18. In consideration of your remarks, I offer the following comments.

First, because a primary function of the Committee on Open Government involves an effort to educate and encourage compliance with law, copies of advisory opinions are routinely sent to the entities that are the subjects of the opinions. The receipt of copies of opinions by governmental entities has on countless occasions served to enhance compliance with the Freedom of Information and Open Meetings Laws.

Second, the records that you requested "are those of purchased and installed ground source heat pumps by the residential community." You contend that portions of the records containing the "name, installation address, city , state and zip" must be disclosed, and that the records do not constitute "a list of names and addresses." From my perspective, if a grouping of records is intended to be used for the purpose of creating the equivalent of a mailing list for a commercial or fund-raising purpose, the provision cited in the opinion of June 18 would be implicated.

As a general matter, when records are accessible under the Freedom of Information Law, it has been held that they should be made equally available to any person, regardless of one's status, interest or the intended use of the records [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Moreover, the Court of Appeals, the state's highest court, has held that:

> "FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on government decision-making, its ambit is not confined to records actually used in the decision-making process. (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the

> person making the request" [Farbman v. New York City Health and Hospitals Corporation, 62 NY 2d 75, 80 (1984)].

The only exception to the principles described above involves a provision pertaining to the protection of personal privacy. As indicated previously, §89(2)(b) of the Law provides a series of examples of unwarranted invasions of personal privacy, one of which pertains to:

> "sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes" [§89(2)(b)(iii)].

The provision quoted above represents what might be viewed as an internal conflict in the law. Although the status of an applicant and the purposes for which a request is made are irrelevant to rights of access and an agency cannot ordinarily inquire as to the intended use of records, due to the language of §89(2)(b)(iii), rights of access to a list of names and addresses, or equivalent records, may be contingent upon the purpose for which a request is made [see Scott, Sardano & Pomeranz v. Records Access Officer of Syracuse, 65 NY 2d 294, 491 NYS 2d 289 (1985); Goodstein v. Shaw, 463 NYS 2d 162 (1983)].

In a case involving a list of names and addresses in which the agency inquired as to the purpose for which the list was requested, it was found that an agency could make such an inquiry. Specifically, in Golbert v. Suffolk County Department of Consumer Affairs (Supreme Court, Suffolk County, September 5, 1980), the Court cited and apparently relied upon an opinion rendered by this office in which it was advised that an agency may appropriately require that an applicant for a list of names and addresses provide an assurance that a list of names and addresses will not be used for commercial or fund-raising purposes. In that decision, it was stated that:

> "The Court agrees with petitioner's attorney that nowhere in the record does it appear that petitioner intends to use the information sought for commercial or fund-raising purposes. However, the reason for that deficiency in the record is that all efforts by respondents to receive petitioner's assurance that the information sought would not be so used apparently were unsuccessful. Without that assurance the respondents could reasonably infer that petitioner did want to use the information for commercial or fund-raising purposes."

In addition, it was held that:

> "[U]nder the circumstances, the Court finds that it was not unreasonable for respondents to require petitioner to submit a certification that the information sought would not be used for commercial purposes. Petitioner has failed to establish that the respondents denial or petitioner's request for information constituted an abuse of discretion as a matter of law, and the Court declines to substitute its judgement for that of the respondents" (id.).

While your request may not involve a list *per se*, it has been held, in essence, that a request for records that would be used to develop a list of names and addresses to be used for a commercial purpose may be denied [see Scott, Sardano & Pomeranz, supra, 65 NY 2d 294 (1985)]. That decision dealt with a request by a law firm for copies of motor vehicle accident reports to be used for the purpose of direct mail solicitation of accident victims. Although the Court of Appeals found that accident reports are available, in view of the intended use of the reports, i.e., to create a mailing list for a commercial purpose, it was determined that names and addresses of accident victims could be withheld based on considerations of privacy. Therefore, if you are seeking the records in order to develop a mailing list or its equivalent to be used for commercial or fund-raising purposes, §89(2)(b)(iii) may be pertinent.

I hope that the foregoing serves to clarify your understanding of the matter.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12875

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August 9, 2001

Ms. Barbara Elmore
[redacted]

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. Elmore:

I have received your letter of July 5 and the correspondence attached to it. You questioned the propriety of a response to a request under the Freedom of Information Law in which the Meredith Town Clerk "asks for costs of service." The correspondence indicates that your request involved a total of 180 pages, for which the Clerk imposed a fee of ten cents per photocopy. In addition, however, she charged $31.09 for "Postage and service".

In this regard, I offer the following comments.

First when an applicant requests copies of records, the records may be reproduced in the presence of an applicant, the applicant can physically present himself or herself at an agency's offices to obtain copies, or copies can be mailed to the applicant.

While nothing in the Freedom of Information Law or the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) deal with the cost of or the assessment of charges for postage when copies are mailed to an applicant, I do not believe that either would prohibit an agency from charging for postage. In my view, mailing copies of records to an applicant represents an additional service provided by an agency that is separate from the duties imposed by the Freedom of Information Law. An agency must, in my opinion, mail copies of records to an applicant upon payment of the appropriate fees for copying and postage; alternatively, if it informs the applicant of the cost of postage, I believe that an agency could require that an applicant provide a stamped self-addressed envelope.

Second, other than the assessment of a fee for photocopying and the cost of postage, I do not believe that the Town may validly impose any other fee, such as a fee for "service."

By way of background, §87(1)(b)(iii) of the Freedom of Information Law stated until October 15, 1982, that an agency could charge up to twenty-five cents per photocopy unless a different fee was prescribed by "law". Chapter 73 of the Laws of 1982 replaced the word "law" with the term "statute". As described in the Committee's fourth annual report to the Governor and the Legislature of the Freedom of Information Law, which was submitted in December of 1981 and which recommended the amendment that is now law:

> "The problem is that the term 'law' may include regulations, local laws, or ordinances, for example. As such, state agencies by means of regulation or municipalities by means of local law may and in some instances have established fees in excess of twenty-five cents per photocopy, thereby resulting in constructive denials of access. To remove this problem, the word 'law' should be replaced by 'statute', thereby enabling an agency to charge more than twenty-five cents only in situations in which an act of the State Legislature, a statute, so specifies."

As such, prior to October 15, 1982, a local law, an ordinance, or a regulation for instance, establishing a search fee or a fee in excess of twenty-five cents per photocopy or higher than the actual cost of reproduction was valid. However, under the amendment, only an act of the State Legislature, a statute, would in my view permit the assessment of a fee higher than twenty-five cents per photocopy, a fee that exceeds the actual cost of reproducing records that cannot be photocopied, or any other fee, such as a fee for search. In addition, it has been confirmed judicially that fees inconsistent with the Freedom of Information Law may be validly charged only when the authority to do so is conferred by a statute [see Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)].

The specific language of the Freedom of Information Law and the regulations promulgated by the Committee on Open Government indicate that, absent statutory authority, an agency may charge fees only for the reproduction of records. Section 87(1)(b) of the Freedom of Information Law states:

> "Each agency shall promulgate rules and regulations in conformance with this article...and pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the availability of records and procedures to be followed, including, but not limited to...
>
> > (iii) the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by statute."

The regulations promulgated by the Committee state in relevant part that:

> "Except when a different fee is otherwise prescribed by statute:
>
> (a) There shall be no fee charged for the following:
>
> > (1) inspection of records;
> > (2) search for records; or
> > (3) any certification pursuant to this Part" (21 NYCRR section 1401.8).

As such, the Committee's regulations specify that no fee may be charged for "service", inspection of or search for records, except as otherwise prescribed by statute.

Lastly, although compliance with the Freedom of Information Law involves the use of public employees' time, the Court of Appeals has found that the Law is not intended to be given effect "on a cost-accounting basis", but rather that "Meeting the public's legitimate right of access to information concerning government is fulfillment of a governmental obligation, not the gift of, or waste of, public funds" [Doolan v. BOCES, 48 NY 2d 341, 347 (1979)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board
Hon. Betsy Clark

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3349
FOIL-AO-12876

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August 9, 2001

Mr. Norman Verbanic
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Verbanic:

I have received your letter of July 5 in which you raised a series of issues relating to a proceeding before the Town of Elma Board of Assessment Review ("BAR").

In this regard, it is emphasized at the outset that the advisory jurisdiction of the Committee on Open Government is limited to matters relating to public access to government information. Consequently, the following commentary will focus on your inability to obtain a verbatim transcript of a proceeding conducted by the BAR and your contention that the summary minutes of the proceeding are inaccurate.

You wrote that a court stenographer "took all the minutes verbatim" at a meeting of the BAR, but that the Chair of the BAR refused to make the verbatim transcript available to you or to the Town Clerk following her request.

In this regard, I offer the following comments.

First, irrespective of where the record at issue may be kept, I believe that it falls 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 transcript would not be in the possession of the Chair of the BAR but for his role in Town government. That being so, it is my opinion that the record in question is subject to rights conferred by the Freedom of Information Law.

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..."

While others may have physical possession of the records, I point out that §30 of the Town Law indicates that the Town Clerk shall has legal custody of all Town records. Consistent with that provision is §57.19 of the Arts and Cultural Affairs Law, which states in part that a town clerk is the "records management officer" for a town.

Third, the failure to share the transcript with the clerk may effectively preclude the clerk from carrying out her duties as records management officer, or as the designated as records access officer for purposes of responding to requests under the Freedom of Information Law. In short, if the records access officer cannot obtain Town records, that person may not have the ability to grant or deny access to records in a manner consistent with the requirements of the Freedom of Information Law.

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 form continuing from doing so."

As such, the Town 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 Town officials and employees are required to cooperate with the records access officer in an effort to enable her to carry out his or her official duties.

In short, I believe that the Chair of the BAR must either disclose the transcript to you at the direction of the Town Clerk, and/or furnish the transcript to the Town Clerk at her request in order to enable her to carry out her official duties.

Lastly, for reasons discussed earlier, I believe that the transcript clearly constitutes a Town record. However, I note that the Open Meetings Law does not require the preparation of a transcript. Section 106 of that Law prescribes what might be considered to be minimum requirements concerning the contents of minutes. Specifically, 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 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. Most importantly, I believe that minutes must be accurate. Preparation or alteration of minutes in a manner that does not accurately reflect what occurred or what was said at a meeting, would, in my view, be inconsistent with law.

In an effort to enhance compliance with and understanding of applicable law, copies of this opinion will be forwarded to Town officials.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Patricia King, Town Clerk
John Simme, Chair, BAR

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12827

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August 9, 2001

Mr. James J. White
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. White:

I have received your letter and the materials attached to it. You asked that they be reviewed and that "an order to comply with the Freedom of Information Law be sent to the City of Lackawanna Records Access Officer Ms. Carol Daley."

According to the materials, you requested "information concerning town projects that the Lackawanna Community Development Corporation (LCDC) was 1. leasing, by contract form the COL [City of Lackawanna] and 2. Small Business Investment Fund [SBIF], administering for COL." Although the City granted access to some records falling within the scope of your request, the Assistant City Attorney wrote that the City does not have such a fund and, therefore, maintains no records of loan payments. You indicated that he added, however that:

> "...the COL does have a SBIF with approximately $45,000 in the fund for loans. The money in the fund is from different sources from Community Block Grant funds granted through the county of Erie consortium of small communities to the COL transferred to SBIF fund administered by the LCDC, proceeds from a BAN sale by the COL and other various accounts, according to a contract dated June 10, 1991."

It is my understanding that you believe that the City and the LCDC have withheld "public records" that you requested.

In this regard, it is noted at the outset that the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee is not empowered to "order" a person or agency to comply with the Freedom of Information Law. Nevertheless, in an effort to assist you, I offer the following comments.

First, although the materials indicate that the LCDC is a not-for-profit corporation, its status under the Freedom of Information Law is unclear. Some not-for-profit corporations, due to their relationship with government, have been found to 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."

I note that there are various kinds of not-for-profit corporations, one of which is a "local development corporation." There is no indication in the materials that you sent that the LCDC is such a corporation. However, due to its name, it may be that kind of entity.

Specific reference is found in §1411 of the Not-for-Profit Corporation Law to local development corporations, and that 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 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 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 LCDC and the City of Lackawanna is similar to that of the BEDC and the City of Buffalo, the LCDC would constitute an "agency" required to comply with the Freedom of Information Law.

Second, even if the LCDC is not an agency required to independently comply with the Freedom of Information Law, the records maintained by the LCDC of your interest may nonetheless fall within the coverage of the Freedom of Information Law. The contract between the City and the LCDC indicates that the LCDC carries out a variety of functions for the City with respect to the implementation and administration of the City's economic development programs. Here I point out that the Freedom of Information Law is applicable not only to records in the physical possession of an agency, but also those kept *for* an agency. Section 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 custody 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).

Perhaps most significantly, in a decision rendered by the Court of Appeals, it was found that materials received by a corporation providing services pursuant to a contract with a branch of the State University were kept for the University and constituted "records" falling with the coverage of the Freedom of Information Law. I point out that the Court rejected "SUNY's contention that disclosure turns on whether the requested information is in the physical possession of the agency", for such a view "ignores the plain language of the FOIL definition of 'records' as information kept or held 'by, with or for an agency'" [see Encore College Bookstores, Inc. v. Auxiliary Services Corporation of the State University of New York at Farmingdale, 87 NY 2d 410. 417 (1995)].

In sum, insofar as the records sought are maintained for the 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. Additionally, it is reiterated that if the LCDC constitutes an "agency", it would be required to give effect to the Freedom of Information Law.

Copies of this opinion will be forwarded to City officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Norman Polanski
Hon. Carol Daley
D. Daniel Stevanovic
Director, Lackawanna Community
Development Corporation

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 9, 2001

Mr. Emanuel Prince
[redacted]

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. Prince:

I have received a copy of your letter of July 2 addressed to Ms. Christine Weber, Vice-President of the Green Point Bank in Lake Success. In that letter, you made reference to Ms. Weber's request for "information as to the payments made by the Government to [your] account" and copies of certain statements. You apparently did so, and at the end of the letter, you added a handwritten note, asking that I comment.

In this regard, I must admit that you reason for seeking my views is unclear. The functions of the Committee on Open Government focus on information maintained by entities of state and local government in New York. While the Freedom of Information and Personal Privacy Protection Laws fall within the scope of the Committee's advisory jurisdiction, I do not believe that either would be pertinent or relevant to your relationship with a bank.

The Freedom of Information Law is applicable to agency records, and for purposes of that statute, §86(3) defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

The Personal Privacy Protection Law deals with rights of access by individuals to records maintained by state agencies pertaining to them and limits the authority of those agencies to collect personal information from individuals. For purposes of that law, §92(1) defines 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 propriety 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."

In short, neither the Freedom of Information Law nor the Personal Privacy Protection Law would be applicable to records maintained or sought by a private entity, such as a bank or by the federal government.

I hope that the foregoing serves as a clarification useful to you and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

From: Robert Freeman
To: Internet:mpasciak@buffnews.com
Date: 8/10/01 9:27AM
Subject: Hi Mary - -

Hi Mary - -

I hope that all is well.

You have raised a variety of issues, and rather than writing extensively, it would be more efficient for you to call any time.

In brief, however, first, Town officials are not required to talk to you or answer your questions. Nevertheless, they are required to disclose records to the extent that rights of access exist. Second, insofar as a union contract restricts access to records in a manner inconsistent with the Freedom of Information Law, it is of no effect. In short, the government and a union cannot in my view negotiate an agreement which diminishes rights conferred by law upon the public. Third, the fact that the individual has died tends to minimize the extent to which the Town can withhold records to protect his privacy. And fourth, whether employed or deceased, records indicating discipline, findings of misconduct or rules violations would be accessible, as would records indicating the use of sick leave, attendance or the fact of a suspension.

Again, to consider the issues in greater detail, please give me a call.

Robert J. Freeman
Executive Director
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Website - www.dos.state.ny.us/coog/coogwww.html

12880

From: Robert Freeman
To: Internet[redacted]
Date: 8/10/01 9:49AM
Subject: Dear Mr. Shankman:

Dear Mr. Shankman:

The Freedom of Information Law is applicable to agencies, and section 86(3) defines the term "agency" to mean, in brief, any entity of state or local government in New York, except the courts and the State Legislature.

On basis of the definition of "agency", it is clear in my view that records maintained by a City Marshal in New York City (there may be up to 83 city marshals appointed by the Mayor) are subject to the Freedom of Information Law.

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-12581

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 13, 2001

Mr. Louis Leath
97-A-5249
Green Have Correctional Facility
Drawer B
Stormville, NY 12582

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Leath:

I have received your letter in which you sought assistance in obtaining records from the New York City Fire Department.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of your correspondence, I offer the following comments.

The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Sincerely,

David M. Treacy
Assistant Director

DMT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12882

41 State Street, Albany, New York 12231
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August 13, 2001

Mr. Thomas Hayes
98-A-6130
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 facts presented in your correspondence.

Dear Mr. Hayes:

I have received your letter in which you sought assistance in obtaining records from the Hempstead Police Department. In brief, you requested a variety of records relative to your arrest.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of your correspondence, I offer the following comments.

First, I note that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. While some aspects of the records sought might properly be withheld, relevant is a decision by the Court of Appeals concerning complaint follow up reports and police officers' memo books in which it was held that a denial of access based on their characterization as intra-agency materials would be inappropriate.

The provision at issue, §87(2)(g) of the Freedom of Information Law, enables an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

In its analysis of the matter, the decision states that:

"...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)...

"...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][i]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182).

"Against this backdrop, we conclude that the complaint follow-up reports contain substantial factual information available pursuant to the provisions of FOIL. Sections of the report are devoted to such purely factual data as: the names, addresses, and physical descriptions of crime victims, witnesses, and perpetrators; a checklist that indicates whether the victims and witnesses have been interviewed and shown photos, whether crime scenes have been photographed and dusted for fingerprints, and whether neighborhood residents have been canvassed for information; and a blank space denominated 'details' in which the officer records the particulars of any action taken in connection with the investigation.

> "However, the Police Department argues that any witness statements contained in the reports, in particular, are not 'factual' because there is no assurance of the statements' accuracy and reliability. We decline to read such a reliability requirement into the phrase 'factual data', as the dissent would have us do, and conclude that a witness statement constitutes factual data insofar as it embodies a factual account of the witness's observations. Such a statement, moreover, is far removed from the type of internal government exchange sought to be protected by the intra-agency exemption (see, Matter of Ingram v. Axelod, 90 AD2d 568, 569 [ambulance records, list of interviews, and reports of interviews available under FOIL as 'factual data']). By contrast, any impressions, recommendations, or opinions recorded in the complaint follow-up report would not constitute factual data and would be exempt from disclosure. The holding herein is only that these reports are not categorically exempt as intra-agency material. Indeed, the Police Department is entitled to withhold complaint follow-up reports, or specific portions thereof, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" [Gould, Scott and DeFelice v. New York City Police Department, 653 NYS2d 54, 89 NY2d 267 (1996); emphasis added by the Court].

Based on the foregoing, the Police Department can not claim that complaint follow up reports can be withheld in their entirety on the ground that they constitute intra-agency materials. However, the Court was careful to point out that other grounds for denial might apply in consideration of those records, as well as others that you requested.

For instance, of potential significance is §87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". That provision might be applicable relative to the deletion of identifying details in a variety of situations, i.e., where a record identifies a confidential source or a witness, for example.

Often the most relevant provision concerning access to records maintained by law enforcement agencies is §87(2)(e), which permits an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;

> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in sub-paragraphs (i) through (iv) of §87(2)(e).

Another possible ground for denial is §87(2)(f), which permits withholding to the extent that disclosure "would endanger the life or safety of any person". The capacity to withhold on that basis is dependent upon the facts and circumstances concerning an event.

In a decision concerning a request for records maintained by the office of a district attorney that would ordinarily be exempted from disclosure under the Freedom of Information Law, it was held that "once the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public" [see Moore v. Santucci, 151 AD 2d 677, 679 (1989)]. Based upon that decision, it appears that records introduced into evidence or disclosed during a public judicial proceeding should be available.

However, in the same decision, it was also found that:

> "...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

Lastly, you asked that fees for copying be waived. Here I point out that there is nothing in the Freedom of Information Law that requires an agency to waive fees, irrespective of the status of an applicant for records. Further, it has been held that an agency may charge its established fees even though the applicant is an indigent inmate [Whitehead v. Morgenthau, 552 NYS 2d 518 (1990)].

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12883

41 State Street, Albany, New York 12231
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August 13, 2001

Mr. Blondell Dobson
90-A-8259
Fishkill Correctional Facility
Box 1245
Beacon, NY 12508

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Dobson:

I have received your letter in which you sought assistance obtaining records from the New York City Police Department. You have sought copies of an arresting officer's memo book and drug test results from the time of your arrest.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute to compel an agency to grant or deny access to records. However, based on a review of your correspondence, I offer the following comments.

First, I note that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been

constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. While some aspects of the records sought might properly be withheld, relevant is a decision by the Court of Appeals concerning complaint follow up reports and police officers' memo books in which it was held that a denial of access based on their characterization as intra-agency materials would be inappropriate.

The provision at issue, §87(2)(g) of the Freedom of Information Law, enables an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

In its analysis of the matter, the decision states that:

> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)...
>
> "...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][i]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182).
>
> "Against this backdrop, we conclude that the complaint follow-up reports contain substantial factual information available pursuant to the provisions of FOIL. Sections of the report are devoted to such purely factual data as: the names, addresses, and physical descriptions of crime victims, witnesses, and perpetrators; a checklist that indicates whether the victims and witnesses have been interviewed and shown photos, whether crime scenes have been photographed and dusted for fingerprints, and whether neighborhood residents have been canvassed for information; and a blank space denominated 'details' in which the officer records the particulars of any action taken in connection with the investigation.

> "However, the Police Department argues that any witness statements contained in the reports, in particular, are not 'factual' because there is no assurance of the statements' accuracy and reliability. We decline to read such a reliability requirement into the phrase 'factual data', as the dissent would have us do, and conclude that a witness statement constitutes factual data insofar as it embodies a factual account of the witness's observations. Such a statement, moreover, is far removed from the type of internal government exchange sought to be protected by the intra-agency exemption (see, Matter of Ingram v. Axelod, 90 AD2d 568, 569 [ambulance records, list of interviews, and reports of interviews available under FOIL as 'factual data']). By contrast, any impressions, recommendations, or opinions recorded in the complaint follow-up report would not constitute factual data and would be exempt from disclosure. The holding herein is only that these reports are not categorically exempt as intra-agency material. Indeed, the Police Department is entitled to withhold complaint follow-up reports, or specific portions thereof, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" [Gould, Scott and DeFelice v. New York City Police Department, 653 NYS2d 267 (1996); emphasis added by the Court].

Based on the foregoing, the Police Department can not claim that complaint follow up reports can be withheld in their entirety on the ground that they constitute intra-agency materials. However, the Court was careful to point out that other grounds for denial might apply in consideration of those records, as well as others that you requested.

For instance, of potential significance is §87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". That provision might be applicable relative to the deletion of identifying details in a variety of situations, i.e., where a record identifies a confidential source or a witness, for example.

Often the most relevant provision concerning access to records maintained by law enforcement agencies is §87(2)(e), which permits an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;

> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in sub-paragraphs (i) through (iv) of §87(2)(e).

Another possible ground for denial is §87(2)(f), which permits withholding to the extent that disclosure "would endanger the life or safety of any person". The capacity to withhold on that basis is dependent upon the facts and circumstances concerning an event.

In a decision concerning a request for records maintained by the office of a district attorney that would ordinarily be exempted from disclosure under the Freedom of Information Law, it was held that "once the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public" [see Moore v. Santucci, 151 AD 2d 677, 679 (1989)]. Based upon that decision, it appears that records introduced into evidence or disclosed during a public judicial proceeding should be available.

However, in the same decision, it was also found that:

> "...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

Lastly, in regard to your request for your records indicating drug test results, as discussed above, §87(2)(b) permits an agency to withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy." Assuming that no other ground for denial is applicable, I do not believe that a request made by the subject of a request for records pertaining to him, or by his representative who has obtained a written release authorizing disclosure to the representative, could be denied on the basis of §87(2)(b). As stated in §89(2)(c) of the Freedom of Information Law:

> "Unless otherwise provided by this article, disclosure shall not be construed to constitute an unwarranted invasion of personal privacy pursuant to paragraphs (a) and (b) of this subdivision...
>
> ii. when the person to whom a record pertains consents in writing to disclosure..."

To the extent that persons other than the applicant for records are identified in the records, there may be privacy considerations that arise relative to those individuals. In such situations, perhaps identifying details or certain portions of records might be deleted on the ground that disclosure would result in an unwarranted invasion of personal privacy with respect to those third parties.

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12884

41 State Street, Albany, New York 12231
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August 13, 2001

Mr. Tobias Walls
95-A-5397
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. Walls:

I have received your letter in which you sought assistance in obtaining records from the New York City Police Department. In brief, you have sought a variety of records pertaining to your arrest.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of your correspondence, I offer the following comments.

First, I note that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. While some aspects of the records sought might properly be withheld, relevant is a decision by the Court of Appeals concerning complaint follow up reports and police officers' memo books in which it was held that a denial of access based on their characterization as intra-agency materials would be inappropriate.

The provision at issue, §87(2)(g) of the Freedom of Information Law, enables an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
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> i. statistical or factual tabulations or data;
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> ii. instructions to staff that affect the public;
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> iii. final agency policy or determinations; or
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> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

In its analysis of the matter, the decision states that:

> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information

contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)...

"...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][i]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182).

"Against this backdrop, we conclude that the complaint follow-up reports contain substantial factual information available pursuant to the provisions of FOIL. Sections of the report are devoted to such purely factual data as: the names, addresses, and physical descriptions of crime victims, witnesses, and perpetrators; a checklist that indicates whether the victims and witnesses have been interviewed and shown photos, whether crime scenes have been photographed and dusted for fingerprints, and whether neighborhood residents have been canvassed for information; and a blank space denominated 'details' in which the officer records the particulars of any action taken in connection with the investigation.

"However, the Police Department argues that any witness statements contained in the reports, in particular, are not 'factual' because there is no assurance of the statements' accuracy and reliability. We decline to read such a reliability requirement into the phrase 'factual data', as the dissent would have us do, and conclude that a witness statement

> constitutes factual data insofar as it embodies a factual account of the witness's observations. Such a statement, moreover, is far removed from the type of internal government exchange sought to be protected by the intra-agency exemption (see, Matter of Ingram v. Axelod, 90 AD2d 568, 569 [ambulance records, list of interviews, and reports of interviews available under FOIL as 'factual data']). By contrast, any impressions, recommendations, or opinions recorded in the complaint follow-up report would not constitute factual data and would be exempt from disclosure. The holding herein is only that these reports are not categorically exempt as intra-agency material. Indeed, the Police Department is entitled to withhold complaint follow-up reports, or specific portions thereof, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" [Gould, Scott and DeFelice v. New York City Police Department, 653 NYS2d 54 89 NY2d 267 (1996); emphasis added by the Court].

Based on the foregoing, the Police Department can not claim that complaint follow up reports can be withheld in their entirety on the ground that they constitute intra-agency materials. However, the Court was careful to point out that other grounds for denial might apply in consideration of those records, as well as others that you requested.

For instance, of potential significance is §87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". That provision might be applicable relative to the deletion of identifying details in a variety of situations, i.e., where a record identifies a confidential source or a witness, for example.

Often the most relevant provision concerning access to records maintained by law enforcement agencies is §87(2)(e), which permits an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in sub-paragraphs (i) through (iv) of §87(2)(e).

Another possible ground for denial is §87(2)(f), which permits withholding to the extent that disclosure "would endanger the life or safety of any person". The capacity to withhold on that basis is dependent upon the facts and circumstances concerning an event.

In a decision concerning a request for records maintained by the office of a district attorney that would ordinarily be exempted from disclosure under the Freedom of Information Law, it was held that "once the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public" [see Moore v. Santucci, 151 AD 2d 677, 679 (1989)]. Based upon that decision, it appears that records introduced into evidence or disclosed during a public judicial proceeding should be available.

However, in the same decision, it was also found that:

> "...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

Lastly, you asked that fees for copying be waived. Here I point out that there is nothing in the Freedom of Information Law that requires an agency to waive fees, irrespective of the status of an applicant for records. Further, it has been held that an agency may charge its established fees even though the applicant is an indigent inmate [Whitehead v. Morgenthau, 552 NYS 2d 518 (1990)].

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 14, 2001

Mr. Edward MacKenzie
94-A-2495
Shawangunk Correctional Facility
Box 700
Wallkill, NY 12589-0700

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. MacKenzie:

I have received your letter in which you sought assistance in obtaining a copy of a contract from the Department of Correctional Services and inquired about "obtaining litigation costs incurred in seeking judicial intervention."

In this regard, first, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of your correspondence, I offer the following comments.

The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Second, with regard to obtaining litigation costs, a court may award attorney's fees, payable by an agency, in certain circumstances. Specifically, §89(4)(c) of the Freedom of Information Law states that:

> "The court in such a proceeding may assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed, provided, that such attorney's fees and litigation costs may be recovered only where the court finds that:
>
> i. the record involved was, in fact, of clearly significant interest to the general public: and
>
> ii. the agency lacked a reasonable basis in law for withholding the record."

I point out that there is a decision in which the issue was whether a person representing himself who was not an attorney was eligible for an award of attorney's fees. In Leeds v. Burns (Supreme Court, Queens County, NYLJ, July 27, 1992), the petitioner was a law student who brought a proceeding against the Dean of the City University of New York Law School at Queens College pro se under the Freedom of Information Law. He prevailed and requested attorney's fees. The court found that he met all of the conditions prescribed in §89(4)(c), except one. In short, the court found that he was an "aspiring attorney" but not yet a licensed attorney, and that, therefore, attorney's fees would not be awarded. On the basis of that decision, I believe that one must be or represented by a licensed attorney in order to be eligible for an award of attorney's fees under §89(4)(c).

I hope that I have been of some assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:tt

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

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Committee Members

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August 14, 2001

Mr. Donald Nacey
89-T-1159
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 facts presented in your correspondence.

Dear Mr. Nacey:

I have received your letter in which you sought assistance in obtaining mental health records pertaining to your incarceration at the Queens House of Detention. You submitted a request under the Freedom of Information Law to that facility.

In this regard, I offer the following comments.

Although the Freedom of Information Law provides broad rights of access, the first ground for denial, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute." One such statute is §33.13 of the Mental Hygiene Law, which generally requires that clinical records pertaining to persons receiving treatment in a mental hygiene facility be kept confidential.

However, §33.16 of the Mental Hygiene Law pertains specifically to access to mental health records by the subjects of the records. Under that statute, a patient may direct a request for inspection or copies of his or her mental health records to the "facility", as that term is defined in the Mental Hygiene Law, which maintains the records. If the Queens House of Detention maintains the records as a facility, I believe that it would be required to disclose the records to you to the extent required by §33.16 of the Mental Hygiene Law. Alternatively, it is possible that the records in question were transferred when you were placed in a state correctional facility. If that is so, the records may be maintained by a different agency. It is my understanding that mental health "satellite units" that operate within state correctional facilities are such "facilities" and are operated by the New York State Office of Mental Health. Further, I have been advised that requests by inmates for records of such "satellite units" pertaining to themselves may be directed to the Director of Sentenced Services, Bureau of Forensic Services, Office of Mental Health, 44 Holland Avenue,

Albany, NY 12229. Lastly, it is noted that under §33.16, there are certain limitations on rights of access.

I hope that I have been of some assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:tt

STATE OF NEW YORK
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August 14, 2001

Mr. Jose Velez
97-A-5334
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 facts presented in your correspondence.

Dear Mr. Velez:

I have received your letter in which you sought assistance in obtaining records from the New York City Department of Corrections. You requested copies of log books indicating dates that attorneys visited "the holding pens of the Supreme Court 6th floor, in Part 20, in the County of Bronx."

In this regard, first, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of your correspondence, I offer the following comments.

The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Second, with respect to access to the log "books", I note that if a list is maintained that pertains only to your visitors, I believe that it would be accessible to you. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, if such a list exists, none of the grounds for denial would be applicable.

If, however, no separate visitors list is maintained with respect to each inmate, rights of access may be different. For instance, if a visitor's log or similar documentation is kept in plain sight and can be viewed by any person, and if the staff at the facility have the ability to locate portions of the log of your interest, I believe that those portions of the log would be available. However, if a visitors log or similar documents are not kept in plain sight and cannot ordinarily be viewed, it is my opinion that those portions of the log pertaining to persons other than yourself could be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy. In short, the identities of those with whom a person associates is, in my view, nobody's business.

A potential issue involves the requirement imposed by §89(3) of the Freedom of Information Law that an applicant "reasonably describe" the records sought. In considering that standard, the State's highest court has found that to meet the standard, the terms of a request must be adequate to enable the agency to locate the records, and that an agency must "establish that 'the descriptions were insufficient for purposes of locating and identifying the documents sought'...before denying a FOIL request for reasons of overbreadth" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

Although it was found in the decision cited above that the agency could not reject the request due to its breadth, it was also stated that:

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency']" (id. at 250).

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping systems. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number.

I am unaware of the means by which a visitor's log, if it exists, is kept or compiled. If an inmate's name or other identifier can be used to locate records or portions of records that would identify the inmate's visitors, it would likely be easy to retrieve that information, and the request would reasonably describe the records. On the other hand, if there are chronological logs of visitors

and each page would have to be reviewed in an effort to identify visitors of a particular inmate, I do not believe that agency staff would be required to engage in such an extensive search.

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:tt

STATE OF NEW YORK
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August 15, 2001

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 in which you sought assistance in obtaining records from the Bronx County District Attorney's Office.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of your correspondence, I offer the following comments.

It is noted that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been

constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
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August 15, 2001

Mr. Harry Ayrhart
87-C-559
Elmira Correctional Facility
P.O. Box 500
Elmira, NY 14902

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Ayrhart:

I have received your letter in which you sought assistance in obtaining records from an attorney who represented you in a criminal matter.

In this regard, the Freedom of Information Law pertains to agency records, and §86(3) of that statute defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, the Freedom of Information Law applies, in general, to records of entities of state and local government in New York. It would not apply to a private organization or a private attorney.

Section 716 of the County Law states in part that the "board of supervisors of any county may create an office of public defender, or may authorize a contract between its county and one or more other such counties to create an office of public defender to serve such counties." Therefore, a county office of public defender in my opinion is an agency subject to the Freedom of Information Law that is required to disclose records to the extent required by that statute.

In a case in which an attorney is appointed, while I believe that the records of the governmental entity required to adopt a plan under Article 18-B of the County Law are subject to the Freedom of Information Law, the records of an individual attorney performing services under Article 18-B may or may not be subject to the Freedom of Information Law, depending upon the nature of the plan. For instance, if a plan involves the services of a public defender, for reasons offered earlier, I believe that the records maintained by or for an office of public defender would fall within the scope of the Freedom of Information Law. However, if it involves services rendered by private attorneys or associations, those persons or entities would not in my view constitute agencies subject to the Freedom of Information Law.

In the event that your attorney was acting as a public defender, I note that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to request. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

David Treacy

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
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August 15, 2001

Mr. James Heaney
Buffalo News
One New Plaza
P.O. Box 100
Buffalo, NY 14240

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence, unless otherwise indicated.

Dear Mr. Heaney:

As you are aware, I have received your letter in which you sought an advisory opinion concerning rights of access to the contents of two forms that are maintained by the State Department of Economic Development ("the Department") and the Buffalo Economic Renaissance Corporation ("the Corporation").

The forms are completed by business entities that have applied for or have been certified for participation in the "Empire Zones" program. You enclosed both forms, one of which is an "Application for Joint Certification of an Empire Zone Business Enterprise"; the other is a "Business Annual Report." I note that I have been contacted by Mr. John Heffron, Director of the Corporation, concerning your request, and have discussed the matter with the Department's records access officer, George M. Kazanjian, and Robert Ryan, the Department's Empire Zones attorney. Based on my conversations with them, the terms of the Freedom of Information Law, and the judicial interpretation of that statute, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

It is emphasized that the courts have consistently interpreted the Freedom of Information Law in a manner that fosters maximum access. As stated by the Court of Appeals, the state's highest court, 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 with an effective tool for exposing waste, negligence and abuse on the part of government officers" (id., 565-566).

Second, the key exception in the context of your inquiry in my view 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.

From my perspective, in some circumstances, that exception might be properly asserted with respect to part B of the Application for Joint Certification, entitled "Investment To Be Made In Zone Facility (Actual or Projected)"; similar information appears in box B of the Business Annual Report and might also be withheld *in toto* or in part, depending on the attendant facts.

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.

Perhaps most relevant to the analysis is a decision rendered by the Court of Appeals, 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]). 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).

In discussing the matter with representatives of the Department, it was suggested that disclosure of the information contained in the portions of the forms identified earlier could be damaging to firms, for the information could enable competitors to ascertain the geographical areas where a particular firm intends to locate or expand its business, as well as the nature of a firm's investments. Disclosure might also enable competitors to gauge an area as a potential market, thereby providing information that could encourage them enter a particular market to the detriment of a firm participating or seeking to participate in the Empire Zones program.

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). According to the Department staff with whom I spoke, some firms indicated that they would not participate in the program unless there was a likelihood that the information at issue could be withheld from competitors and others. In consideration of the overall public policy of the state concerning the goal of enhancing economic development, I believe that the portions of the forms at issue, subject to certain conditions, may be withheld.

Those conditions largely relate to the occurrence of particular events or, very simply, the passage of time.

Both forms include reference to the purchase of real property. If a purchase is "projected", if it is part of the business plan or strategy of a firm, those portions of the forms containing information regarding investments in real property could, in my view, be withheld under §87(2)(d). On the other hand, if real property has been purchased, if such a transaction has been consummated, I believe that entries regarding investments in real property would be accessible. In short, the

purchase or sale of real property is not secret; records pertaining a transaction of that nature are accessible to any person at an office of a county clerk or a municipal assessor.

With respect to time, the intent of §87(2)(d), as well as the other exceptions to rights of access appearing in the Freedom of Information Law, is, in general, to authorize government agencies to withhold records insofar as disclosure would result in some sort of harm. The focus of the exception at issue involves the possibility that disclosure would "cause substantial injury to the competitive position" of a commercial enterprise. Although records involving a firm's current financial condition or its investment plans for the future could be extremely valuable to a competitor if disclosed, and conversely, extremely damaging to the subject enterprise, records containing the same information prepared years ago likely would be of little value. In that circumstance, I do not believe that an agency could demonstrate that the harmful effects of disclosure sought to be avoided by the assertion of §87(2)(d) would arise. While I could not advise as to the precise period of time that must pass before the ability to assert the exception would essentially disappear, I believe that the value of the information to competitors, and, therefore, the potentially harmful effects of disclosure, continually diminish with the passage of time.

An analogous analysis would be applicable with regard to item 14 in part of A of the Application dealing with "Total Annual Sales Projected for Zone Facility." Again, a figure of that nature if projected or current could likely be withheld. If, however, it appears in applications prepared previously, it may be accessible.

Lastly, in box A of the Annual Report is an "Employer ID Number", and in items 11, 12 and 13 of the Application are, respectively, a firm's federal taxpayer and workers' compensation identification numbers, and a New York State unemployment insurance registration number. Those items might, if disclosed, enable the recipient to use them to gain unauthorized access to a variety of records. I note that records identifiable to claimants of workers' compensation and unemployment insurance benefits are exempted from disclosure by statute (see respectively, Workers' Compensation Law, §110-a; Labor Law, §537). Those identification or registration numbers could be used to obtain information of a personal nature or other information to which there is no right of public access.

I note, too, that §87(2)(i) of the Freedom of Information Law permits an agency to withhold "computer access codes." While the numbers at issue might not have been created for the purpose of being access codes, frequently, because they are unique, they are used as access codes. When that is so, they might be used to gain unauthorized access to information that typically is inaccessible to the public or to transmit viruses that could alter the contents of or disable an electronic information system.

In consideration of the foregoing, I believe that the remainder of the forms must be disclosed.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: George M. Kazanjian
Robert Ryan
John Heffron

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12891

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August 15, 2001

Mr. Ken McIntyre
97-A-0652
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. McIntyre:

I have received your letter of March 19 in which you referred to difficulty in obtaining medical records under the Freedom of Information Law from your facility.

In this regard, I offer the following comments.

First, by way of background, the Freedom of Information Law pertains to agency records, including those maintained by a correctional facility. In terms of rights granted by the Freedom of Information Law, the Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

With regard to medical records, the Freedom of Information Law, in my view, likely permits that some of those records may be withheld in whole or in part, depending upon their contents. For instance, medical records prepared by Department personnel could be characterized as "intra-agency materials" that fall within the scope of §87(2)(g) of the Freedom of Information Law. To the extent that such materials consist of advice, opinion, recommendation and the like, I believe that the Freedom of Information Law would permit a denial.

Second, I note that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to request. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record

> reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Lastly, §18 of the Public Health Law also grants rights of access to medical records to the subjects of the records. As such, that statute may provide greater access to medical records than the Freedom of Information Law. It is suggested that you refer to §18 of the Public Health Law in any request for medical records.

To obtain additional information concerning access to medical records and the fees that may be charged for searching and copying those records, you may write to:

> Access to Patient Information Coordinator
> New York State Department of Health
> Hedley Park Place
> Suite 303
> 433 River Street
> Troy, NY 12180

I hope that I have been of assistance.

Sincerely,

David Treacy

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 15, 2001

Mr. Benjamin Grimes
00-A-1447
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. Grimes:

I have received your letter in which you sought assistance in obtaining records from the Rensselaer County Public Defenders Office, County Court and Family Court.

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. 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 right of 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.

Also of possible relevance to the matter is §166 of the Family Court Act. That statute states that:

> "The records of any proceeding in the family court shall not be open to indiscriminate public inspection. However, the court in its discretion in any case may permit the inspection of any papers or records. Any duly authorized agency, association, society or institution to which a child is committed may cause an inspection of the record of investigation to be had and may in the discretion of the court obtain a copy of the whole or part of such record."

Since the issues relating to Family Court are outside the jurisdiction of this office, it is suggested that you seek the services of an attorney.

With respect to records of the Rensselaer County Public Defenders Office, §716 of the County Law states in part that the "board of supervisors of any county may create an office of public defender, or may authorize a contract between its county and one or more other such counties to create an office of public defender to serve such counties." Therefore, a county office of public defender in my opinion is an agency subject to the Freedom of Information Law that is required to disclose records to the extent required by that statute.

I note that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 15, 2001

Mr. Jose Abrew
97-A-6981
Woodbourne Correctional Facility
P.O. Box 1000
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. Abrew:

I have received your letter in which you sought assistance in obtaining records from the New York City Correctional Institution for Men and the Department of Correction. You indicated that you have not received any responses to your requests.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of your correspondence, I offer the following comments.

The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to request. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been

constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

For your information, I believe that Counsel to the Department of Correction has been designated as its appeals officer.

Lastly, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, the release papers to which you referred should be made available, for none of the grounds for denial appear to be relevant.

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
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August 15, 2001

Mr. Emanuel Santana
87-A-8565
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. Santana:

I have received your letter in which you sought information regarding the availability of a "verdict sheet that was submitted to the jury" at your trial. You have asked whether such records may be obtained from the courts or the district attorney's office.

In this regard, I offer the following comments.

First, 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."

As such, the Freedom of Information Law does not apply to the courts or court records. 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 right of public access to those records.

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 point out 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. 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 relates specifically to the record of your interest.

When it is applicable, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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.

Lastly, as requested, enclosed is a copy of the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
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August 16, 2001

Mr. Tobe Carey
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Carey:

I have received your letter of July 13 in which you sought an opinion concerning rights of access to an audiotape.

You described the situation as follows:

> "Mr. Doan is a Trustee of the Onteora Central School District. At the June 18th public meeting of the Onteora Board of Education, he played a portion of a conversation that he recorded with Ms. Kimberly Fanniff.
>
> "Mr. Doan used the portion he played as a reference in his publicly stated opposition to the leasing of certain temporary buildings in the district. The conversation with Ms. Fanniff was about this lease, and Mr. Doan stated in the meeting that there existed about another 10 minutes of conversation that he wouldn't bother playing at the meeting. I have asked for the release of the entire conversation as recorded by Mr. Doan.
>
> "Mr. Doan presented only a small portion of the conversation that he, as a Trustee of the District, recorded with Ms. Fanniff, and the public record should contain the entire recording...
>
> "I have not requested any recording of topics or memos pertaining to Mr. Doan's personal life that may appear on the original tape. I only wish a faithful copy of the complete conversation as it took place with Ms. Fanniff."

Mr. Doan has contended that:

> "1. The original tape in question contains many other topics and memos pertaining to my personal life and are not covered under FOIL.
>
> "2. The taped conversation between myself and Ms. Fanniff contained my personal opinions which need not be available through FOIL."

As I understand the matter, that portion of the tape representing the entirety of the conversation between Mr. Doan and Ms. Fanniff, an attorney employed by the New York State School Boards Association, must be disclosed. In this regard, I offer the following comments.

First, the Freedom of Information Law applies to agency records, and §86(4) of that statute defines the term "record" expansively to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based upon the language quoted above, documents, or as in this instance, tape recordings, 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.

It has been found that records maintained by an attorney retained by an industrial development agency were subject to the Freedom of Information Law, even though an agency did not possess the records and the attorney's fees were paid by applicants before the agency. The Court determined that the fees were generated in his capacity as counsel to the agency, that the agency was his client, that "he comes under the authority of the Industrial Development Agency" and that, therefore, records of payment in his possession were subject to rights of access conferred by the Freedom of Information Law (see C.B. Smith v. County of Rensselaer, Supreme Court, Rensselaer County, May 13, 1993).

Additionally, in a decision rendered by the Court of Appeals, the state's highest court, it was found that materials received by a corporation providing services for a branch of the State University that were kept on behalf of the University constituted "records" falling with the coverage of the Freedom of Information Law. I point out that the Court rejected "SUNY's contention that disclosure turns on whether the requested information is in the physical possession of the agency", for such a view "ignores the plain language of the FOIL definition of 'records' as information kept or held 'by,

with or for an agency'" [see Encore College Bookstores, Inc. v. Auxiliary Services Corporation of the State University of New York at Farmingdale, 87 NY 2d 410. 417 (1995)].

Perhaps most significantly, in the first decision in which the Court of Appeals dealt squarely with the scope of the term "record", the matter 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" 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" [Westchester-Rockland Newspapers v. Kimball, 50 NY2d 575, 581 (1980)].

The point made in the final sentence of the passage quoted above appears to be especially relevant, for there appears to be "considerable crossover" in the activities of Mr. Doan as a private citizen and as a member of the Board of Education. In my view, he would not have contacted the School Boards Association but for his membership on the Board and, based on my understanding of the School Boards Association's functions, Ms. Fanniff would not have been offering guidance to Mr. Doan if he had not contacted her in his capacity as a member of the Board. In short, the portion of the tape recording containing the conversation between Mr. Doan and Ms. Fanniff clearly in my opinion involved Mr. Doan acting in his role as a member of the Board. That being so, I believe that the entirety of the segment of the tape recording consisting of the conversation between Mr. Doan and Ms. Fanniff constituted an agency record falling within the coverage of the Freedom of Information Law.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

As Mr. Doan suggested, opinions expressed by public officers and employees may be withheld, but that is so only when they are communicated with officers or employees of other agencies. That would not have been so in this instance because the School Boards Association is not an agency. Section 87(2)(g) authorizes a denial of access to "inter-agency or intra-agency materials, and §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 tape recording at issue consists of a communication between Mr. Doan, an official of an agency (a school district), and Ms. Fanniff, who is not employed by an agency, that communication would not in my view constitute either "inter-agency" or "intra-agency material." That being so, as I understand the nature of the discussion that was recorded, I do not believe that §87(2)(g) or any of the exceptions to rights of access could validly be asserted to withhold the portion of the tape recording in which you are interested.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Joseph L. Doan
Harold Rowe

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1/2896

41 State Street, Albany, New York 12231
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Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 16, 2001

Mr. George Cook
00-A-6750
Five Points Correctional Facility
P.O. Box 119
Romulus, NY 14541

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Cook:

I have received your letter in which you sought guidance in obtaining records pertaining to "policies and procedures as it relates to a parole officer marrying a convicted felon." You wrote that you have not received a response to your request.

In this regard, I offer the following comments.

First, the Freedom of Information Law provides direction concerning the time and manner in which an agency must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Second, another issue may involve the extent to which the request "reasonably describes" the records sought as required by §89(3) of the Freedom of Information Law. It has been held by the Court of Appeals that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

The Court in Konigsberg found that the agency could not reject the request due to its breadth and also stated that:

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency'])" (id. at 250).

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping system. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number.

While I am unfamiliar with the record keeping systems of the Department, to extent that the records sought can be located with reasonable effort, I believe that the request would have met the requirement of reasonably describing the records. In Ruberti, Girvin & Ferlazzo v. Division of State Police [218 AD2d 494, 641 NYS2d 411 (1996)], one element of the decision pertained to a request for a certain group of personnel records, and the agency argued that it was not required to search its files those requested "because such records do not exist in a 'central file' and, further, that FOIL does

not require that it review every litigation or personnel file in search of such information" (id., 415). Nevertheless, citing Konigsberg, the court determined that:

> "Although the record before this court contains conflicting proof regarding the nature of the files actually maintained by respondent in this regard, an agency seeking to avoid disclosure cannot, as respondent essentially has done here, evade the broad disclosure provisions FOIL by merely asserting that compliance could potentially require the review of hundreds of records" (id.).

If the Department can locate the records sought with a reasonable effort analogous to that described above, i.e., by reviewing perhaps hundreds of records, it apparently would be obliged to do so. As indicated in Konigsberg, only if it can be established that the Department maintains its records in a manner that renders its staff unable to locate and identify the records would the request have failed to meet the standard of reasonably describing the records.

Third, I note that the Freedom of Information Law pertains to existing records. If no policy or procedure exists, the Freedom of Information Law would not apply. When records do exist, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Should the Department have policies or procedures of interest, I believe that they would be available [see FOIL, §87(2)(g)(iii)].

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1289?

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 16, 2001

Mr. Herbert Washington
88-A-2845
Mid-State Correctional Facility
P.O. Box 2500, #27-2-E-28-B
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. Washington:

I have received your letter in which you sought assistance in obtaining records from your facility. You wrote that you have not received a response to your request pursuant to the Freedom of Information Law.

In this regard, first I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of your correspondence, I offer the following comments.

The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in

accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2898

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 16, 2001

Mr. Hustado Jaroslav
00-R-4625
Riverview Correctional Facility
P.O. Box 158
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. Jaroslav:

I have received your letter in which you sought assistance in obtaining records from the New York City Police Department. You wrote that the Department responded to your request by indicating that a review of the records and "particular exemptions from disclosure set forth in the Freedom of Information Law" would be completed within 120 days. You inquired as to the propriety of the response.

In this regard, first, I note the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

While an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days, when such acknowledgement is given, there is no precise time period within which an agency must grant or deny access to records. The time needed to do so may be dependent upon the volume of a request, the possibility that other requests have been made, the necessity to conduct legal research, the search and retrieval techniques used to locate the records and the like. In short, when an agency acknowledges the receipt of a request because more than five

business days may be needed to grant or deny a request, so long as it provides an approximate date indicating when the request will be granted or denied, and that date is reasonable in view of the attendant circumstances, I believe that the agency would be acting in compliance with law.

If a request is voluminous and a significant amount of time is needed to locate records and review them to determine rights of access, a substantial delay, in view of those and perhaps the other kinds of factors mentioned earlier, might be reasonable. On the other hand, if a record or report is clearly public and can be found easily, there would appear to be no rational basis for delaying disclosure for any extended period of time.

Second, in the event you have not received a response to your request, i.e., if an agency delays responding for an unreasonable time after acknowledging that a request has been received, the request may in my opinion be considered to have been constructively denied.

In such, a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12899

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 17, 2001

Mr. Ivan Cuevas
00-A-5943 B-Z-68
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. Cuevas:

I have received your letter in which you have sought assistance in obtaining records from the New York City Department of Correction. You have questioned "the appropriateness" of your request for "a true and exact copy of the New York warrant, detainer, or other means" used to hold you "in custody for the New York Authorities."

In this regard, I offer the following comments.

First, a key issue appears to involve extent to which the request "reasonably describes" the records sought as required by §89(3) of the Freedom of Information Law. As you may be aware, it has been held by the Court of Appeals that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

The Court in Konigsberg found that the agency could not reject the request due to its breadth and also stated that:

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability

> under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency'])" (id. at 250).

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping system. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number.

While I am unfamiliar with the record keeping systems of the Department, to extent that the records sought can be located with reasonable effort, I believe that the request would have met the requirement of reasonably describing the records. In Ruberti, Girvin & Ferlazzo v. Division of State Police [218 AD2d 494, 641 NYS2d 411 (1996)], one element of the decision pertained to a request for a certain group of personnel records, and the agency argued that it was not required to search its files those requested "because such records do not exist in a 'central file' and, further, that FOIL does not require that it review every litigation or personnel file in search of such information" (id., 415). Nevertheless, citing Konigsberg, the court determined that:

> "Although the record before this court contains conflicting proof regarding the nature of the files actually maintained by respondent in this regard, an agency seeking to avoid disclosure cannot, as respondent essentially has done here, evade the broad disclosure provisions of FOIL by merely asserting that compliance could potentially require the review of hundreds of records" (id.).

If the Department can locate the records sought with a reasonable effort analogous to that described above, i.e., by reviewing perhaps hundreds of records, it apparently would be obliged to do so. As indicated in Konigsberg, only if it can be established that the Department maintains its records in a manner that renders its staff unable to locate and identify the records would the request have failed to meet the standard of reasonably describing the records.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. As I understand the nature of the records sought, if they can be found, I believe that they would be available.

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1290

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 17, 2001

Mr. Hector Batista
93-A-0862
Shawangunk Correctional Facility
P.O. Box 700
Wallkill, NY 12589

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Batista:

I have received your letter in which you sought assistance in obtaining records from the New York State Police.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of your correspondence, 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, and requests should ordinarily be made to that person. Although I believe that those in receipt of your requests should have responded in a manner consistent with the Freedom of Information Law or forwarded your requests to the records access officer, it is suggested that you send a request to the records access officer, Lt. Laurie Wagner, Division of State Police, Bldg. 22., State Campus, Albany, NY 12226.

Second, the Freedom of Information Law provides direction concerning the time and manner in which an agency must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person

> requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1290 2

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 20, 2001

Mr. Clarence Johnson
92-A-9802
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 facts presented in your correspondence.

Dear Mr. Johnson:

I have received your letter in which you sought assistance in obtaining records under the Freedom of Information Law from the Supreme Court in Kings and Nassau County.

In this regard, I offer the following comments.

The Freedom of Information Law is applicable to agency records, and §86(3) defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines the term "judiciary" to mean:

> "the courts of the state, including any municipal or district court, whether or not of record."

Based on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law (see e.g., Judiciary Law, §255) may grant broad public access to those records. Even though other statutes may deal with access to court records, the procedural provisions associated with the Freedom of Information Law (i.e., those involving the designation of a records access officer or the right of appeal a denial) would not ordinarily be applicable.

It is suggested that you cite the appropriate provision of law when requesting records from the courts.

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1290

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 21, 2001

Mr. Nathan McBride
95-A-6015
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. McBride:

I have received your letter in which you sought an opinion as to whether an "investigative company" involved in your case is a "state or local government."

In this regard, I offer the following comments.

First, as you may be aware, the Freedom of Information Law pertains to agency records, and §86(3) of that statute defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, an "agency" generally is an entity of state or local government. Typically, a private entity or a not-for-profit corporation would not be a governmental entity.

Without knowledge of facts about the relationship between the "investigative company" and an agency, I cannot conjecture as to the applicability of the Freedom of Information Law. However, in the event the private company functions as a contraction with or consultant to an agency, records prepared by a contractor or consultant for an agency may be available from the agency except to the extent that the records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law [Xerox Corporation v. Town of Webster, 65 NY 2d 131, 490 NYS 2d 488 (1985), Encore College Bookstores, Inc. v. Auxillary Service Corporation of the State University, 87 NY2d 410 (1995)].

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1290

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 21, 2001

Mr. Jeffrey Dicks
99-R-7789
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. Dicks:

I have received your letter in which you sought assistance in obtaining a variety of records form the New York City Police Department.

In this regard, first, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of your correspondence, I offer the following comments.

Second, I note that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Third, since your referred to §240.65 of the Penal Law, it is suggested that that statute has limited applicability. Section 240.65 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,

David M. Treacy
Assistant Director

DMT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1290

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 21, 2001

Mr. Roman Kevilly
97-A-0654
Oneida Correctional Facility
6100 School Road/P.O. Box 4580
Rome, NY 13440-4580

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Kevilly:

I have received your letter in which you sought assistance in obtaining records from the New York State Comptroller's office. You have requested "monthly reports of closed case files."

While I am unaware of the specific nature of reports transmitted by the courts to the Office of the State Comptroller, I note that there is a distinction between town and village justice courts and district courts. As such, there may be a distinction between the nature of or the extent to which they must file reports with that agency. Insofar as the Office of the State Comptroller maintains records transmitted by the district courts, those records would be subject to the Freedom of Information Law. In brief, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

I hope that the foregoing serves to clarify your understanding of the matter and that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12906

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 24, 2001

Mr. Tayt Brooks
[redacted]

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. Brooks:

I have received your letter and the correspondence associated with it. You have sought an advisory opinion relating to a request for a contract between the Olympic Regional Development Authority and the ECAC concerning the Men's Division One Hockey Championship. The receipt of your request of June 6 was acknowledged on June 12 with a statement that access would be granted or denied within thirty days. Having received no further response at the expiration of thirty days, you appealed on July 17. As of the date of your letter to this office, you had received no further response.

In this regard, first, I believe that your appeal was appropriately made. The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests and appeals. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Although I believe that two of the grounds for denial are pertinent to an analysis of rights of access, one in my view has no application, and the other likely would not be justifiable.

Section 87(2)(c) permits an agency to withhold records when disclosure would "impair present or imminent contract awards..." Since the contract has apparently been signed, that provision, in my opinion, would not serve as a basis for a denial of access to records.

The other ground for denial of significance, §87(2)(d), permits an agency to withhold records or portions thereof that:

> "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise..."

In my view, §87(2)(d) is likely inapplicable, for a contract represents the terms and conditions of negotiated agreements developed by the parties to those agreements; it is not a record that was submitted to the Authority by a commercial enterprise. If that is so, I do not believe that §87(2)(d) would serve as a basis for a denial of access.

Even if that provision is applicable, I do not believe that a denial of access is justifiable. 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 state's highest court, the Court of Appeals, which, for the first time, considered the phrase "substantial competitive injury" [Encore College Bookstores, Inc. v. Auxiliary Service Corporation of the State University of New York at Farmingdale, 87 NY2d 410 (1995)]. In that decision, the Court reviewed the legislative history of the Freedom of Information Law as it pertains to §87(2)(d), and due to the analogous nature of equivalent exception in the federal Freedom of Information Act (5 U.S.C. §552), it relied in part upon federal judicial precedent.

In its discussion of the issue, the Court stated that:

> "FOIL fails to define substantial competitive injury. Nor has this Court previously interpreted the statutory phrase. FOIA, however, contains a similar exemption for 'commercial or financial information obtained from a person and privileged or confidential' (see, 5 USC § 552[b][4]). Commercial information, moreover, is 'confidential' if it would impair the government's ability to obtain necessary information in the future or cause 'substantial harm to the competitive position' of the person from whom the information was obtained...
>
> "As established in Worthington Compressors v Costle (662 F2d 45, 51 [DC Cir]), whether 'substantial competitive harm' exists for purposes of FOIA's exemption for commercial information turns on the commercial value of the requested information to competitors and the cost of acquiring it through other means. Because the submitting business can suffer competitive harm only if the desired material has commercial value to its competitors, courts must consider how valuable the information will be to the competing business, as well as the resultant damage to the submitting enterprise. Where FOIA disclosure is the sole means by which competitors can obtain the requested information, the inquiry ends here.
>
> "Where, however, the material is available from other sources at little or no cost, its disclosure is unlikely to cause competitive damage to the submitting commercial enterprise. On the other hand, as explained in Worthington:
>
> > Because competition in business turns on the relative costs and opportunities faced by members of the same industry, there is a potential windfall for competitors to whom valuable information is released under FOIA. If those competitors are charged only minimal FOIA retrieval costs for the information, rather than the considerable costs of private reproduction, they may be getting quite a bargain. Such bargains could easily have competitive consequences not contemplated as part of FOIA's principal aim of promoting openness in government (id., 419-420).

The Court also observed that the reasoning underlying these considerations is consistent with the policy behind §87(2)(d) to protect businesses from the deleterious consequences of disclosing confidential commercial information so as to further the state's economic development efforts and attract business to New York (id.). In applying those considerations to Encore's request, the Court concluded that the submitting enterprise was not required to establish actual competitive harm;

rather, it was required, in the words of Gulf and Western Industries v. United States, 615 F.2d 527, 530 (D.C. Cir., 1979) to show "actual competition and the likelihood of substantial competitive injury" (id., at 421).

In my view, disclosure of a contract likely would not cause substantial injury to the competitive position of the subject enterprise. It is not analogous to a process, formula, or financial information which shows the strengths or weaknesses of an entity. Rather, it indicates the amounts to be paid and received and the conditions imposed upon the signatories as the result of negotiation between two parties, and I believe that that kind of information must be disclosed.

It has been held that those who choose to bid on contracts to provide service to public agencies have no reasonable expectation of privacy, and that a successful bidder on a public contract "had no reasonable expectation of not having its bid open to the public" (see Contracting Plumbers Cooperative Restoration Corp. v. Ameruso, 430 NYS2d 196 (1980)]. Revealing the terms of public contracts fosters the purpose of the Freedom of Information Law "to shed light on government decisionmaking, which in turn both permits the electorate to make informed choices regarding governmental activities and facilitates exposure of waste, negligence and abuse" (see Encore, supra).

Lastly, I am unaware of the specific status of the ECAC, i.e., whether it is a not-for-profit entity or a commercial enterprise. If it is not a commercial enterprise as envisioned by §87(2)(d), that provision, in my opinion, would be of questionable applicability in any case.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Stephanie Ryan

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12907

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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 23, 2001

Mr. Louis Thompson
93-B-2748
Green Haven Correctional Facility
Drawer B
Stormville, NY 12582

Dear Mr. Thompson:

I have received your letter in which you requested from this office a copy of a records indicating the medical condition of a correction officer who stated at a hearing that you assaulted him.

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee does not have general custody or control of records, and it is not empowered to compel an agency to grant or deny access to records. Nevertheless, I offer the following comments.

First, a request should be made to the agency that maintains the records of your interest. It is noted 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.

Second, it is unlikely in my view that you have the right to obtain the record in question. Although the Freedom of Information Law provides broad rights of access to records, §87(2)(b) states that an agency may withhold records when disclosure would result in "an unwarranted invasion of personal privacy." Further, §89(2)(b) includes a series of examples of unwarranted invasions of personal privacy, the first two of which pertain to medical information. Therefore, the kind of record in which you are interested ordinarily may be withheld under the Freedom of Information Law.

Notwithstanding the foregoing, if the record at issue was introduced and disclosed at your hearing, I believe that it would be available to you. In that circumstance, because it would have been disclosed in a proceeding during which you were present, it should be available to you on request and upon payment of the appropriate fee.

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-1908

41 State Street, Albany, New York 12231
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August 23, 2001

Mr. Edward MacKenzie
94-A-2495
Shawangunk Correctional Facility
Box 700
Wallkill, NY 12589-0700

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. MacKenzie:

I have received your letter in which you asked whether a person acting *pro se* may recover costs and attorney's fees in a suit brought under the Freedom of Information Law.

In this regard, a court may award attorney's fees, payable by an agency, in certain circumstances. Specifically, §89(4)(c) of the Freedom of Information Law states that:

> "The court in such a proceeding may assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed, provided, that such attorney's fees and litigation costs may be recovered only where the court finds that:
>
> i. the record involved was, in fact, of clearly significant interest to the general public: and
>
> ii. the agency lacked a reasonable basis in law for withholding the record."

With respect to your question, there is a decision in which the issue was whether a person representing himself who was not an attorney was eligible for an award of attorney's fees. In Leeds v. Burns (Supreme Court, Queens County, NYLJ, July 27, 1992), the petitioner was a law student who brought a proceeding against the Dean of the City University of New York Law School at Queens College pro se under the Freedom of Information Law. He prevailed and requested attorney's fees. The court found that he met all of the conditions prescribed in §89(4)(c), except one.

In short, the court found that he was an "aspiring attorney" but not yet a licensed attorney, and that, therefore, attorney's fees would not be awarded. On the basis of that decision, I believe that one must be or represented by a licensed attorney in order to be eligible for an award of attorney's fees under §89(4)(c).

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 27, 2001

Mr. Donald J. Feerick, Jr.
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Feerick:

I have received your letter and the correspondence attached to it. You wrote that you have been retained by the Town of Clarkstown "to investigate the availability of civil remedies, if any, in connection with the Town's acquisition of land in the Town of Ramapo." Having requested records from the Office of the Rockland County District Attorney that "are material and necessary to the Town's investigation", particularly those "reflecting payment(s) from Patrick Farms, LLC to Mr. Paul Adler", you were informed that it would not disclose the records sought. In a letter to an assistant district attorney, you expressed the understanding that the Office of the District Attorney "may be a party to a plea agreement" with Mr. Adler, who is apparently the defendant in United States v. Adler, and that the District Attorney "will not further prosecute the Defendant criminally for any conduct set forth in the federal information, complaint and/or indictment."

Assuming that the matter has been accurately presented, it appears that the records sought should be made available in great measure, if not in their entirety. In this regard, I offer the following comments.

First and perhaps most importantly, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. It is emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In my view, the phrase quoted in the preceding sentence evidences a recognition on the part of the Legislature that a single record or report, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld. That being so, I believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

The Court of Appeals reiterated its general view of the intent of the Freedom of Information Law in 1996 in Gould v. NYC Police Department (89 NY2d 267), stating that:

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see,* Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" (id., 275).

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the Department contended that DD5's could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g), an exception separate from those cited in response to your requests. The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276), and stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, stating that:

> "...to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents (*Matter of Fink v. Lefkowitz, supra*, 47 N.Y.2d, at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material (*see, Matter of Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 133, 490 N.Y.S. 2d, 488, 480 N.E.2d 74; *Matter of Farbman & Sons v. New York City Health & Hosps. Corp., supra*, 62 N.Y.2d, at 83, 476 N.Y.S.2d 69, 464 N.E.2d 437)" (id.).

Second, often the most significant exception to rights of access to records relating to a criminal 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."

From my perspective, based on the language quoted above, it is clear that the ability to deny access involves the goal of avoiding the harmful effects of disclosure described in subparagraphs (i) through (iv). Under the circumstances that you presented, it appears unlikely that disclosure would give rise to the harmful effects envisioned by §87(2)(e)(i) or (ii). If indeed there has been a plea agreement and there is no possibility of further prosecution, disclosure would neither interfere with an investigation or a judicial proceeding, nor would it deprive the defendant of a fair trial, for there will be no trial. The remaining provisions within the exception appear to be irrelevant.

Moreover, 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 be articulating a particularized and specific justification for denying access" [Capital Newspapers v. Burns, 67 NY 2d 562, 566 (1986); see also, M. Farbman & Sons v. New York City Health and Hospitals Corp., 62 NY 2d 75, 80 (1984); Fink v. Lefkowitz, 47 NY 2d 567, 571 (1979)]. Based upon the thrust of those decisions, §87(2)(e) should be construed narrowly in order to foster access. Further, case law illustrates why §87(2)(e) should be construed narrowly, and why a broad construction of that provision would give rise to an anomalous result. Specifically, in King v. Dillon (Supreme Court, Nassau County, December 19, 1984), the District Attorney was engaged in an investigation of the petitioner, who had served as a village clerk. In conjunction with the investigation, the District Attorney obtained minutes of meetings of the village board of trustees "pursuant to a Grand Jury subpoena." Those minutes, which were prepared by the petitioner, were requested from the District Attorney. In granting access to the minutes, the decision indicated that "the party resisting disclosure has the burden of proof in establishing entitlement to the exemption," and the judge wrote that he:

> "must note in the first instance that the records sought were not compiled for law enforcement purposes (P.O.L. 87[2]e). Minutes of Village Board meetings serve a different function...These were public records, ostensibly prepared by the petitioner, so there can be little question of the disclosure of confidential material."

Often records prepared in the ordinary course of business 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. Records of payments

between the defendant and Patrick Farms appear to have been prepared in the ordinary course of business, and not for any law enforcement purpose. If that is so, I do not believe that §87(2)(e) would be applicable.

I note that a similar conclusion has been reached in other contexts relating to law enforcement records. Again, in King (id.), it was found that records subpoenaed for presentation to a grand jury that had been prepared in the ordinary course of business fell beyond the grand jury secrecy requirements imposed by §190.25(4) of the Criminal Procedure Law. In another decision, it was found that records of a County Sheriff that were in the temporary possession of the United States Attorney for presentation to a federal grand jury did not render them secret or outside the scope of rights of access conferred by the Freedom of Information Law [Buffalo Broadcasting Co., Inc. v. County of Erie, 203 AD2d 895 (1993)]. In a different but related vein, as you are aware, "official records" relating to a criminal matter are sealed pursuant to §§160.50 and 160.55 of the Criminal Procedure Law when a criminal proceeding has been dismissed in favor of an accused. At issue in Lockwood v. Suffolk County Police Department (Supreme Court, Suffolk County, NYLJ, February 14, 2001) were records that came into the possession of a law enforcement agency that were prepared in the ordinary course of business by a third party, and it was found that those records were not "official records" and, therefore, were not sealed in accordance with the Criminal Procedure, but rather remained subject to rights of access granted by the Freedom of Information Law.

In short, judicial decisions rendered in a variety of contexts indicate that records used in a criminal investigation or proceeding are not necessarily exempt from disclosure or otherwise beyond the scope of rights established under the Freedom of Information Law. In the context of your inquiry, I do not believe that the records of your primary interest may be characterized as having been compiled for a law enforcement purpose or that they would be exempted from disclosure by a statute other than the Freedom of Information Law. As I understand the matter, exceptions to rights of access in the Freedom of Information Law other than §87(2)(e) do not appear to be pertinent.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Michael Bongiorno
William McClarnon

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12910

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August 27, 2001

Hon. June Darlin
Town Clerk
Town of Maine
P.O. Box 336
Maine, NY 13802

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Darlin:

I have received your letter in which you asked whether "a town board member who is acting on his own [has] the right to obtain town records at any time for any reason." Additionally, you questioned your role as "records management officer."

In this regard, I offer the following comments.

First, I do not believe that a board member, "acting on his own", necessarily has the right to obtain all town records "at any time for any reason."

By way of background, from my perspective, the Freedom of Information Law is intended to enable the public to request and obtain accessible records. Further, it has been held that accessible records should be made equally available to any person, without regard to status or interest [see e.g., Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976) and M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)]. Nevertheless, if it is clear that records are requested in the performance of one's official duties, the request might not be viewed as having been made under the Freedom of Information Law. In such a situation, if a request is reasonable, and in the absence of a rule or policy to the contrary, I believe that a member of a 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; also Town Law, §63). 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 the absence of any such rule, a member seeking records could presumably be treated in the same manner as the public generally.

Second, with respect to your function as "records management officer", §57.19 of the Arts and Cultural Affairs Law 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" (emphasis added).

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..." (emphasis added).

Related is the implementation of the Freedom of Information Law. Under §89 (1) of the Freedom of Information Law, the Committee on Open Government is required 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 form continuing from doing so."

As such, the Town 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 Town 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. As you may be aware, because town clerks are both the legal custodians of town records under §30 of the Town Law and the records management officer, they are in most circumstances also designated as records access officer.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12911

41 State Street, Albany, New York 12231
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August 29, 2001

Mr. Stacy D. Lasher
00-R-1960
Marcy Correctional Facility
P.O. Box 3600
Marcy, NY 13403

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Lasher:

I have received your letter in which you referred to difficulty in obtaining medical records under the Freedom of Information Law from the Schenectady County Jail.

In this regard, I offer the following comments.

First, by way of background, the Freedom of Information Law pertains to agency records, including those maintained by a county jail. In terms of rights granted by the Freedom of Information Law, the Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

With regard to medical records, the Freedom of Information Law, in my view, likely permits that some of those records may be withheld in whole or in part, depending upon their contents. For instance, medical records prepared by Department personnel could be characterized as "intra-agency materials" that fall within the scope of §87(2)(g) of the Freedom of Information Law. To the extent that such materials consist of advice, opinion, recommendation and the like, I believe that the Freedom of Information Law would permit a denial.

Second, perhaps of greatest significance is §18 of the Public Health Law. In brief, that statute generally grants rights of access to medical records to the subjects of the records. As such, that statute may provide greater access to medical records than the Freedom of Information Law. It is suggested that you refer to §18 of the Public Health Law in any request for medical records.

To obtain additional information concerning access to medical records and the fees that may be charged for searching and copying those records, you may write to:

Access to Patient Information Program
New York State Department of Health
Hedley Park Place
Suite 303
433 River Street
Troy, NY 12180

I hope that I have been of some assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12912

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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 29, 2001

Mr. Theron Thomas
93-A-9430
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 facts presented in your correspondence.

Dear Mr. Thomas

I have received your letter in which you sought assistance in obtaining a list of mail you received at "current and former correctional facilities."

First, with regard to the procedure for requesting a list of incoming mail, the regulations promulgated by the Department of Correctional Services indicate that requests for records kept at correctional facilities should be made to the superintendent of a facility or his designee.

Second, it is noted that the Freedom of Information Law pertains to existing records. Section 89(3) of that statute provides in part that an agency is not required to prepare a record that is not maintained by the agency in response to a request. In short, if the record in question does not exist, i.e., if there is no "list" the Freedom of Information Law would not apply.

Third, with regard to requesting a copy of your "transcripts from court libraries to obtain them at a reduced rate," it is doubtful that any libraries maintain such records. Further, for your information, §86(3) of the Freedom of Information Law defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In 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 possession of the document, citing an applicable statute as the basis for the request.

Lastly, while the federal Freedom of Information Act, which applies only to federal agencies, 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,

David M. Treacy
Assistant Director

DMT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12913

41 State Street, Albany, New York 12231
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August 29, 2001

Mr. Karsem Williams
95-A-6745
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 facts presented in your correspondence.

Dear Mr. Williams:

I have received your letter in which you sought guidance in attempting to ascertain whether "any other witnesses were promised any favors for their testimony" at your trial.

In this regard, I offer the following comments.

The Freedom of Information Law pertains to agency records and §86(3) of that statute defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, a district attorney's office is an "agency" subject to the Freedom of Information Law. It is suggested that you direct a request reasonably describing records sought to the appropriate district attorney's office.

I note that while the Freedom of Information Law may require an agency to disclose certain existing records, it does not require an agency to provide answers in response to questions. I could not conjecture as to existence or availability of records pertinent to your request.

Lastly, if records are in existence that indicate that promises were made to witnesses for their testimony, it is likely in my view that any such record may be withheld. Potentially relevant would be §87(2)(b) pertaining to an unwarranted invasion of personal privacy, §87(2)(e)(iii), which deals with the disclosure of law enforcement records involving confidential sources or similar information

regarding a criminal investigation, and §87(2)(f) concerning endangerment of a person's life or safety.

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1291 4

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August 29, 2001

Mr. Steven Briecke
85-A-4706
Elmira Correctional Facility
Box 500
Elmira, NY 14902

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Briecke:

I have received your letter in which you sought assistance in obtaining records from the Division of Parole relating to an alleged assault by a parole officer.

In this regard, first, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of your correspondence, I offer the following comments.

Second, I note that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

For your information, the records appeals officer for the Division of Parole is Mr. Terrence X. Tracy, 97 Central Avenue, Albany, N.Y. 12206.

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12915

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 29, 2001

Mr. Alfonso Rizzuto
00-A-2600
Elmira Correctional Facility
Box 500
Elmira, NY 14902

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Rizzuto:

I have received your letter in which you sought assistance in obtaining records from a variety of agencies that did not respond to your request for records.

In this regard, first I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of your correspondence, I offer the following comments.

The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

David Treacy

David M. Treacy
Assistant Director

DMT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 29, 2001

Mr. Jean M. Belot, Jr.
Auburn Correctional Facility
135 State Street
Auburn, NY 13024

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Belot:

I have received your letter in which you sought guidance in obtaining records from the New York State temporary Commission of Investigation. You have sought "records that only specifically deal" with your interview by the Commission.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

The first ground for denial in the Freedom of Information Law, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute." I believe that records relating to the Commission's investigations are specifically exempted from disclosure. Section 7502(11)(d) of the Unconsolidated Laws states in part that:

> "Unless otherwise instructed by resolution adopted by a majority of the members of the commission, every witness attending before the commission shall be examined privately and the commission shall not make public the particulars of such examination."

Further, §7505 states that:

> "Any person conducting or participating in any examination or investigation who shall disclose to any person other than the commission or an officer having the power to appoint one or more of the commissioners the name of any witness examined, or any information obtained or given upon such examination or

investigation, except as directed by the governor or commission, shall be guilty of a misdemeanor."

I hope that the foregoing serves to enhance your understanding of applicable provisions of law and that I have been of assistance.

Sincerely,

David Treacy

David M. Treacy
Assistant Director

DMT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 30, 2001

Mr. Richard L. Tubbs
[redacted]

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. Tubbs:

I have received your letter in which you sought guidance in your efforts in obtaining records concerning a motor vehicle accident in which you were involved in the Town of Guilderland. You indicated that the Town disclosed an accident report "with the teens names blacked out", and that the teens' statements were withheld. You added that you were informed that the teens appeared in Family Court in Saratoga County, but that you are unaware of whether they were charged with or convicted of any violation or crime.

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, written materials comprising an accident report, as well as other documentation, including photographs taken at the scene by Town employees, would in my opinion clearly 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. I note that §89(6) states that if records are available under some other provision of law or by means of judicial interpretation, the grounds for denial appearing in §87(2) cannot be asserted.

Third, except in unusual circumstances, accident reports prepared by police agencies are in my opinion available under both the Freedom of Information Law and §66-a of the Public Officers Law. Section 66-a states that:

> "Notwithstanding any inconsistent provisions of law, general, special of local or any 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 involved in or connected with the accident."

The Freedom of Information Law is consistent with the language quoted above, for while accident reports are generally available, §87(2)(e)(i) of the Freedom of Information Law states in relevant part that records compiled for law enforcement purposes may be withheld to the extent that disclosure would "interfere with law enforcement investigations or judicial proceedings." Further, the state's highest court, the Court of Appeals, has held that a right of access to accident reports "is not contingent upon the showing of some cognizable interest other than that inhering in being a member of the public" [Scott, Sardano & Pomeranz v. Records Access Officer, 65 NY 2d 294, 491 NYS 2d 289, 291 (1985)]. Therefore, 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. Certainly you, as one involved in the accident, would be a person "having an interest" in the report in conjunction with the language of §66-a of the Public Officers Law.

As I understand §66-a, there is nothing in that statute that would authorize an agency, such as a Town, to withhold details identifying those involved in an accident, irrespective of their ages. Moreover, if the statements to which you referred are part of the accident report, I believe that they, too, would be available under §66-a. 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 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)]. Again, except to the extent that disclosure would "interfere with the investigation involved in or connected with the accident", the documentation comprising the accident
report must, in my view, be disclosed.

Insofar as the records sought are not part of an accident report, potentially 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." One such statute is §784 of the Family Court Act, which states that:

> "All police records relating to the arrest and disposition of any person under this article shall be kept in files separate and apart from the arrests of adults and shall be withheld from public inspection, but such records shall be open to inspection upon good cause shown by the parent, guardian, next friend or attorney of that person upon the written order of a judge of the family court in the county in which the order was made or, if the person is subsequently convicted of a crime, of a judge of the court in which he was convicted."

Based on the foregoing, I believe that a court or a government agency may be precluded from disclosing certain records.

If there was no arrest or charge and §784 of the Family Court Act does not apply, but the teens appeared in Family Court nonetheless, §166 of the Family Court Act may be pertinent. That provision 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."

Since you were involved in the accident, you might suggest that your request to inspect Family Court records would not be "indiscriminate" but rather would reflect your legal interest in the matter.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Rosemary Centi, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-B361
FOIL-AO-12918

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August 30, 2001

E-MAIL

TO: Mary Lee Lasota [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 Ms. Lasota:

As you are aware, I have received your letter in which you raised questions relating to the process of filling a vacancy on the Hilton Central School District Board of Education.

The first area of inquiry involves any requirement that the District publicize or disclose the names of those who have applied to fill the vacant position. In this regard, there is nothing in the Freedom of Information Law or any other law of which I am aware that would require that the District, on its own initiative, to disclose the names of applicants. However, in response to a request made under the Freedom of Information Law, I believe that the District would be required to disclose a record or records identifying the applicants.

In brief, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. The only ground for denial of significance in my view would be §87(2)(b), which authorizes an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." The Court of Appeals, the state's highest court, held that the intent of the exception is to permit agencies to protect against disclosure of "intimate details" of persons' lives, and that the standard should consider the reasonable person of ordinary sensibilities [Hanig v. State Department of Motor Vehicles, 79 NY 2d 106 (1992)]. From my perspective, the fact that a person has applied to fill a vacancy in what ordinarily is an elective office would not represent a disclosure of an intimate personal detail or would, therefore, constitute an unwarranted invasion of personal privacy.

Similar considerations would be pertinent in determining rights of access "application letters" and resumes of applicants. I note, too, that §89(2)(b) includes a series of examples of unwarranted

invasions of personal privacy. Based on those examples, a person's employment history, other than public employment, may be withheld; medical information may be withheld; other details, such as a social security number, may also be withheld in my view. However, some details within the records would not in my opinion rise to the level of an unwarranted invasion of personal privacy if disclosed. For instance, it has been held that one's general educational background must be disclosed [see Ruberti, Girvin & Ferlazzo v. NYS Division of State Police, 641 NYS2d 411, 218 AD2d 494(1996)].

The remaining area of inquiry involves the Board's ability to interview or discuss the applicants in executive session. By way of background, the Open Meetings Law is based on a presumption of openness. In a manner analogous to the Freedom of Information Law, 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 opinion, the only provision that might justify 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. I point out that the Appellate Division affirmed the substance of the lower court decision but did not refer to the passage quoted above. Whether other courts would uniformly concur with the finding enunciated in that passage is conjectural. Nevertheless, since it is the only decision that has dealt squarely with the issue at hand, I believe that it is appropriate to consider Gordon as an influential precedent.

I hope that I have been of assistance.

RJF:tt

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 30, 2001

Ms. Carolyn K. Hall
Projects Manager
ACME Research
2813 Rio Grande Avenue, Suite 103
Austin, Tx 78705-3651

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. Hall:

I have received your letter of August 2 as well as the correspondence attached to it. You have sought an advisory opinion in relation to requests made under the Freedom of Information Law to the New York City School Construction Authority.

By way of background, in a letter dated June 26, you requested "public spending information regarding contracts [the Authority] has awarded during fiscal year 2000 or calendar year 2000." You added that you are specifically interested in obtaining information containing "the project names or description, location of the work to be performed if not included in the project name or description, the total value of the contract, and the name and address of the awardee." You added that you surmised that the authority would maintain " an existing report that would be essentially responsive to [y]our request", but that if that is not so, you would be "willing to reimburse [the Authority] for any reasonable expense incurred in providing the requested information if an estimate of costs" could be provided in advance.

In response to the request, the Authority's records access officer advised you that:

> "...the information you are seeking does not exist in the form requested and , therefore, cannot be provided to you. The SCA does not generate such lists on a regular basis and is not required to create records/reports in response to FOIL requests."

Thereafter, you requested a list, by subject matter, of the Authority's records as required by §87(3)(c) of the Freedom of Information Law. In response to that request, the records access officer wrote that:

> "...at the SCA the subject matter list in question is not a printed document but is comprised of a number of databases which list the records in the SCA's Central Files System. The combined total of these databases is currently approximately 24,000 pages in length. I must inform you that in order to compile and print the databases for your review, the SCA would require an advance certified check or money order in the amount of $6,000 which represents the allowable $0.25 per page charge."

You have contended that the Authority's responses are inconsistent with law. I agree in great measure with your contention, and 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. From my perspective, insofar as the information sought exists, it should be made available, for none of the grounds for denial would be applicable.

Second, on the basis of the terms of your initial request, you did not seek records or information in any particular form; on the contrary, you specified that you would be willing to accept records "essentially responsive" to your request. Here I point out that the Freedom of Information Law pertains to agency records, and that §86(4) of the Law defines the term "record" expansively to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

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 more than twenty years ago that "[i]nformation is increasingly being stored in computers and access to such data should not be restricted merely because it is not in printed form" [Babigian v. Evans, 427 NYS 2d 688, 691 (1980); aff'd 97 AD 2d 992 (1983); see also, Szikszay v. Buelow, 436 NYS 2d 558 (1981)].

When information is maintained electronically, 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 disc. On the other hand, if information sought can be generated only through the use of new programs, so doing would in my opinion represent the equivalent of creating a new record.

Questions and issues have arisen in relation to information maintained electronically concerning §89(3) of the Freedom of Information Law, which states in part that an agency is not required to create or prepare a record in response to a request. In this regard, often information stored electronically can be extracted by means of keystrokes or queries entered 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. Transferring the data from one electronic storage medium to another involved relatively little effort and cost; preparation of a printout, however, involved approximately a million pages and a cost of ten thousand dollars for paper alone. 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)].

In another decision which 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).

Perhaps most pertinent and timely is a decision rendered last month concerning a request for records, data and reports maintained by the New York City Department of Health regarding "childhood blood-level screening levels" (New York Public Interest Research Group v. Cohen and the New York City Department of Health, Supreme Court, New York County, July 16, 2001; hereafter "NYPIRG"). The agency maintained much of the information in its "LeadQuest" database. I am unaware whether the LeadQuest system is used by other counties in the state. Nevertheless, the principles enunciated in that decision would likely be applicable with respect to information maintained electronically in the context of your requests.

In NYPIRG, the Court described the facts, in brief, as follows:

> "...the request for information in electronic format was denied on the following grounds:
>
> > '[S]uch records cannot be prepared in an electronic format with individual identifying information redacted, without the Department creating a unique

> computer program, which the Department is not required to prepare pursuant to Public Officer's Law §89(3).'
>
> "Instead, the agency agreed to print out the information at a cost of twenty-five cents per page, and redact the relevant confidential information by hand. Since the records consisted of approximately 50,000 pages, this would result in a charge to petitioner of $12,500."

It was conceded by an agency scientist that:

> "...several months would be required to prepare a printed paper record with hand redaction of confidential information, while it would take only a few hours to program the computer to compile the same data. He also confirmed that computer redaction is less prone to error than manual redaction."

In consideration of the facts, the Court wrote that:

> "The witnesses at the hearing established that DOH would only be performing queries within LeadQuest, utilizing existing programs and software. It is undisputed that providing the requested information in electronic format would save time, money, labor and other resources - maximizing the potential of the computer age.
>
> "It makes little sense to implement computer systems that are faster and have massive capacity for storage, yet limit access to and dissemination of the material by emphasizing the physical format of a record. FOIL declares that the public is entitled to maximum access to public records [Fink v. Lefkowitz, 47 NY2d 567, 571 (1979)]. Denying petitioner's request based on such little inconvenience to the agency would violate this policy."

Based on the foregoing, it was concluded that:

> "To sustain respondents' positions would mean that any time the computer is programmed to provide less than all the information stored therein, a new record would have been prepared. Here all that is involved is that DOH is being asked to provide less than all of the available information. I find that in providing such limited information DOH is providing data from records 'possessed or maintained' by it. There is no reason to differentiate between data redacted by a computer and data redacted manually insofar as whether or not the redacted information is a record 'possessed or maintained' by the agency.
>
> "Moreover, rationality is lacking for a policy that denies a FOIL request for data in electronic form when to redact the confidential information would require only a few hours, whereas to perform the redaction manually would take weeks or months (depending on the

> number of employees engaged), and probably would not be as accurate as computer generated redactions."

Assuming that your requests involve similar considerations, in my opinion, responses to those requests, based on the precedent offered in NYPIRG, must involve the disclosure of data stored electronically for which there is no basis for a denial of access.

With respect to the second request, as suggested above, as a general matter, with certain exceptions, an agency is not required to create or prepare a record to comply with the Freedom of Information Law [see §89(3)]. An exception to that rule relates to a list that must be maintained by an agency. Specifically, §87(3) of the Freedom of Information Law states in relevant part that:

> "Each agency shall maintain...
>
> c. a reasonably detailed current list by subject matter, of all records in the possession of the agency, whether or not available under this article."

The "subject matter list" required to be maintained under §87(3)(c) is not, in my opinion, required to identify each and every record of an agency; rather I believe that it must refer, by category and in reasonable detail, to the kinds of records maintained by an agency. Further, the regulations promulgated by the Committee on Open Government state that such a list should be sufficiently detailed to enable an individual to identify a file category of the record or records in which that person may be interested [21 NYCRR 1401.6(b)]. I emphasize that §87(3)(c) does not require that an agency ascertain which among its records must be made available or may be withheld. Again, the Law states that the subject matter list must refer, in reasonable detail, to the kinds of records maintained by an agency, whether or not they are available.

In my view, the record required to be maintained pursuant to §87(3)(c) must be a distinct list; I do not believe that it can be "comprised of a number of databases" in combination with one another.

It has been suggested that the records retention and disposal schedules developed by the State Archives at the State Education Department, or in the case of New York City agencies, the City's Department of Records and Information Services, may be used as a substitute for or equivalent of the subject matter list.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Milo Reverso
Michael Szabaga

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12920

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 30, 2001

Mr. Stanley A. France, Jr.
Director
Central Data Processing
P.O. Box 541
Schoharie, NY 12157

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. France:

I have received your letter in which you sought an advisory opinion concerning "whether software developed with municipal funds is subject to the Freedom of Information Law." You indicated that the issue relates to software developed "for the County Clerk with the intent that it be freely shared with other counties."

In this regard, first, the Freedom of Information Law is applicable to all agency records and §86(4) of that statute defines the term "record" expansively to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Although there is no decision rendered in New York of which I am aware dealing with the status of software, it has been advised that software, because it is reflective of information in a physical form, constitutes a "record" that falls within the coverage of the Freedom of Information Law.

Prior to the advent of computer technology, documentary materials equivalent in substance to software would be and remain records. As I understand the nature of software, it consists of a series of instructions designed to produce information that can be seen on a screen, printed, stored, transferred and transmitted. *Webopedia*, the "online encyclopedia dedicated to computer technology", defines "software" to mean "computer instructions or data" and states that "anything

that can be stored electronically is software." Based on the foregoing, since it exists in a physical form and can be developed in the manner that you described, or perhaps purchased as a distinct entity, an information product, I believe that software constitutes a "record" falling within the coverage of the Freedom of Information Law.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, based on the facts that you presented, none of the grounds for denial would be applicable.

Relevant to rights of access in some circumstances might 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."

Situations have arisen, for example, in which a government agency carries out certain of its functions as an entity in competition with private firms, and 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).

My understanding of the matter is that the software developed by the County is not being used in a manner in which the County acts, in essence, as a competitor with private entities. On the contrary, to reiterate, you wrote that it was developed "with the intent that it be freely shared with other counties." That being so, I do not believe that §87(2)(d) or any other ground for denial of access could be asserted.

As you requested, a copy of this opinion will be sent to the County Attorney.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Michael West

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1292

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 30, 2001

Ms. Susan G. McCabe
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. McCabe:

I have received your letter and the correspondence attached to it. You have sought assistance concerning your request for records made to the Town of Blooming Grove.

Having requested certain telephone bills covering the period of April to December, 2000, several were made available. However, Town officials indicated that the remaining bills are not "final bills" and to date have "not yet been reconciled."

From my perspective, that the bills may not be "final" or reconciled is not determinative of rights of access to them. In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to all agency records, such as those maintained by or for a town, and I note that §86(4) of that statute defines the term "record" expansively to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, once the bills have come into possession of the Town, whether they are in the physical custody of the Supervisor, the Town Clerk, or any other Town officer or employee, I believe that they constitute "records" that fall within the scope of the Freedom of Information Law.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Several bills have been disclosed, and I do not believe that any of the grounds for denial could be asserted with respect to those have not yet been made available.

Lastly, in some instances, the fact that a record may not be "final" is relevant in relation to the ability of an agency to deny access. That is particularly so in the context of §87(2)(g), which pertains to "inter-agency" and "intra-agency" materials. Those kinds of records may in some instances be withheld if they are preliminary or not final. However, the bills at issue would not, in my view, fall within that exception. 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."

In consideration of the foregoing, "inter-agency" materials would involve communications between or among entities of state or local government; "intra-agency" materials involve communications between or among officers or employees of a single unit of government. The bills were sent to the Town by Nextel, a private company. That being so, the bills would be neither inter-agency nor intra-agency materials, and the exception to rights of access regarding those materials would not be applicable.

In order to avoid misleading a recipient of records that do not reflect finality, it has been suggested that an agency may mark the records "non-final" or "preliminary", for example. By so doing, the recipient is made aware that the contents of the records are subject to change.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Katherine E. Bonelli
Hon. Barbara E. Becker

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12922

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August 30, 2001

Mr. Kevin Hicks
[redacted]

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. Hicks:

I have received your letter and the correspondence attached to it. You referred to a denial of access to portions of a "Legal-Mail Logbook" maintained at the Cayuga Correctional Facility and requested an "investigation" of the denial, "as it adversely affects [your] First(1st) Amendment Rights for legal redress in a court of law."

In this regard, first, it is noted that the outset that the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee has neither the authority nor the resources to conduct an investigation.

Second, your interest or potential use of records is, in my view, irrelevant to rights of access. As stated by the Court of Appeals in a case involving a request made under the Freedom of Information Law by a person involved in litigation against an agency: "Access to records of a government agency under the Freedom of Information Law (FOIL) (Public Officers Law, Article 6) is not affected by the fact that there is pending or potential litigation between the person making the request and the agency" [Farbman v. NYC Health and Hospitals Corporation, 62 NY 2d 75, 78 (1984)]. Similarly, in an earlier decision, the Court of Appeals determined that "the standing of one who seeks access to records under the Freedom of Information Law is as a member of the public, and is neither enhanced...nor restricted...because he is also a litigant or potential litigant" [Matter of John P. v. Whalen, 54 NY 2d 89, 99 (1980)]. Most recently, the Court of Appeals held that the Criminal Procedure Law does not limit a defendant's ability to attempt to obtain records under the Freedom of Information Law [Gould v. New York City Police Department, 89 NY 2d 267 (1996)].

In short, I believe that the Freedom of Information Law imposes a duty to disclose records, as well as the capacity to withhold them, irrespective of the status or interest of the person requesting

them. To be distinguished are other provisions of law that may require disclosure based upon one's status, e.g., as a litigant or defendant, and the nature of the records or their materiality to a proceeding.

Lastly, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

From my perspective, you likely have the right to obtain those portions of the log book pertaining to you. However, I believe that the remainder pertaining to persons other than yourself may be withheld under §87(2)(b) on the ground that disclosure would constitute "an unwarranted invasion of personal privacy."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Anthony J. Annucci

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12923

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August 30, 2001

Hon. Charlotte Richmond
Town Clerk
Town of Henderson
P.O. Box 259
Henderson, NY 13650

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Richmond:

I have received your letters of July 26 and August 11 in which you raised questions relating to access to records.

The first issue involves the application of the Freedom of Information Law to a tape recording prepared by a member of the Town Board. You wrote that the it was alleged that you made an error in your minutes of a meeting, and that your error could be proven by hearing the recording. Nevertheless, your request for the tape was denied, and the member, Mr. Michael J. Contino, wrote that it is his personal property. He added that:

> "I have found it necessary to make those tapes of the Henderson Town Board Meetings in order to protect myself. It is unfortunate that a Town Official would have to do this but I find that the tapes force you to keep the Town minutes more accurately and others to be more truthful in their discussions concerning Town business. These tapes are and have been a great benefit to me and friends of mine currently in office."

In this regard, the Freedom of Information Law applies to agency records, and §86(4) of that statute defines the term "record" expansively to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations,

> memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based upon the language quoted above, documents, or as in this instance, tape recordings, 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.

It has been found that records maintained by an attorney retained by an industrial development agency were subject to the Freedom of Information Law, even though an agency did not possess the records and the attorney's fees were paid by applicants before the agency. The Court determined that the fees were generated in his capacity as counsel to the agency, that the agency was his client, that "he comes under the authority of the Industrial Development Agency" and that, therefore, records of payment in his possession were subject to rights of access conferred by the Freedom of Information Law (see C.B. Smith v. County of Rensselaer, Supreme Court, Rensselaer County, May 13, 1993).

Additionally, in a decision rendered by the Court of Appeals, the state's highest court, it was found that materials received by a corporation providing services for a branch of the State University that were kept on behalf of the University constituted "records" falling with the coverage of the Freedom of Information Law. I point out that the Court rejected "SUNY's contention that disclosure turns on whether the requested information is in the physical possession of the agency", for such a view "ignores the plain language of the FOIL definition of 'records' as information kept or held 'by, with or for an agency'" [see Encore College Bookstores, Inc. v. Auxiliary Services Corporation of the State University of New York at Farmingdale, 87 NY 2d 410. 417 (1995)].

Perhaps most significantly, in the first decision in which the Court of Appeals dealt squarely with the scope of the term "record", the matter 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" 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" [Westchester-Rockland Newspapers v. Kimball, 50 NY2d 575, 581 (1980)].

The point made in the final sentence of the passage quoted above appears to be especially relevant, for there appears to be "considerable crossover" in the activities of Mr. Contino as a private citizen and as a member of the Town Board.

On the basis of Mr. Contino's statement, he records Town Board meetings and keeps recordings of those meetings "to protect" himself, and to ensure that the minutes that you prepare are accurate. Further, he specified that the tapes have been of "great benefit" to him and to "friends...currently in office." From my perspective, his statement indicates that the tapes are prepared *because* he is a Board member, and that they are used by him and other government officials *in their capacities as government officials*. In consideration of Mr. Contino's statement, even though he uses his own tape recorder and purchases the tapes, I believe that those portions of the tapes that consist of recordings of Town Board meetings constitute "records" that fall within the scope of the Freedom of Information Law. In short, the tapes, according to Mr. Contino, were prepared in conjunction with the performance of his duties as a Town Board member.

That being so, I believe that you or any member of the public should have the ability to listen to a tape at no charge. If a copy is requested, the fee, based on §87(1)(b)(iii) of the Freedom of Information Law, would involve the actual cost of reproduction (i.e., the cost of a new tape).

Your second area of inquiry involves the right of a Board member to see "everything" kept in the Town's files. By way of background, from my perspective, the Freedom of Information Law is intended to enable the public to request and obtain accessible records. Further, it has been held that accessible records should be made equally available to any person, without regard to status or interest [see e.g., Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976) and M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)]. Nevertheless, if it is clear that records are requested in the performance of one's official duties, the request might not be viewed as having been made under the Freedom of Information Law. In such a situation, if a request is reasonable, and in the absence of a law, a rule or policy to the contrary, I believe that a member of a 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; also Town Law, §63). 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 the absence of any such rule, a member seeking records could presumably be treated in the same manner as the public generally.

Also pertinent is your function as "records management officer", §57.19 of the Arts and Cultural Affairs Law 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" (emphasis added).

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..." (emphasis added).

Related is the implementation of the Freedom of Information Law. Under §89 (1) of the Freedom of Information Law, the Committee on Open Government is required 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 form continuing from doing so."

As such, the Town 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 Town 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. As you are aware, because town clerks are both the legal custodians of town records under §30 of the Town Law and the records management officer, they are in most circumstances also designated as records access officer.

Lastly, you asked whether it is "against the law...to have the Town Supervisor's file in [your] Clerk's room." Although the question does not relate to the Freedom of Information Law, I know of no law that so specifies.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Michael J. Contino

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12924

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August 30, 2001

Michael Kuzma, Esq.
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Kuzma:

I have received your letter and the correspondence attached to it. You have sought guidance concerning a request made under the Freedom of Information Law to Erie County.

In a request in which you indicated that you are an attorney representing Ms. Alethe Rusiniak sent to Patricia M. Brammer of the County Division of Equal Employment Opportunity, you asked that she engage in:

> "...a complete and thorough search of all filing systems and locations for all records maintained by your agency pertaining to Alethe Rusiniak, including but not limited to, files and document captioned in, or whose captions include Alethe Rusiniak in the title."

You added that:

> "This request specifically includes, but is not limited to, any and all records generated by your agency in response to the complaint filed this year against Alethe Rusiniak by Mr. Barry Berns."

In a response by Assistant County Attorney Kristin Klein Wheaton, it was stated that:

> "Ms. Brammer has concluded her investigation of the complaint that was brought against Ms. Rusiniak. On June 8, 2001, your client was notified of her findings. Ms. Brammer concluded that there was no violation of the harassment policy. Notwithstanding this finding, Ms. Brammer warned your client not to engage in any acts that could be

> construed as retaliatory. I again ask you to warn your client about retaliation which includes using others to retaliate on her behalf. If your client engages in retaliation or engages others to retaliate on her behalf, she will be subject to disciplinary action.
>
> "With respect to your FOIL request for Ms. Brammer's file relative to this matter, said file is exempt from FOIL. Accordingly, a copy of the file will not be provided."

In this regard, I offer the following comments.

First, that your client may have been the subject of an investigation or complaint does not, in my opinion, in and of itself, constitute a basis for a denial of access to records or affect her right to seek records under the Freedom of Information Law. It has been held that records accessible under that statute should be made equally available to any person, irrespective of one's status or interest [see Burke v. Yudelson, 368 NYS2d 779, aff'd 51 AD2d 673, 378 NYS2d 165 (1976) and M. Farbman & Sons v. New York City Health and Hosps. Corp., 62 NY2d 75 (1984)].

Second, since you requested "a complete and thorough search of all filing systems and locations for all records" pertaining to your client, a potential issue involves the extent to which the request "reasonably describes" the records sought as required by §89(3) of the Freedom of Information Law. I point out that it has been held by the Court of Appeals that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

The Court in Konigsberg found that the agency could not reject the request due to its breadth and also stated that:

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency'])" (id. at 250).

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing

or record-keeping system. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number.

While I am unfamiliar with the recordkeeping systems of the 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.

Third, with respect to those records that have been "reasonably described", as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Since I am unaware of the contents of such records, I cannot offer specific guidance. However, it is likely that two of the grounds for denial are relevant to an analysis of rights of access or, conversely, the ability of the County to deny access to records.

Sections 87(2)(b) and 89(2)(b) authorize an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." While your client cannot invade her own privacy, it is likely that elements of the records sought include information identifiable to others, such as the complainant or persons who might have been questioned or interviewed. The provisions cited above may serve as a basis for a denial of access.

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. In the context of the records sought, it appears that all of them fall within §87(2)(g). As suggested above,

however, the contents of those records coupled with the assertion of other grounds for denial [i.e., §87(2)(b)], are pertinent in ascertaining an agency's ability to deny access.

Lastly, in your request, you asked that the agency:

> "...provide a complete itemized inventory and a detailed factual justification of total or partial denial of documents. Specify the number of pages in each document and the total number of pages pertaining to this request."

In my view, the Freedom of Information Law does not require that an agency provide that degree of detail in response to a request or an administrative appeal. Further, I am unaware of any provision of the Freedom of Information Law or judicial decision that would require that a denial at the agency level identify every record withheld or include a description of the reason for withholding each document. Such a requirement has been imposed under the federal Freedom of Information Act, which may involve the preparation of a so-called "Vaughn index" [see Vaughn v. Rosen, 484 F.2D 820 (1973)]. Such an index provides an analysis of documents withheld by an agency as a means of justifying a denial and insuring that the burden of proof remains on the agency. Again, I am unaware of any decision involving the New York Freedom of Information Law that requires the preparation of a similar index. Further, one decision suggests the preparation of that kind of analysis might in some instances subvert the purpose for which exemptions are claimed. In that decision, an inmate requested records referring to him as a member of organized crime or an escape risk. In affirming a denial by a lower court, the Appellate Division found that:

> "All of these documents were inter-agency or intra-agency materials exempted under Public Officers Law section 87(2)(g) and some were materials the disclosure of which could endanger the lives or safety of certain individuals, and thus were exempted under Public Officers Law section 87(2)(f). The failure of the respondents and the Supreme Court, Westchester County, to disclose the underlying facts contained in these documents so as to establish that they did not fall 'squarely within the ambit of [the] statutory exemptions' (Matter of Farbman & Sons v. New York City Health and Hosps. Corp., 62 NY 2d 75, 83; Matter of Fink v. Lefkowitz, 47 NY 2d 567, 571), did not constitute error. To make such disclosure would effectively subvert the purpose of these statutory exemptions which is to preserve the confidentiality of this information" [Nalo v. Sullivan, 125 AD 2d 311, 312 (1987)].

Notwithstanding the foregoing, Ms. Wheaton failed to inform you of your right to appeal the denial of your request as required by the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401.7). Further, while I am not suggested that litigation be initiated, I note that the Court of Appeals has held that an agency's failure to inform a person denied access of the right to appeal enables that person to initiate a proceeding to review the denial under Article 78 of the Civil Practice Law and Rules [see Barrett v. Morgenthau, 144 AD2d 1040, 74 NY2d 907 (1990)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Kristin Klein Wheaton

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12925

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August 30, 2001

Hon. Sharon V. Carlesimo
Village Clerk/Treasurer
Village of Frankfort
P.O. Box 188
Frankfort, NY 13340

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Carlesimo:

I appreciate having received a copy of an appeal made under the Freedom of Information Law by Ms. Carol Jean Rocco and the determination of the appeal by Mayor Fred Pumilio.

According to Ms. Rocco's appeal, the records sought include:

> "1. The Village of Frankfort's monthly personnel records reports for all employees for the month's of January and December from 1991 through 2001.
>
> "2. The breakdown of vacation time, personal time, comp time, current and old sick time paid to all employees who have separated from service from January 1991 through March 2001 along with the employee's dates of separation."

In response to the appeal, the Mayor wrote that the:

> "request for monthly personnel records reports cannot be fulfilled because the records you are seeking do not exist. To the extent any of the other information you seek is available in other records, it is subject to the exemption of Public Officers Law, §87(2) and is, therefore, protected from release."

In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law pertains to existing records, and §89(3) states in relevant part that an agency is not required to create a record in response to a request. Therefore, if, for example, there is no "breakdown" containing the items requested, the Village would not be required to prepare a new record containing the information sought.

Second, however, insofar as the Village maintains records containing the substance of the information requested, I believe that information of that nature would be accessible.

Based on the language of the Freedom of Information Law and a decision rendered by the state's highest court, the Court of Appeals, records or portions of records indicating payments to a public employee or a public employee's dates of service and attendance, including those portions reflective of the use or accrual of vacation or sick leave, for example, must be disclosed.

As you are likely aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Section 87(2)(b) of the Freedom of Information Law authorizes an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy", and the courts have provided substantial direction regarding the privacy of public employees. According to those decisions, it is clear that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. With regard to records pertaining to public employees, the courts have found that, as a general rule, records that are relevant to the performance of a public employee' s official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

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 leave used or accrued 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).

In sum, while I agree that the Village is not required to prepare new records, existing records containing information analogous to the kinds of items that have been requested would, in my view, be accessible.

I hope that I have been of assistance. If you would like to discuss the matter, please fee free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Fred Pumilio
Carol Jean Rocco

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12926

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August 31, 2001

Mr. Jerome Howard
99-A-4219
Franklin Correctional Facility
P.O. Box 10
Malone, NY 12953

Dear Mr. Howard:

I have received you letter of August 24 in which you appealed a denial of your request to review "guidance and counsel records" pertaining to you at your facility. You wrote that you were informed that you must "get it copied" if you want to gain access to the records.

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 determine appeals or otherwise compel an agency to grant or deny access to records. The provision concerning the right to appeal, §89(4)(a) of the Freedom of Information Law, states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

For your information, the person designated by the Department of Correctional Services to determine appeals is Anthony J. Annucci, Counsel to the Department.

Second, while I am unfamiliar with the specific contents of the records in question, it is possible that portions of the records may be withheld. I note that if a record is available under the law in its entirety, a person seeking to inspect the record may do so at no charge. However, if some aspect of the record may be withheld, that person would not have the right to inspect the record. Rather, to gain access to those portions that must be disclosed, the agency would first copy the record and make appropriate deletions prior to releasing the remainder. In that kind of situation, an agency could charge a fee for photocopying.

It appears that §87(2)(g) would be pertinent in ascertaining the extent to which the records at issue must be disclosed. That provision permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

In short, in consideration of the nature of the records, it is likely that factual portions pertaining to you would be accessible, but that opinions or recommendations could be withheld.

I hope that the foregoing serves to enhance your understanding of the Freedom of Information Law and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Carolyn Cushman

STATE OF NEW YORK
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August 31, 2001

Mr. Anthony Carty
92-A-9491
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 facts presented in your correspondence.

Dear Mr. Carty:

I have received your letter in which you sought assistance in obtaining "the prosecutor's work sheets and material prepared during trial."

In this regard, I offer the following comments.

First, the courts have provided direction concerning the Freedom of Information Law as opposed to the use of discovery under the Civil Practice Law and Rules (CPLR) in civil proceedings, and discovery in criminal proceedings under the CPL. The principle is that the Freedom of Information Law is a vehicle that confers rights of access upon the public generally, while the disclosure provisions of the CPLR or the CPL, for example, are separate vehicles that may require or authorize disclosure of records due to one's status as a litigant or defendant.

As stated by the Court of Appeals in a case involving a request made under the Freedom of Information Law by a person involved in litigation against an agency: "Access to records of a government agency under the Freedom of Information Law (FOIL) (Public Officers Law, Article 6) is not affected by the fact that there is pending or potential litigation between the person making the request and the agency" [Farbman v. NYC Health and Hospitals Corporation, 62 NY 2d 75, 78 (1984)]. Similarly, in an earlier decision, the Court of Appeals determined that "the standing of one who seeks access to records under the Freedom of Information Law is as a member of the public, and is neither enhanced...nor restricted...because he is also a litigant or potential litigant" [Matter of John P. v. Whalen, 54 NY 2d 89, 99 (1980)]. The Court in Farbman, supra, discussed the distinction between the use of the Freedom of Information Law as opposed to the use of discovery in Article 31 of the CPLR. Specifically, it was found that:

> "FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on governmental decision-making, its ambit is not confined to records actually used in the decision-making process (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request.
>
> "CPLR article 31 proceeds under a different premise, and serves quite different concerns. While speaking also of 'full disclosure' article 31 is plainly more restrictive than FOIL. Access to records under CPLR depends on status and need. With goals of promoting both the ascertainment of truth at trial and the prompt disposition of actions (Allen v. Crowell-Collier Pub. Co., 21 NY 2d 403, 407), discovery is at the outset limited to that which is 'material and necessary in the prosecution or defense of an action'" [see Farbman, supra, at 80].

Most recently, the Court of Appeals held that the CPL does not limit a defendant's ability to attempt to obtain records under the Freedom of Information Law (Gould v. New York City Police Department, 653 NYS 2d 54, 89 NY 2d 267 (1996).

In sum, I believe that the Freedom of Information Law imposes a duty to disclose records, as well as the capacity to withhold them, irrespective of the status or interest of the person requesting them. To be distinguished are other provisions of law that may require disclosure based upon one's status, e.g., as a defendant, and the nature of the records or their materiality to a proceeding.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Relevant under the circumstances in my view is the first ground for denial, §87(2)(a), which pertains to the ability to withhold records that "are specifically exempted from disclosure by state or federal statute." Because the records were prepared following the initiation of claims against the City, it appears that the records would fall within the scope of subdivisions (c) and/or (d) of §3101of 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 NYS 2d 173 (1989)]. In another decision, the ability to withhold the work product of an attorney was discussed, and it was found that:

> "The attorney-client privilege requires some showing that the subject information was disclosed in a confidential communication to an attorney for the purpose of obtaining legal advice (*Matter of Priest v. Hennessy*, 51 N.Y.2d 62, 68-69, 431 N.Y.S.2d 511, 409 N.E.2d 983). The work-product privilege requires an attorney affidavit showing that the information was generated by an attorney for the purpose of litigation (*see, Warren v. New York City Tr. Auth.*, 34 A.D.2d 749, 310 N.Y.S.2d 277). The burden of satisfying each element of the privilege falls on the party asserting it (*Priest v. Hennessy, supra*, 51 N.Y.2d at 69, 431 N.Y.S. 2d 511, 409 N.E.2d 983), and conclusory assertions will not suffice (*Witt v. Triangle Steel Prods. Corp.*, 103 A.D.2d 742, 477 N.Y.S.2d 210)" [Coastal Oil New York, Inc. v. Peck, [184 AD 2d 241 (1992)].

The thrust of case law concerning material prepared for litigation is consistent with the preceding analysis, in that §3101(d) may properly be asserted as a means of shielding such material from an adversary.

In sum, assuming that the records in question consist of the work product of an attorney or were prepared in anticipation of litigation, in my view, the records may be withheld from disclosure.

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12928

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September 4, 2001

Ms. Mary Remsen
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Remsen:

Your letter 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 and opinions concerning rights of access to government records, primarily under the state's Freedom of Information Law.

You indicated that your son was "assaulted by a student in Wyandanch High School" and that the school's administrators asked several other students to write statements concerning the incident. When you asked for the report relating to the incident, the superintendent, according to your letter, denied access.

In this regard, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. It is emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within one or more of the grounds for denial that follow. The phrase quoted in the preceding sentence is based on a recognition that a single record might include both available and deniable information. It also imposes an obligation on an agency to review records sought in their entirety to determine which portions, if any, may justifiably be withheld and to disclose the remainder.

Relevant to the facts that you presented 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 other than your son, 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 you, as a parent, have rights of access to records identifiable to your son. However, it also states that that any "education record," a term that is broadly defined, that is personally identifiable to a particular student other than your child 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.

Therefore, while I believe that you would have rights of access to those portions of a report or records identifiable to your child, other portions identifiable to other students could, in my view, be withheld pursuant to FERPA.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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September 5, 2001

Mr. James Nichol
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Nichol:

I have received your letter and appreciate your kind words. You have questioned a policy adopted by a school district indicating that teachers requesting personnel files must make an appointment to do so at least twenty-four hours in advance, that appointment times are 8 to 9:15am on Tuesdays and 2:30 to 3:45 pm on Thursdays, and that there will be a "limit of four (4) available appointments on each day during the times" specified above.

When records are sought under the Freedom of Information Law, 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 in which an issue involved the validity of a limitation regarding the time permitted to inspect records established by a village pursuant to regulation. The Court held that the village was required to enable the public to inspect records during its regular business hours, stating 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, a school district, in my view, cannot limit the ability to inspect records requested under the Freedom of Information Law 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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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September 5, 2001

Peter Henner, Esq.
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Henner:

I have received your letter in which you sought an advisory opinion concerning the Freedom of Information Law on behalf of a client seeking to obtain records from the Sullivan West Central School District.

Specifically, you asked:

> "1) Whether the failure of an individual to exhaust his administrative appeals and/or to timely commence an Article 78 proceeding challenging the denial of a request for access to records precludes the individual from filing a new request for the same records?
>
> 2) Whether an agency that has denied a requestor access to records without a proper legal basis, can utilize its previous denial with respect to a new request, by a different requestor, to refuse access to the records?"

By way of background, your client requested records from the District, from which some portions were redacted. In an opinion addressed to him in October of last year, it was advised that it was doubtful that those portions of the records were justifiably withheld. Because it was unclear whether he had appealed the denial in a timely manner, he submitted a new request for the redacted material, the request was denied, and he initiated a proceeding to review the denial under Article 78 of the CPLR. The court held that the statute of limitations had begun to run when your client's administrative remedies were exhausted with respect to his initial request and dismissed the proceeding; it did not deal with the merits of the District's denial of access (Norden v. Sullivan West Central School District, Supreme Court, Albany County, July 20, 2001). As such, in relation to your

first question, the issue is whether your client may be "permanently barred" from seeking the records he had originally requested.

From my perspective, the petitioner, or any person in the situation that you described, may seek the same records again and simply begin the procedural steps described in §89(3) and (4) of the Freedom of Information Law.

First, and I am not suggesting that this factor is critical to the matter, the District never determined rights of access to the materials in question on the merits following an appeal. Since no final agency determination was rendered, I do not believe that the initial denial of access can reasonably be accorded the weight of a determination rendered by the District's governing body or the person or body that it has designated to determine appeals.

Second, there is precedent indicating that a request may be renewed when a proceeding initiated under the Freedom of Information Law has been dismissed without reaching the merits of an agency's denial of access to records. In Matter of Mitchell (Supreme Court, Nassau County, NYLJ, March 1979), the petitioner was denied access to records and brought an Article 78 proceeding more than four months after the agency's final determination to deny access. Although the proceeding was dismissed and petitioner apparently suggested that she could never again seek the records, the court found that:

> "petitioner is incorrect in her assertion that the Statute of Limitations is, in effect, forever tolled because the respondents have a continuing duty to provide access to the records in question. Contrary to her assertion, while the Statute of Limitations may act as a bar to a particular proceeding under the Freedom of Information Law, a member of the public is not forever barred as a result from again seeking those same records under the applicable procedures."

Based upon the holding in Mitchell, if a request is denied and four months pass without the initiation of an Article 78 proceeding, an applicant may make a new request for the records. In the case of your client, I am unaware of any provision that would preclude him from seeking the records at issue anew. Similarly, there is nothing in the Freedom of Information Law or any other statute with which I am familiar that would forbid a person other than your client from seeking the records. Further, because the court in Norden dismissed the petition on procedural grounds and did not reach the merits in relation to rights of access or the propriety of the District's denial of access, I do not believe that the dismissal serves to estop either your client or any other person from requesting the records, potentially having a request denied, appealing in accordance with §89(4)(a) of the Freedom of Information Law, and if the initial denial is sustained following the administrative appeal, seeking judicial review of the denial by commencing an Article 78 proceeding. Any other result would foreclose not only your client, but also every member of the public, from asserting rights of access and requiring the District to meet its burden of defending secrecy, demonstrating that one or more of the grounds for denial appearing in §87(2) may properly be asserted.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
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September 5, 2001

Patricia and Thomas Pawlaczyk
[redacted]

The staff of the Committee on Open 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 in which you asked "how long the Village [of Bergen] can delay their response" 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..."

Based on the foregoing, an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date indicating when it can be anticipated that a request will be granted or denied. The acknowledgement by the records access officer did not make reference to such a date.

I note that there is no precise time period within which an agency must grant or deny access to records. The time needed to do so may be dependent upon the volume of a request, the possibility that other requests have been made, the necessity to conduct legal research, the search and retrieval techniques used to locate the records and the like. In short, when an agency acknowledges the receipt of a request because more than five business days may be needed to grant or deny a request,

so long as it provides an approximate date indicating when the request will be granted or denied, and that date is reasonable in view of the attendant circumstances, I believe that the agency would be acting in compliance with law. Notwithstanding the foregoing, in my view, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, if records are clearly available to the public under the Freedom of Information Law, and if they are readily retrievable, there may be no basis for a lengthy delay in disclosure.

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 12932

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 6, 2001

Aaron Mark Zimmerman, Esq.
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Zimmerman:

I have received your letter of August 7 concerning your request to view records of the Workers' Compensation Board. Your question is as follows: "if the Board has several regional offices, may it nonetheless limit document reviews to its Albany office?"

In this regard, §87(2) of the Freedom of Information Law requires that accessible records be made available for inspection and copying. Relevant to your inquiry is a provision in the regulations promulgated by the Committee on Open Government that states in part that "[e]ach agency shall designate the locations where records shall be available for public inspection and copying" (21 NYCRR §1401.3). In my view, neither the Law nor the regulations require that records be transferred from their designated locations to accommodate an applicant at a regional official or a site convenient to the applicant.

If the Workers' Compensation Board has designated its Albany or New York City offices, for example, as the locations where records sought under the Freedom of Information Law may be inspected and copied, I do not believe that the Board would be required to transfer records to a different site at the request of an applicant.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm
cc: Camille Jobin-Davis

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12933

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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 5, 2001

Mr. Louis Barbieri
92-A-8612
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. Barbieri:

I have received your letter in which you sought an advisory opinion relating to your request for a variety of records from the New York State Police. In this regard, I offer the following comments.

First, I point out the Freedom of Information Law pertains to existing records. Section 89(3) of that statute provides in part that an agency is not required to prepare a record that is not maintained by the agency in response to a request. In short, if the records in question do not exist, the Freedom of Information Law would not apply.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Insofar as the records exist, I believe that they would be available, for it appears that none of the grounds for denial would apply.

Lastly, you wrote that you were concerned that the New York State Police would not respond to your Freedom of Information Law request. I note that that statute provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written

> acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12934

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September 6, 2001

Mr. David N. Green
Attorney
Crime Victims Board
845 Central Avenue, Room 107
Albany, NY 12206-1588

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Green:

I have received your letter of August 13 in which you sought guidance regarding the ability of the Crime Victims Board to gain access to records maintained by units of local government. In this regard, I offer the following comments.

First, as you are aware, §623 of the Executive Law describes the powers and duties of the Board, and subdivision (4) specifies that the Board is authorized:

> "To request from the division of state police, from county or municipal police departments and agencies and from any other state or municipal department or agency, or public authority, and the same are hereby authorized to provide, such assistance and date as well enable the board to carry out its functions and duties."

Based upon the foregoing, it is clear that the State Legislature intended that the Board seek and that other agencies comply with its requests to provide assistance "and data", i.e., records, that enable the Board to carry out its duties.

Second, from my perspective, when the Board seeks records from another entity of government, it would not be doing so under the Freedom of Information Law. That statute, as you are aware, deals with requests by and rights of access conferred upon members of the public. When records are sought under the Freedom of Information Law, it has been held that an applicant does so as a member of the public and that the status or interest of the applicant is irrelevant to rights of access [see M. Farbman & Sons v. New York City Health and Hosps. Corp., 62 NY2d 75 (1984) and Burke v. Yudelson, 368 NYS2d 779, aff'd 51 AD2d 673, 378 NYS2d 165 (1976)]. In consideration

of §623(4) of the Executive Law, I do not believe that the Board would be seeking records from entities of state or local government as a member of the public under the Freedom of Information Law. Consequently, the standards for determining the extent to which records should or may be disclosed by those entities in my view should not be based upon the grounds for denial appearing in §87(2) of the Freedom of Information Law.

Third, as a general matter, the Freedom of Information Law is permissive. Stated differently, even though an agency, such as a unit of local government *may* withhold records in accordance with the grounds for denial listed in §87(2), it is not required to do so [see Capital Newspapers v. Burns, 109 AD2d 92, aff'd 67 NY2d 562 (1986)]. Therefore, even though records requested under the Freedom of Information Law might justifiably be withheld from a member of the public, the same considerations need not apply when a request is made by the Board in carrying out its duties under the Executive Law.

The only circumstance in my view in which another agency could not disclose would involve those instances in which a statute other than the Freedom of Information Law prohibits disclosure. Pertinent is §87(2(a), which involves records that are "specifically exempted from disclosure by state or federal statute", and the correspondence attached to your letter alludes to situations in which records cannot be disclosed. Specifically, §784 of the Family Court Act forbids the disclosure of police records concerning the arrest and disposition of juveniles; §720.35 of the Criminal Procedure Law prohibits the disclosure of records relating to a case involving a youth who has been adjudicated a youthful offender; §50-b of the Civil Rights Law prohibits disclosure of portions of records identifiable to a victim of sex offense; and §160.50 of the Criminal Procedure Law deals with the sealing of records when charges are dismissed in favor of an accused. In each of those situations, a statute would prohibit a unit of government from disclosing particular records.

Nevertheless, to reiterate, absent a statutory prohibition regarding disclosure, a unit of local government is permitted to disclose records to the Board, even though those records may be withheld from a member of the public under the Freedom of Information Law.

I hope that I have been of assistance. If you would like to discuss the matter, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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September 6, 2001

Mr. James D. Merriman IV
Senior Vice President & General Counsel
Charter Schools Institute
74 North Pearl Street - 4th Floor
Albany, NY 12207

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Merriman:

I have received your letter in which you sought an advisory opinion concerning the application of the Freedom of Information Law to Charter Schools.

You wrote that charter schools are required to comply with the Freedom of Information Law, "not by virtue of POL § 86(3) (defining entities subject to FOIL)", but rather pursuant to §2854(1)(e) of the Education Law, which specifies that charter schools are subject to the Freedom of Information Law. That being so, you asked whether "charter schools enjoy the exceptions to public access, including, in particular, the inter and intra-agency exception, POL § 87(2)(g)."

From my perspective, charter schools have the same obligation to disclose their records as governmental entities clearly subject to the Freedom of Information Law, as well as the same authority to deny access to those records. In this regard, I offer the following comments.

First, as you suggested in your letter, 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, as a general matter, the Freedom of Information Law applies to governmental entities performing a governmental function.

Second, charter schools are, in my view, unique entities. As you are aware, §2851(1) of the Education Law states that an application to establish a charter school may be submitted "by teachers, parents, school administrators, community residents or any combination thereof" or "in conjunction with a college, university, museum, educational institution, not-for-profit corporation...or corporate entity authorized to do business in New York state." Despite the manner or means by which they are created, charter schools are characterized in several provisions as "public schools."

Paragraph (n) of §2851(2) requires that charter schools "provide at least as much instruction time during a school year as required *of other public schools*"; §2853(1)(c) states that "A charter school shall be deemed an independent and autonomous *public school*". Moreover, charter schools have characteristics that are in most instances unique to government, and paragraph (d) of the provision cited in the preceding sentence states that "[t]he powers granted to a charter school under this article constitute the performance of essential public purposes and governmental purposes of this state." Other provisions indicate that charter schools must meet the same requirements as public schools. For instance, in §2854, in addition to a provision requiring charter schools to comply with the Freedom of Information and Open Meetings Laws, they must meet the same health and safety, civil rights and student assessment requirements as "other public schools"; students are required to take regents exams "to the same extent" as "other public school students"; charter schools may grant regents diplomas; and charter schools are deemed to be public employers for purposes of the Taylor Law, the series of statutes in the Civil Service Law dealing with the relationship between public employers and public employee unions.

In short, even though charter schools may not clearly be governmental entities, it is clear that they are "public schools" and must meet many of the critical standards applicable to public schools that are clearly governmental, and that they carry out essential public and governmental purposes.

I note, too, that there is precedent indicating that a not-for-profit corporation may be an "agency" required to comply with the Freedom of Information Law. In Westchester-Rockland Newspapers v. Kimball [50 NYS 2d 575 (1980)], a case involving access to records relating to a lottery conducted by a volunteer fire company, the Court of Appeals found that volunteer fire companies, despite their status as not-for-profit corporations, are "agencies" subject to the Freedom of Information Law. In so holding, the Court stated that:

> "We begin by rejecting respondent's contention that, in applying the Freedom of Information Law, a distinction is to be made between a volunteer organization on which a local government relies for performance of an essential public service, as is true of the fire department here, and on the other hand, an organic arm of government, when that is the channel through which such services are delivered. Key is the Legislature's own unmistakably broad declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to

> extend public accountability wherever and whenever feasible' (emphasis added; Public Officers Law, §84).
>
> "For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objections cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" (id. at 579].

In another decision rendered by the Court of Appeals, Buffalo News v. Buffalo Enterprise Development Corporation [84 NY 2d 488 (1994)], 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 public schools involved in the "performance of essential public purposes and governmental purposes of this state", charter schools are, arguably, based on the thrust of judicial decisions, "agencies" that would be subject to the Freedom of Information Law even in the absence of the enactment of §2854(1)(e) of the Education Law. If they are agencies, there is no doubt that they could rely upon the grounds for denial of access appearing in §87(2) of the Freedom of Information Law. In my view, however, while it may be questionable whether charter schools are agencies, I believe that they are instrumentalities of government that clearly perform a governmental function. They are public schools that bear the same responsibilities and which may confer the same

credentials as hundreds of entities that are clearly agencies subject to the Freedom of Information Law, other public schools and school districts.

To find that they cannot assert the same grounds for denial of access to records as governmental entities performing analogous functions would, in my view, be anomalous and irrational: if they could not assert the grounds for denial appearing in §87(2) of the Freedom of Information Law, the result would be that they must disclose to a greater extent than any agency subject to that statute. In that circumstance, they could not withhold details that frequently appear in records, such as the social security numbers, marital status, medical information or any number of other intimate personal items of information pertaining to their employees; they would have no basis for withholding records prior to the award of a contract or consummation of an agreement, even if premature disclosure would impair their ability to reach an optimal financial arrangement on behalf of taxpayers, parents or students; members of the governing body of a charter school and their employees could not exchange written expressions of opinion, advice or recommendation without an obligation to disclose when those records are sought under the Freedom of Information Law. In each of those instances, school districts would have the authority to deny access under that statute.

In sum, in consideration of the legislative scheme concerning the creation, functions and responsibilities of a charter school, as well as the potentially deleterious and unreasonable consequences of reaching a different conclusion, I believe that a charter school should be treated as an "agency" for purposes of the Freedom of Information Law having the same obligation to disclose and the same capacity to deny access to records as any entity subject to that statute.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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September 6, 2001

[redacted]

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. Rockway:

I have received your letter of August 9, as well as the materials attached to it. You have sought assistance concerning your requests for made under the Freedom of Information Law to the Patchogue-Medford School District. As I understand the matter, the records at issue involve communications involving the District and the United States Department of Education relating to a grant program.

While I am not fully familiar with the program, based on the correspondence that you enclosed, I offer the following general comments.

First, the Freedom of Information Law pertains to existing records, and §86(3) of that statute provides in part that an agency need not create a new record in response to a request. Therefore, insofar as records have not yet been prepared or received by an agency, the Freedom of Information Law would not apply.

Second, however, the Freedom of Information Law includes all agency records within its coverage, 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, as soon as documentation, irrespective of its physical form, has been prepared or received by the District, it would constitute a "record" that falls within the framework of the Freedom of Information Law.

In the context of your inquiry, if materials have been prepared by District staff and have not yet been sent to the Department of Education or have been sent to the Department, but the Department has not yet responded, those materials, despite the absence of finality relating to a process or transaction, would, in my view, clearly constitute District records. I point out that in a case in which an agency claimed, in essence, that it could choose which documents it considered to be "records" for purposes of the Freedom of Information Law, the state's highest court rejected that contention. As stated by the Court of Appeals:

> "...respondents' construction -- permitting an agency to engage in a unilateral prescreening of those documents which it deems to be outside the scope of FOIL -- would be inconsistent with the process set forth in the statute. In enacting FOIL, the Legislature devised a detailed system to insure that although FOIL's scope is broadly defined to include all governmental records, there is a means by which an agency may properly withhold from disclosure records found to be exempt (see, Public Officers Law §87[2]; §89[2],[3]. Thus, FOIL provides that a request for access may be denied by an agency in writing pursuant to Public Officers Law §89(3) to prevent an unwarranted invasion of privacy (see, Public Officers Law §89[2]) or for one of the other enumerated reasons for exemption (see, Public Officers Law §87[2]). A party seeking disclosure may challenge the agency's assertion of an exemption by appealing within the agency pursuant to Public Officers Law §89(4)(a). In the event that the denial of access is upheld on the internal appeal, the statute specifically authorizes a proceeding to obtain judicial review pursuant to CPLR article 78 (see, Public Officers Law §89[4][b]). Respondents' construction, if followed, would allow an agency to bypass this statutory process. An agency could simply remove documents which, in its opinion, were not within the scope of the FOIL, thereby obviating the need to articulate a specific exemption and avoiding review of its action. Thus, respondents' construction would render much of the statutory exemption and review procedure ineffective; to adopt this construction would be contrary to the accepted principle that a statute should be interpreted so as to give effect to all of its provisions...
>
> "...as a practical matter, the procedure permitting an unreviewable prescreening of documents -- which respondents urge us to engraft on the statute -- could be used by an uncooperative and obdurate public official or agency to block an entirely legitimate FOIL request. There would be no way to prevent a custodian of records from removing a public record from FOIL's reach by simply labeling it 'purely private'. Such a construction, which could thwart the entire objective of FOIL by creating an easy means of avoiding compliance, should be rejected" [Capital Newspapers v. Whalen, 69 NY 2d 246, 253-254 (1987)].

In short, insofar as records are maintained by or for the District, I believe that they are subject to rights conferred by the Freedom of Information Law.

Third, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

The only ground of apparent significance, §87(2)(g), pertains to "inter-agency" and "intra-agency" materials. In general, insofar as those kinds of materials consist of opinions, recommendations, advice and the like communicated between or among agency officers or employees, they may be withheld. 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, such as the United States Department of Education. Moreover, in 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, 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)].

If §87(2)(g) does not apply, it appears that any District records falling within the scope of your request should be disclosed, for no other ground for denial would be pertinent.

Lastly, in several instances, the District's records access officer responded to your requests by indicating that your request was "being reviewed and you will be contacted shortly." "Shortly", based on the language of the law and its judicial interpretation, is an inadequate response.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law 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, no approximate dates were given.

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:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

As you suggested, copies of this opinion will be forwarded to District officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Dr. Veronica McDermott, Superintendent
Barbara Kane, Freedom of Information Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12937

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September 7, 2001

Ms. Anne Ball
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Ball:

I have received your letter of August 12, as well as the materials attached to it. As in the case of previous correspondence, you have sought assistance relating to your requests for records of the Town of Glenville concerning a proposal to construct a power plant near your home.

Certainly I can appreciate your frustration, and I continue to believe that many of the records that you have requested should be disclosed either in great measure or in their entirety. Nevertheless, this office is not empowered to compel an agency to grant or deny access to records. It is our hope, however, that opinions prepared by this office are educational and persuasive, and that they serve to enhance compliance with and understanding of the Freedom of Information Law.

Having reviewed the opinion sent to you on April 25, I do not believe that I can substantially add to it. However, in consideration of the statements attributed to the Town Attorney in the news article that you sent, I believe that certain points should be made or reiterated.

First, it appears that numerous records characterized as "intra-agency" materials have been withheld in their entirety. In this regard, the Court of Appeals, the state's highest court, has stressed that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" [Gould v. New York City, 89 NY2d 267, 275 (1996)]. That holding is especially relevant in the context of a denial of access based on §87(2)(g) of the Freedom of Information Law. Even when records may properly be considered to be "intra-agency materials" falling within the scope of that provision, it is likely that significant portions must be disclosed. In short, insofar as they consist of "statistical or factual" information, they must be disclosed. From my perspective, in consideration of the nature and volume of the records sought, it is inconceivable that some portions do not consist of statistical or factual information.

Second, the Town Attorney referred to the Town's Technical Advisory Commission (TAC) and, according to the article, stated that the Commission "may not be subject to the law because it may not be an 'agency'." Whether the Commission is an agency is not determinative of the coverage of the Freedom of Information Law in this instance or the duty to disclose. That statute pertains to all agency records, and §86(4) defines the term "record" expansively to mean:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, since the Commission would have prepared or maintained records *for* the Town, any such records would be Town records subject to rights conferred by the Freedom of Information Law. Further, if the Commission is not an agency, the records that it prepared or transmitted would be neither inter-agency nor intra-agency materials, and the exception to rights of access pertaining to those materials, §87(2)(g), would not be applicable.

Lastly, in a letter to the Town Attorney, you asked that he explain in writing "why each particular record is being withheld." In my view, there is no obligation to do so. The Freedom of Information Law does not require that an agency provide that degree of detail in response to a request or an administrative appeal, and I am unaware of any provision in that statute 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.

As you requested, the package of materials that you sent is being returned to you.

In an effort to provide guidance, copies of this response will be sent to Town officials.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Town Board
Robert A. Moore

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12938

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September 10, 2001

Mr. Robert A. Corradino
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Corradino:

I have received your letter and the materials attached to it. You have sought guidance concerning a request made under the Freedom of Information Law to the City of Ithaca for a variety of records "in preparation for trial." The materials of your interest involve records relating to a traffic ticket that was issued to you and include a police officer's notes, documentation concerning the use of a radar device and other records that you consider to be pertinent to your situation. The Deputy City Prosecutor appears to have denied an earlier request, for the records were not "appropriate for pre-trial discovery."

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, the Freedom of Information Law pertains to existing records, and §89(3) of that statute provides in part that an agency need not create a record in response to a request. In the context of your request, if, for example, there is no "listing of traffic tickets" issued by a certain police officer containing specified items of information or a "tally of traffic tickets issued" by the City of Ithaca containing the items that you requested, the City would not be obliged to prepare records on your behalf containing the information sought.

Third, insofar as a 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 is emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In my view, the phrase quoted in the preceding sentence evidences a recognition on the part of the Legislature that a single record or report, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld. That being so, I believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

The Court of Appeals, the state's highest court, reiterated its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department [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. 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.).

With respect to notes or similar documentation prepared by the police officer, again, if none exist, the Freedom of Information Law would not apply. Insofar as they do exist, the Gould decision cited earlier concluded that police officers' memo books and similar materials are subject to rights of access. In short, the Police Department contended that memo books, also known as "police activity logs", were not "records" that fell within the coverage of the Freedom of Information Law, but rather were the personal property of police officers. In rejecting the Department's position, the Court found that:

> "Activity logs are the leather-bound books in which officers record all their work-related activities, including assignments received, tasks performed, and information relating to suspected violations of law. Significantly, the Police Department issues activity logs to all its officers, who are required to maintain these memo books in the course of their regular duties and to store the completed books in their lockers; the officers are obligated to surrender the activity logs to superiors for inspection upon request; and the contents of the logs are meticulously prescribed by departmental regulation (*accord, Matter of Washington Post Co. v. New York State Ins. Dept.*, 61 N.Y.2d 557, 564-565. 475 N.Y.S.2d 263, 463 N.E.2d 604 [minutes of meetings of private insurance companies, required by regulation to be turned over to Insurance Department for inspection, are 'records' under FOIL]). Thus, although the officers generally maintain physical possession of the activity logs, they are nevertheless 'kept [or] held' by the officers for the Police Department, which places these documents squarely within the statutory definition of 'records' (*see, Matter of Encore Coll. Bookstores v. Auxiliary Serv. Corp.*, 87 N.Y.2d 410, 417, 639, N.Y.S.2d 990, 663 N.E.2d 302). Subject to any applicable exemption and upon payment of the appropriate fee (*see*, Public Officers Law, § 87[1][b][iii]), the activity logs are agency records available under provisions of FOIL" (id., 278-279).

Relevant with respect to several of the records that you requested is a recent judicial decision, Capruso v. New York State Police (Supreme Court, New York County, NYLJ, July 11, 2001). In that case, the request involved the "operator's manual for any radar speed detection device used" by the New York State Police and the New York City Police Department. The Division of State Police contended that disclosure would interfere with the ability to effectively enforce the law concerning speeding. Nevertheless, following an *in camera* inspection of the records, a private review by the judge, it was found that the Division could not meet it burden of proving that the harmful effects of disclosure appearing in the exceptions to rights of access would in fact arise.

In its attempt to deny access to the records, the Division relied upon §87(2)(e)(i) and (iv) of the Freedom of Information Law as a means of justifying its denial. Those provisions permit an agency to withhold records that are "compiled for law enforcement purposes" to the extent that disclosure would "i. interfere with law enforcement investigations or judicial proceedings" or "iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

From my perspective, records prepared by manufacturer of a radar device could not be characterized as having been "compiled for law enforcement purposes. If my contention is accurate, §87 (2)(e) would not be applicable as a means of withholding those records.

Even if that provision is applicable, the court in Capruso determined that a denial of access would not be sustained. The leading decision dealing with law enforcement manuals and similar records detailing investigative techniques and procedures is Fink v. Lefkowitz [47 NY2d 567 (1979)], which was cited in Gould, supra, and] involved access to a manual prepared by a special prosecutor that investigated nursing homes in which the Court of Appeals held that:

> "The purpose of this exemption is obvious. Effective law enforcement demands that violators of the law not be apprised the nonroutine procedures by which an agency obtains its information (see Frankel v. Securities & Exch. Comm., 460 F2d 813, 817, cert den 409 US 889). However beneficial its thrust, the purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution.
>
> "To be distinguished from agency records compiled for law enforcement purposes which illustrate investigative techniques, are those which articulate the agency's understanding of the rules and regulations it is empowered to enforce. Records drafted by the body charged with enforcement of a statute which merely clarify procedural or substantive law must be disclosed. Such information in the hands of the public does not impede effective law enforcement. On the contrary, such knowledge actually encourages voluntary compliance with the law by detailing the standards with which a person is expected to comply, thus allowing him to conform his conduct to those requirements (see Stokes v. Brennan, 476 F2d 699, 702; Hawkes v. Internal Revenue Serv., 467 F2d 787, 794-795; Davis, Administrative Law [1970 Supp], section 3A, p 114).
>
> "Indicative, but not necessarily dispositive of whether investigative techniques are nonroutine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel (see Cox v. United States Dept. of Justice, 576 F2d 1302, 1307-1308; City of Concord v. Ambrose, 333 F Supp 958)."

In applying those criteria to specific portions of the manual, which was compiled for law enforcement purposes, the Court found that:

> "Chapter V of the Special Prosecutor's Manual provides a graphic illustration of the confidential techniques used in a successful nursing home prosecution. None of those procedures are 'routine' in the sense of fingerprinting or ballistic tests (see Senate Report No. 93-1200, 93 Cong 2d Sess [1974]). Rather, they constitute detailed, specialized methods of conducting an investigation into the activities of a specialized industry in which voluntary compliance with the law has been less then exemplary.
>
> "Disclosure of the techniques enumerated in those pages would enable an operator to tailor his activities in such a way as to significantly diminish the likelihood of a successful prosecution. The information detailed on pages 481 and 482 of the manual, on the other hand, is merely a recitation of the obvious: that auditors should pay particular attention to requests by nursing homes for Medicaid reimbursement rate increases based upon projected increase in cost. As this is simply a routine technique that would be used in any audit, there is no reason why these pages should not be disclosed" (id. at 573).

As the Court of Appeals has suggested, to the extent that the records in question include descriptions of investigative techniques which if disclosed would enable potential lawbreakers to evade detection or endanger the lives or safety of law enforcement personnel or others [see also, Freedom of Information Law, §87(2)(f)], a denial of access would be appropriate.

In consideration the direction given by the state's highest court in Fink, the court in Capruso rejected the contentions offered by the law enforcement agencies and determined that:

> "These arguments fail to establish a casual link as to how release of the information in the manufacturers' operational manual would enable a speeding driver to avoid detection. Similarly, absent from the affidavits is an explanation as to how the knowledge of the testing procedures used by the police to ensure the device is functioning properly would enable such driver to escape detection. Furthermore, the affidavits lack proof as to how the information in the manual would enable the use of a jamming device which could not otherwise be used. Thus, the claim that the release of these manuals would result in drivers engaging in dangerous behavior solely to avoid detection is speculative.
>
> "The State also objects to the release of the State Police Radar and Aerial Speed Enforcement Training Manuals as they contain 'operational and legal considerations.' However, as the Court of Appeals stated in Fink v. Lefkowitz, supra at 571, '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.' The Court explained, the question 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,' (citations omitted) Id.
>
> "Thus, after an in camera review, the City and State have failed to establish that the release of these manuals would allow motorists who are violating traffic laws to tailor their conduct to evade detection."

Lastly, you sought records concerning the training and experience of the police officer who issued the ticket. In this regard, §87(2)(a) of the Freedom of Information Law 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 states that those personnel records pertaining to police officers that are "used to evaluate performance toward continued employment or promotion" are confidential. Insofar as the records that you requested fall within the coverage of that statute, I believe that they must be withheld, absent consent to disclose by the officer or a court order.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Julie Conley Holcomb
Robert Al Sarachan

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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September 10, 2001

Ms. Lorraine J. Kelleher
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Kelleher:

I have received your letter in which you described a series of issues and difficulties in obtaining records from the Town of Newburgh. In consideration of your remarks, I offer the following general comments.

First, the Freedom of Information Law is expansive, for it includes all records of an agency, such as the Town, within its coverage. Section 86(4) of that statute defines the term "record" to mean:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

In the context of one of the situations to which you referred, where a record was "not on file with the ...Planning Board office", if the record sought was maintained by or for the Town, irrespective of its physical location, it would fall within the scope of the Freedom of Information Law. For instance, if records were kept or received by a member of the Planning Board in relation to the performance of his or her duties at that person's home, the records would, in my view, clearly be subject to the Freedom of Information Law; they would be kept "for" the Town. In that situation, the Town's records access officer has the duty of "coordinating" the Town's response to requests for records (21 NYCRR Part 1401). In that role, he or she would be required, in my opinion, to direct the person in possession of the records to disclose them in a manner consistent with law, or to transfer the records so that the records access officer could determine rights of access and disclose accordingly.

Second, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests and appeals. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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, from my perspective, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, if records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a lengthy delay in disclosure. As the Court of Appeals has asserted:

> "...the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objectives cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely

punctuates with explicitness what in any event is implicit" [Westchester News v. Kimball, 50 NY 2d 575, 579 (1980)].

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 hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12940

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September 12, 2001

Ms. Stephanie S. Abrutyn
Counsel
Tribune Company
Two Park Avenue
New York, NY 10016

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Abrutyn:

I have received your letter of August 17 in which you sought an advisory concerning a request made under the Freedom of Information Law by *Newsday* reporter Christian Murray.

You wrote that Mr. Murray sought "copies of documents reflecting any zoning variances granted on 70 known properties in the Town of Brookhaven" and has provided the Town with street addresses, the names of current owners of the parcels and the "physical lot description (section-block-lot) relating to each of the properties. Nevertheless, the Town indicated that the request must include a "metes and bounds" description of each property, as well as the dates that the Zoning Board of Appeals considered applications for variances. Further, you were informed that the Town "would take two months to provide the requested records."

In this regard, I offer the following comments.

First, by way of historical background, when the Freedom of Information Law was initially enacted in 1974, it required that an applicant request "identifiable" records. Therefore, if an applicant could not name the record sought or "identify" it with particularity, that person could not meet the standard of requesting identifiable records. In an effort to enhance its purposes, when the Freedom of Information Law was revised, the standard for requesting records was altered. Since 1978, §89(3) has stated that an applicant must merely "reasonably describe" the records sought. I point out that it has been held by the Court of Appeals that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

The Court in Konigsberg found that the agency could not reject the request due to its breadth and also stated that:

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency']])" (id. at 250).

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping system. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number.

While I am unfamiliar with the record keeping systems of the Town, to the extent that the records sought can be located with reasonable effort, I believe that the request would have met the requirement of reasonably describing the records. In Ruberti, Girvin & Ferlazzo v. Division of State Police [218 AD2d 494, 641 NYS2d 411 (1996)], one element of the decision pertained to a request for a certain group of personnel records, and the agency argued that it was not required to search its files for those requested "because such records do not exist in a 'central file' and, further, that FOIL does not require that it review every litigation or personnel file in search of such information" (id., 415). Nevertheless, citing Konigsberg, the court determined that:

> "Although the record before this court contains conflicting proof regarding the nature of the files actually maintained by respondent in this regard, an agency seeking to avoid disclosure cannot, as respondent essentially has done here, evade the broad disclosure provisions FOIL by merely asserting that compliance could potentially require the review of hundreds of records" (id.).

If the Town can locate the records sought with a reasonable effort analogous to that described above, i.e., even if a search involves the review of hundreds of records, it apparently would be obliged to do so. As indicated in Konigsberg, only if it can be established that the Department maintains its records in a manner that renders its staff unable to locate and identify the records would the request have failed to meet the standard of reasonably describing the records.

Based on my experience, it would be unlikely that the Town could not locate the records on the basis of the names of owners, a street address or section, lot and block of a parcel. I would

conjecture as well that the records sought may be maintained by more than one unit of the Town government. In addition to the records of the Zoning Board of Appeals, the records might also be maintained, typically by address, by the office of building inspector or code enforcement officer.

Second, with respect to the delay in disclosure of the 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..."

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 can be located with reasonable effort, 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 two months 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, 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 located with reasonable effort, there may 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 understanding of the Freedom of Information Law, copies of this opinion will be forwarded to Town Officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Stan Allen, Town Clerk
Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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September 13, 2001

Mr. Calvin Combo
95-A-6640
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. Combo:

I have received your letter in which you sought assistance in obtaining a copy of an "I-64 form", which apparently lists items in your "Court property bag."

In this regard, I offer the following comments.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. It appears that none of the grounds for denial would be applicable.

However, I point out that the Freedom of Information Law pertains to existing records. Section 89(3) of that statute provides in part that an agency is not required to prepare a record that is not maintained by the agency in response to a request. In short, if the record in question does not exist, the Freedom of Information Law would not apply.

The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person

> requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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 requested, I am returning your letters.

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 12942

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 14, 2001

Mr. Keith Maguire
01-A-1234
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. Maguire:

I have received your letter in which you sought assistance in obtaining records indicating the amount of currency taken from the Rhinebeck Savings Bank. You inquired as to whether you may obtain such documentation "under F.O.I.A. from the bank itself."

In this regard, I offer the following comments.

I note that your letter refers to the "F.O.I.A." For purposes of clarification, the acronym "FOIA" is used to indicate the federal Freedom of Information Act, which applies only to records of federal agencies. This office prepares opinions relating to the New York State Freedom of Information Law.

With regard to your questions, the Freedom of Information Law pertains to agency records, and §86(3) of that statute defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, an "agency" is generally an entity of state or local government. As such, it would not apply to a private entity, such as a bank. Therefore, the bank would not be required to respond to Freedom of Information Law requests.

I hope that the foregoing services to enhance your understanding of the Freedom of Information Law.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 12943

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 17, 2001

Mr. Robert F. Reninger
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Reninger:

I have received your letter in which you sought an advisory opinion relating to a request for records of the Town of Greenburgh. Based on the materials that you attached, it appears that the original records of your interest may have been destroyed, but that some may be maintained on microfilm or in storage, both within and outside of Town offices. You were informed, however, in your words, that "current staffing does not enable" the Town to locate the records.

In this regard, I offer the following comments.

First, the Freedom of Information Law, one of the statutes within the advisory jurisdiction of the Committee on Open Government, does not address matters involving the retention and disposal of records. As you indicated, those matters involve the implementation of Article 57-A of the Arts and Cultural Affairs Law. As such, I cannot effectively comment with respect to the propriety of what may have been the disposal of Town records.

Second, however, with respect to a contention that there may be inadequate staff to honor your request, I note that it has been held that denials of access to records based on an agency's contention that it had insufficient staff cannot be sustained, for a denial on that basis would "thwart the very purpose of the Freedom of Information Law [United Federation of Teachers v. New York City Health and Hospitals Corporation, 428 NYS2d 823 (1980)]. Moreover, the Court of Appeals, recognizing that implementation of the Freedom of Information Law may be burdensome, has stated that "Meeting the public's legitimate rights of access concerning government is fulfillment of a governmental obligation, not the gift of, or waste of, public funds" [Doolan v. BOCES, 48 NY2d 341, 347 (1979)].

Third, the Freedom of Information Law is expansive in its scope, for it deals with all 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."

Based on the foregoing, irrespective of their physical form or location, insofar as the materials sought continue to exist, I believe that they would constitute Town records subject to rights of access.

Lastly, and in my view, most importantly, the primary issue appear to involve whether or the extent to which your request has "reasonably described" the records sought as required by §89(3) of the Freedom of Information Law. In considering that standard, the Court of Appeals, the state's highest court, has determined that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

The Court in Konigsberg found that the agency could not reject the request due to its breadth and also stated that:

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency'])" (id. at 250).

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping system. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number.

While I am unfamiliar with the record keeping systems of the Town, to the extent that the records sought can be located with reasonable effort, I believe that the request would have met the requirement of reasonably describing the records. In Ruberti, Girvin & Ferlazzo v. Division of State Police [218 AD2d 494, 641 NYS2d 411 (1996)], one element of the decision pertained to a request for a certain group of personnel records, and the agency argued that it was not required to search its files for those requested "because such records do not exist in a 'central file' and, further,

that FOIL does not require that it review every litigation or personnel file in search of such information" (id., 415). Nevertheless, citing Konigsberg, the court determined that:

> "Although the record before this court contains conflicting proof regarding the nature of the files actually maintained by respondent in this regard, an agency seeking to avoid disclosure cannot, as respondent essentially has done here, evade the broad disclosure provisions FOIL by merely asserting that compliance could potentially require the review of hundreds of records" (id.).

If the Town can locate the records sought with a reasonable effort analogous to that described above, i.e., even if a search involves the review of hundreds of records, it apparently would be obliged to do so. As indicated in Konigsberg, only to the extent that it can be established that the Town maintains its records in a manner that renders its staff unable to locate and identify the records would the request have failed to meet the standard of reasonably describing the records.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Hon. Paul Feiner
Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12944

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 19, 2001

Mr. Anthony J. Palermo
00-A-4304
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. Palermo:

I have received your letter in which you sought assistance in obtaining records from Greene County relating to "pertinent informational documents needed for a meaningful perfection of a criminal appeal."

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of your correspondence, I offer the following comments.

First, it is noted that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been

constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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.

However, in Moore v. Santucci [151 AD2d 677 (1989)], it was found that:

> "...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. 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).

It is suggested that you contact your attorney in an effort to determine whether he or she maintains any of the requested records.

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12945

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 19, 2001

Mr. Bradley Hinton
99-R-4636
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. Hinton:

I have received your letter in which you sought assistance in obtaining records from the Oneida Correctional Facility. You wrote that you have not received responses to your requests for records under the Freedom of Information Law.

In this regard, 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 [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of 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,

David Treacy

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12946

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 19, 2001

Mr. Thomas R. Foley
99-B-2042
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. Foley:

I have received your letter in which you sought assistance in obtaining personnel records of a former New York State Police Officer.

In this regard, by way of background, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

The first ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §50-a of the Civil Rights Law. In brief, that statute provides that personnel records of police and correction officers that are used to evaluate performance toward continued employment or promotion are confidential. The Court of Appeals, the State's highest court, in reviewing the legislative history leading to its enactment, has held that the exemption from disclosure conferred by §50-a of the Civil Rights Law "was designed to limit access to said personnel records by criminal defense counsel, who used the contents of the records, including unsubstantiated and irrelevant complaints against officers, to embarrass officers during cross-examination" [Capital Newspapers v. Burns, 67 NY2d 562, 568 (1986)]. In another decision which dealt with unsubstantiated complaints against correction officers, the Court of Appeals held that the purpose of §50-a "was to prevent the release of sensitive personnel records that could be used in litigation for purposes of harassing or embarrassing correction officers" [Prisoners' Legal Services v. NYS Department of Correctional Services, 73 NY 2d 26, 538 NYS 2d 190, 191 (1988)]. The Court in an opinion rendered in 1999 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)].

To acquire the records regarding an active police officer, there must be a court order issued in accordance with other provisions in §50-a. Those provisions state that:

> "2. Prior to issuing such court order the judge must review all such requests and give interested parties the opportunity to be heard. No such order shall issue without a clear showing of facts sufficient to warrant the judge to request records for review.
>
> 3. If, after such hearing, the judge concludes there is a sufficient basis he shall sign an order requiring that the personnel records in question be sealed and sent directly to him. He shall then review the file and make a determination as to whether the records are relevant and material in the action before him. Upon such a finding the court shall make those parts of the record found to be relevant and material available to the persons so requesting."

Lastly, you indicated that the police officer that is the subject of your request no longer serves as a police officer. If that person is no longer a police officer, in view of decisions rendered by the Court of Appeals and the intent of §50-a of the Civil Rights Law, I do not believe that §50-a would apply. In that event, the Freedom of Information Law would govern rights of access.

If the Freedom of Information Law is the governing statute, final determinations reflective of findings of misconduct would in my view be available. Pertinent to an analysis of rights of access would be two of the grounds for denial.

Section 87(2)(b) permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". While the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public officers employees. It is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public officers and employees are required to be more accountable than others. With regard to records pertaining to public officers and employees, the courts have found that, as a general rule, records that are relevant to the performance of their official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, supra; Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

The other ground for denial of significance, §87(2)(g), states that an agency may withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. Insofar as a request involves final agency determinations, I believe that those determinations must be disclosed, again, unless a different ground for denial could be asserted.

In terms of the judicial interpretation of the Freedom of Information Law, in situations in which allegations or charges have resulted in the issuance of a written reprimand, disciplinary action,

or findings that public employees have engaged in misconduct, records reflective of those kinds of determinations have been found to be available, including the names of those who are the subjects of disciplinary action [see Powhida v. City of Albany, 147 AD 2d 236 (1989); also Farrell, Geneva Printing, Scaccia and Sinicropi, supra].

In contrast, when allegations or charges of misconduct have not yet been determined or did not result in disciplinary action or a finding of misconduct, the records relating to such allegations may, in my view, be withheld, for disclosure would result in an unwarranted invasion of personal privacy [see e.g., Herald Company v. School District of City of Syracuse, 430 NYS 2d 460 (1980)]. Similarly, to the extent that charges are dismissed or allegations are found to be without merit, I believe that they may be withheld.

In sum, if the person who is the subject of your inquiry continues to serve as a police officer, I believe that §50-a of the Civil Rights Law would govern, and that a court order would be needed to obtain the records. If, however, he no longer serves as a police officer, the Freedom of Information Law would govern, and the records would be accessible to the extent described above.

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12947

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 19, 2001

Mr. Richard W. Dunnigan
90-B-3027 9-2-58
Tappan Correctional Facility
353 Hunter Street
Ossining, NY 10562-5442

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Dunnigan:

I have received your letter in which you sought an advisory opinion as to the appropriateness of your request to the Waverly Police Department for "an index or listing (not the record itself) of all records that are available."

In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law pertains to existing records, and an agency is not required to create a record in response to a request [see §89(3)]. Similarly, if records that once existed have legally been disposed of or destroyed, the Freedom of Information Law would not apply.

An exception to that rule appears to relate 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.

I hope that the foregoing serves to enhance your understanding of the matter and that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12948

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 19, 2001

Mr. Timothy J. Taylor
[redacted]

The staff of the Committee on Open 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 in which you sought assistance in obtaining records from the "Williamson State Police" relating to "criminal allegations alleged by" a particular individual. You indicated that you have not received a response to your Freedom of Information Law request.

In this regard, I offer the following comments.

First, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of

Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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, assuming that the records sought involve the interview of a witness that has 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 the witness or the contents of other records that have already been disclosed. If disclosure of the records in question would not serve to infringe upon a witnesses' privacy in view of other 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). It is possible that the record sought would constitute "confidential information relating to a criminal investigation."

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,

David Treacy

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12949

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 19, 2001

Ms. Stephanie S. Abrutyn
Counsel
Tribune Company
Two Park Avenue
New York, NY 10016

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Abrutyn:

I have received your letter of August 20. On behalf of WB11/WPIX-TV and its reporter, Polly Kreisman, you have sought an advisory opinion concerning rights of access to records "relating to a single Furbearer Possession Tag" maintained by the Department of Environmental Conservation. The Department has denied access on the ground that disclosure would constitute an unwarranted invasion of privacy. The record most likely to exist appears to be a completed Furbearer Possession Tag application, and you included a blank copy of that document.

The general instructions on the application indicate that it allows the "the taker" to "legally possess the pelt or unskinned animal until sealing is required" and that the completed form must be sent to the Department. The application requires a person's name, address, date of birth, and information concerning the kind of animal taken, the town, county and date taken. Following the submission of the application to the Department, it fills in a seal number, with the date, the region and the "badge or sealer" number. A seal is then sent to the person who completed the application.

From my perspective, most of the application must be disclosed. In this regard, I offer the following comments.

First, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. It is emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In my view, the phrase quoted in the preceding sentence evidences a recognition on the part of the Legislature that a single

record or report, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld. That being so, I believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

The Court of Appeals reiterated its general view of the intent of the Freedom of Information Law in Gould, stating that:

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see,* Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" (id., 275).

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the Department contended that 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 different from that referenced in response to the request at issue. 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 the request by Ms. Kreisman, rather than citing §87(2)(g) as a basis for a blanket denial of access to the records at issue in Gould, the Department appears to have engaged in a blanket denial by relying on a different provision in a manner which, in my view, is equally

inappropriate. I am not suggesting that the record or records sought must be disclosed in full. Rather, based on the direction given by the Court of Appeals in several decisions, any such records must be reviewed by the Department for the purpose of identifying those portions that might fall within the scope of one or more of the grounds for denial of access. As the Court stated later in the decision: "Indeed, the Police Department is entitled to withhold complaint follow-up reports, *or specific portions thereof*, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" (id., 277; emphasis added).

Second, I believe that the only ground for denial of significance is the provision to which the Department alluded, §87(2)(b), which states that an agency may withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." The issuance of a furbearer possession tag, as I understand its function, indicates that the recipient, a licensed hunter or trapper, has met certain requirements imposed by the Department pursuant to the Environmental Conservation Law, Article 11, and the regulations promulgated thereunder, 6 NYCRR §6.3(c). The latter state in part that:

> "Tagging and sealing requirements for beaver, otter, coyote, bobcat, fisher and pine marten taken in New York State. (1) Persons intending to take the species listed in the this subdivision in the State must first obtain a supply of furbearer possession tags from the department.
>
> (2) To legally possess until sealing, as required by paragraph (3) of this subdivision, the unprocessed pelt or unskinned carcass of a species listed in this subdivision legally taken in this State, the taker must:
>
> > (i) complete an entire furbearer possession tag immediately upon reaching the license vehicle used by the taker for highway travel, or immediately upon reach the camp or home used by the taker, whichever comes first after the animal is taken; and
> >
> > (ii) keep the above-mentioned tag with the pelt (or unskinned carcass) at all times until the pelt (or unskinned carcass) is sealed."

Historically, information pertaining to those persons or entities obtaining licenses, permits and similar certifications has been available to the public, for it is intended to enable the public to know that those persons or entities are qualified to engage in certain activities in which the government has a substantial interest. The fact that a license has been issued to engage in the practice of a variety of professions (i.e., medicine, law, architecture, social work, etc.) and other kinds of activities, (i.e., selling real estate, being a barber or cosmetologist, driving an automobile or possessing a firearm) involve matters all of which enable the public to know that the recipient has

met the required conditions for licensure or engaging in certain activities. While a furbearer possession tag may not be a license or permit *per se*, I believe that it serves an analogous function; it enables the public to know that a person, through hunting or trapping, may take and possess certain species of animals in the state.

Although the standard in the law relating to unwarranted invasions of personal privacy is not specific, the Court of Appeals has held that the "essence" of the exception 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)]. As the foregoing relates to the information contained in the application, the only item, in my view, that is uniquely personal or private would be one's date of birth. That item, in my opinion, could be deleted. The only other items which if disclosed might arguably constitute an unwarranted invasion of personal privacy would be the "street or box number" and the city, assuming that those items reflect the applicant's home address. I believe that the remaining items on the application, including the applicant's name, the "trapping/hunting stamp number", the state and zip code of the applicant, the county, town and date an animal was taken, and the details relating to animals, would be accessible. Several of those items are unrelated to personal privacy, and the others, not being "intimate" would in my opinion constitute a permissible rather than an unwarranted invasion of personal privacy if disclosed.

With specific reference to the street and city address, some have contended that those items must be withheld to protect personal privacy. However, in some instances, the residence addresses of licensees or permit holders are public. For instance, under §400.00(5) of the Penal Law, the names and residence addresses of holders of firearms licenses must be disclosed. Further, in an example of an unwarranted invasion of personal privacy, §89(2)(b)(iii) refers to the "sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes." My understanding is that the reporter may be seeking a single application and that her request is unconnected to any commercial or fund-raising activity. In consideration of the foregoing, the ability to withhold the street name and city would, in my view, be questionable.

Lastly, if the applicant was acting in a business capacity, I believe that the only item that could be withheld would be the date of birth. Several judicial decisions, both New York State and federal, pertaining to records about individuals in their business or professional capacities 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, 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 this instance, although the information in question would be identifiable to a particular individual, if it pertains to his or her business capacity, again, I believe that the only item that could justifiably be withheld would be the date of birth.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Ruth Earl

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12950

41 State Street, Albany, New York 12231
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September 19, 2001

Mr. Ronuoldo Gonzalez
00-A-7067
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. Gonzalez:

I have received your letter in which you sought assistance in obtaining a variety of records from "DOC Manhattan Detention Complex Officials." You wrote that you had not received a response to your Freedom of Information Law request.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of your correspondence, I offer the following comments.

First, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) require that each agency designated one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests. While I believe that the person in receipt of your request should have responded directly in a manner consistent with the Freedom of Information Law or forwarded the request to the records access officer, it is suggested that you resubmit your request to the records access officer. I believe that such a request may be addressed to Mr. Thomas Antenen, Records Access Officer, Department of Correction, 60 Hudson Street, 6th Floor, New York, NY 10013. I note, too, that response to requests may be further delayed due to the attack of September 11.

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 [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of 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,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12951

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 20, 2001

Mr. Robert Ferrara
83-A-1067
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. Ferrara:

I have received your letter in which you sought assistance in obtaining records which have been sealed following the termination of a criminal action in favor of the accused. The records of your interest pertain to a person other than yourself.

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. 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, the Criminal Procedure Law, §160.50, generally requires that the records that you seek are sealed and unavailable to you unless a court directs otherwise.

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12952

41 State Street, Albany, New York 12231
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September 20, 2001

Mr. Damon Miller
96-A-0061
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. Miller:

I have received your letter in which you sought assistance in obtaining records from the Oneida County District Attorney's Office.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of your correspondence, 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 [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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, it appears that the records you seek may have previously been provided to you or your attorney. In this regard, I note that in Moore v. Santucci [151 AD2d 677 (1989)] it was found that:

> "...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. 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).

It is suggested that you contact your attorney to determine whether the requested records were previously disclosed and are still in existence.

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12953

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September 20, 2001

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 letter in which you sought assistance in obtaining records from the Department of Correctional services, and raised a variety of questions concerning the Freedom of Information Law.

In this regard, I offer the following comments.

First, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 5 NY 2d 774 (1982)].

Second, as general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Third, I point out that the retention and disposal of records are governed by the Arts and Cultural Affairs Law. Specifically, §57.05 of the Arts and Cultural Affairs Law provides that the Commissioner of Education is empowered:

> "[t]o authorize the disposal or destruction of state records including books, papers, maps, photographs, microphotographs or other documentary materials made, acquired or received by any agency. At least forty days prior to the proposed disposal or destruction of such records, the commissioner of education shall deliver a list of the records to be disposed of or destroyed to the attorney general, the comptroller and the state agency that transferred such records. No state records listed therein shall be destroyed if within thirty days after receipt of such list the attorney general, comptroller, or the agency that transferred such records shall notify the commissioner that in his opinion such state records should not be destroyed."

Fourth, the Freedom of Information Law pertains to existing records. Section 89(3) of that statute provides in part that an agency is not required to prepare a record that is not maintained by the agency in response to a request. In short, if the record in question does not exist, the Freedom of Information Law would not apply.

Fifth, 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."

Lastly, enclosed are the advisory opinions that you requested.

I hope that I have been of assistance.

Sincerely,

David Treacy

David M. Treacy
Assistant Director

DMT:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12954

41 State Street, Albany, New York 12231
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September 20, 2001

Mr. George Santiago
99-A-4555
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. Santiago:

I have received your letter in which you have sought assistance in obtaining your medical records from the "University Hospital SUNY Center in Syracuse."

In my view, a SUNY hospital is a governmental entity and its records would be 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.

With regard to medical records, the Freedom of Information Law, in my view, likely permits that some of those records may be withheld in whole or in part, depending upon their contents. For instance, medical records prepared by Hospital personnel could be characterized as "intra-agency materials" that fall within the scope of §87(2)(g) of the Freedom of Information Law. To the extent that such materials consist of advice, opinion, recommendation and the like, I believe that the Freedom of Information Law would permit a denial.

Nevertheless, a different statute, §18 of the Public Health Law, generally grants rights of access to medical records to the subjects of the records. As such, that statute may provide greater access to medical records than the Freedom of Information Law. It is suggested that you send your request to the hospital and make specific reference to §18 of the Public Health Law when seeking medical records.

To obtain additional information concerning access to medical records and the fees that may be charged for searching and copying those records, you may write to:

Access to Patient Information Program
New York State Department of Health
Hedley Park Place
Suite 303
433 River Street
Troy, NY 12180

I hope that I have been of some assistance.

Sincerely,

David Treacy

David M. Treacy
Assistant Director

DMT:jm

OML-AO-3367
FOIL-AO-12955

From: Robert Freeman
To: [redacted]
Date: 9/24/01 9:55AM
Subject: Dear Ms. Harrington:

Dear Ms. Harrington:

I have received your inquiry in which you asked whether towns and villages "have to take minutes of public hearings" and, if so, whether the minutes are subject to the Freedom of Information Law (FOIL).

In this regard, it is noted that there is a distinction between a "hearing" and a "meeting".

A hearing is usually held by law to enable the public to express points of view concerning a particular subject or action to be taken by a board. For instance, both the Town and Village Law require that a public hearing be held to enable the public to comment with respect to proposed budgets. There are no requirements involving the preparation of minutes in relation to hearings.

A meeting involves the gathering of a board for the purpose of discussing public business, deliberating and potentially taking action. The Open Meetings Law includes provisions concerning minutes of meetings. In brief, minutes must, at a minimum, consist of a record or summary of motions, proposals, resolutions, action taken and the vote of each member.

Even though there may be no requirement that minutes of hearings be prepared, often summaries or tape recordings of hearings are prepared. If any such record is prepared, it would be subject to the FOIL. I note that FOIL is applicable to all records of a government agency and defines the term "record" to include any information in any physical form whatsoever maintained by or for the agency. Therefore, a tape recording of a hearing or a meeting, for example, would constitute a "record" that clearly falls within the coverage of FOIL.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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Albany, NY 12231
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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September 24, 2001

Mr. Jeffrey Dicks
[redacted]

Dear Mr. Dicks:

I have received your letter of September 18 in which you appealed to this office following "the non-compliance (which may be deemed as a denial)" by the Queens County District Attorney concerning your request for grand jury minutes.

In this regard, first, the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law; it is not empowered to determine appeals or otherwise compel an agency to grant or deny access to records. The provision referring to the right to appeal a denial of access to records, §89(4)(a), states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Second, the initial ground for denial in the Freedom of Information Law, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute". 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 or other records "attending a grand jury proceeding" would be outside the scope of rights conferred by the Freedom of Information Law. Any disclosure of those records would be based upon a court order or perhaps a vehicle authorizing or requiring disclosure that is separate and distinct from the Freedom of Information Law.

I hope that the foregoing serves to enhance your understanding of the matter and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12957

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September 24, 2001

Mr. Hector Chebere
99-A-2842
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. Chebere:

I have received your letter in which you sought assistance in obtaining records related to certain witness interviews from the Bronx County District Attorney's Office.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of the correspondence, I offer the following comments.

First, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been

constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. While some aspects of the records sought might properly be withheld, relevant is a decision by the Court of Appeals concerning complaint follow up reports and police officers' memo books in which it was held that a denial of access based on their characterization as intra-agency materials would be inappropriate.

The provision at issue, §87(2)(g) of the Freedom of Information Law, enables an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

In its analysis of the matter, the decision states that:

> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)...
>
> "...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption; which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][i]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182).
>
> "Against this backdrop, we conclude that the complaint follow-up reports contain substantial factual information available pursuant to the provisions of FOIL. Sections of the report are devoted to such purely factual data as: the names, addresses, and physical descriptions of crime victims, witnesses, and perpetrators; a checklist that indicates whether the victims and witnesses have been interviewed and shown photos, whether crime scenes have been photographed and dusted for fingerprints, and whether neighborhood residents have been canvassed for information; and a blank space denominated 'details' in which the officer records the particulars of any action taken in connection with the investigation.

> "However, the Police Department argues that any witness statements contained in the reports, in particular, are not 'factual' because there is no assurance of the statements' accuracy and reliability. We decline to read such a reliability requirement into the phrase 'factual data', as the dissent would have us do, and conclude that a witness statement constitutes factual data insofar as it embodies a factual account of the witness's observations. Such a statement, moreover, is far removed from the type of internal government exchange sought to be protected by the intra-agency exemption (see, Matter of Ingram v. Axelrod, 90 AD2d 568, 569 [ambulance records, list of interviews, and reports of interviews available under FOIL as 'factual data']). By contrast, any impressions, recommendations, or opinions recorded in the complaint follow-up report would not constitute factual data and would be exempt from disclosure. The holding herein is only that these reports are not categorically exempt as intra-agency material. Indeed, the Police Department is entitled to withhold complaint follow-up reports, or specific portions thereof, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" [Gould, Scott and DeFelice v. New York City Police Department, 653 NYS2d 54, 89 NY2d 267 (1996); emphasis added by the Court].

Based on the foregoing, neither the Police Department nor an office of a district attorney can claim that complaint follow up reports can be withheld in their entirety on the ground that they constitute intra-agency materials. However, the Court was careful to point out that other grounds for denial might apply in consideration of those records, as well as others that you requested.

For instance, of potential significance is §87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". That provision might be applicable relative to the deletion of identifying details in a variety of situations, i.e., where a record identifies a confidential source or a witness, for example.

Often the most relevant provision concerning access to records maintained by law enforcement agencies is §87(2)(e), which permits an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;

> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in sub-paragraphs (i) through (iv) of §87(2)(e).

Another possible ground for denial is §87(2)(f), which permits withholding to the extent that disclosure "would endanger the life or safety of any person". The capacity to withhold on that basis is dependent upon the facts and circumstances concerning an event.

Lastly, in a decision concerning a request for records maintained by the office of a district attorney that would ordinarily be exempted from disclosure under the Freedom of Information Law, it was held that "once the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public" [see Moore v. Santucci, 151 AD 2d 677, 679 (1989)]. Based upon that decision, it appears that records introduced into evidence or disclosed during a public judicial proceeding should be available.

However, in the same decision, it was also found that:

> "...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

I hope that I have of some assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
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September 24, 2001

Mr. Norman J. Charnock, III
95-B-0544
Woodbourne Correctional Facility
P.O. Box 1000
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. Charnock:

I have received your letter in which you sought assistance in reviewing your medical prescription forms.

In this regard, I offer the following comments.

First, by way of background, the Freedom of Information Law pertains to agency records, including those maintained by a state correctional facility. In terms of rights granted by the Freedom of Information Law, the Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

With regard to medical records, the Freedom of Information Law, in my view, likely permits that some of those records may be withheld in whole or in part, depending upon their contents. For instance, medical records prepared by Department personnel could be characterized as "intra-agency materials" that fall within the scope of §87(2)(g) of the Freedom of Information Law. To the extent that such materials consist of advice, opinion, recommendation and the like, I believe that the Freedom of Information Law would permit a denial.

Second, in 1987, a new statute, §18 of the Public Health Law, became effective. In brief, that statute generally grants rights of access to medical records to the subjects of the records. As such, that statute may provide greater access to medical records than the Freedom of Information Law. It is suggested that you refer to §18 of the Public Health Law in any request for medical records.

I hope that I have been of some assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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September 24, 2001

Mr. Luis D. Cruz
Reg. No. 09506-055
United States Penitentiary
P.O. Box 1000
Lewisburg, PA 17837

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Cruz:

I have received your letter in which you requested that this office contact the Erie County Sheriff's Office "in an attempt to resolve" a matter involving requests for records related to your criminal case. The Sheriff's Office advised you to contact your attorney for the records. You indicated that your attorney has refused to furnish the records numerous times.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of the correspondence, I offer the following comments.

Without specific knowledge of the contents of the records sought, I cannot conjecture as to their availability. However, I note that in a decision concerning a request for records maintained by an office of a district attorney, it was held 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" [Moore v. Santucci, 151 AD2d 677, 678 (1989)].

Based on the foregoing, it is suggested that you attempt to provide satisfactory evidence to the Sheriff's Office that the requested records are unavailable from your attorney.

I hope that I have of some assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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September 24, 2001

Mr. Jose Pratts
98-A-5195
Lakeview S.I.C.F.
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 information presented in your correspondence.

Dear Mr. Pratts:

I have received your letter in which you sought assistance in obtaining records from certain individuals employed by the Department of Correctional Services.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of the correspondence, I offer the following comments.

By way of background, §89(1) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural implementation of that statute (21 NYCRR Part 1401). In turn, §87(1) requires the governing body of a public corporation to adopt rules and regulations consistent those promulgated by the Committee and with the Freedom of Information Law. Further, §1401.2 of the regulations provides in relevant part that:

> "(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so."

Based on the foregoing, it is suggested that you resubmit your request to the appropriate records access officer. The person designated by the Department of Correctional Services to serve as records access officer with respect to records maintained at the Department's Albany offices is Daniel Martuscello. With respect to records kept at a correctional facility, the Department's regulations indicate that requests may be made to the facility superintendent or his designee.

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 [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

For your information, the person at the Department designated to determine appeals is Anthony J. Annucci, Counsel to the Department.

I hope that I have of some assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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September 25, 2001

E-Mail

TO: Don Kaake [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. Kaake:

I have received your letter in which you sought guidance concerning delays in response to your requests for records of a village. You indicated that the village clerk is on maternity leave, and that you have been largely unable to gain access to records for some three months.

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, or, as in the situation that you described, the absence or incapacity of a key staff member. 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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September 25, 2001

Mr. Charles Barone, Jr.
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Barone:

I have received your letter of August 22 and the materials attached to it. In brief, you indicated that you submitted a request under the Freedom of Information Law to the Lackawanna Municipal Housing Authority on August 13, but that as of the date of your letter to this office, you had received no response.

Based on a review of the correspondence, I offer the following comments.

First, in one aspect of your request, you raised questions; in others, you sought a printout or a "listing" containing certain information. In this regard, it is emphasized that the Freedom of Information Law pertains to existing records and that §89(3) of that statute provides in relevant part that an agency is not required to create a record in response to a request. Therefore, if, for example, there is no listing containing the items sought, the Authority would not be obliged to create a new record including those items on your behalf. Similarly, although the staff of an agency may provide information in response to questions, it is not required to do so by the Freedom of Information Law. Again, that statute pertains to existing records.

Second, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of 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 J. Radich

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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September 25, 2001

Mr. William C. Tountas
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Tountas:

I have received your letter of August 22 and the materials attached to it. You have sought an advisory opinion concerning a request for "audio tapes" of certain open meetings held by the Board of Education of the Herricks Union Free School District. Your request for the tapes was denied on the ground that they "are not maintained by the district." Nevertheless, you wrote that you observed the President of the Board taping meetings.

Based on the assumption that a Board member or other officer or employee of the District tape recorded open meetings of the Board of Education, I offer the following comments.

First, the Freedom of Information Law applies to agency records, and §86(4) of that statute defines the term "record" expansively to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

In consideration of the language quoted above, documents, or as in this instance, tape recordings, 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.

It has been found that records maintained by an attorney retained by an industrial development agency were subject to the Freedom of Information Law, even though an agency did not possess the records and the attorney's fees were paid by applicants before the agency. The Court determined that the fees were generated in his capacity as counsel to the agency, that the agency was his client, that "he comes under the authority of the Industrial Development Agency" and that, therefore, records of payment in his possession were subject to rights of access conferred by the Freedom of Information Law (see C.B. Smith v. County of Rensselaer, Supreme Court, Rensselaer County, May 13, 1993).

Additionally, in a decision rendered by the Court of Appeals, the state's highest court, it was found that materials received by a corporation providing services for a branch of the State University that were kept on behalf of the University constituted "records" falling with the coverage of the Freedom of Information Law. I point out that the Court rejected "SUNY's contention that disclosure turns on whether the requested information is in the physical possession of the agency", for such a view "ignores the plain language of the FOIL definition of 'records' as information kept or held 'by, with or for an agency'" [see Encore College Bookstores, Inc. v. Auxiliary Services Corporation of the State University of New York at Farmingdale, 87 NY 2d 410. 417 (1995)].

Perhaps most significantly, in the first decision in which the Court of Appeals dealt squarely with the scope of the term "record", the matter 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" 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" [Westchester-Rockland Newspapers v. Kimball, 50 NY2d 575, 581 (1980)].

The point made in the final sentence of the passage quoted above appears to be especially relevant, for there appears to be "considerable crossover" in the activities of the Board President as a private citizen and as a member of the Board of Education. If he recorded meetings in furtherance of or to enhance the performance of his duties as President, I believe that the tapes would constitute District records that fall within the scope of the Freedom of Information Law.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. 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.

Lastly, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests and appeals. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Ronald M. Barnes

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12964

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 25, 2001

Mr. Harvey M. Elentuck
[redacted]

Dear Mr. Elentuck:

I have received your letter of August 24 in which you sought guidance in relation to your contention that "the message has not properly been passed along" to staff at the New York City Board of Education concerning the implementation of §87(2)(g) of the Freedom of Information Law. In this regard, as you aware, the Committee's website includes a variety of materials pertaining to the topic of your concern, and it is suggested that you may duplicate and disseminate those that may be useful to you.

You also asked that I comment with respect to an article, "Public Information – What Are the Rights", that appears on the State Education Department's website. I am in general agreement with its contents. While I do not mean to be overly technical, it is noted that references to the time limits for responding to requests and appeals should refer, respectively, to five business days and ten business days, rather than five days and ten days. Also, as you pointed out, the reference to the name and address of this office is inaccurate.

Perhaps most important in my view is the broad statement that "Education Law provides that records, books, papers of the office of any school officers are the property of the district and open for inspection." It appears that the statement quoted in the preceding sentence is an allusion to §2116 of the Education Law, which was enacted in 1947 and states that:

> "The records, books and papers belonging or appertaining to the office of any officer of a school district are hereby declared to be the property of such district and shall be open for inspection by any qualified voter of the district at all reasonable hour, and any such voter may makes copies thereof."

Based upon a decision rendered by the Court of Appeals, I do not believe that §2116 of the Education Law could be construed as broadly as its language indicates. In a case concerning the scope of §51 of the General Municipal Law, which states, in brief, that all records of a municipality are available, the contention was that rights granted by that statute exist notwithstanding the exceptions found in the Freedom of Information Law. The Court, however, found that:

> "Such a result would nullify the FOIL exemptions, which the Legislature - presumably aware of General Municipal Law [section] 51 at the time it enacted FOIL - could not have intended. To give effect to both statutes, the FOIL exemptions must be read as having engrafted, as a matter of public policy, certain limitations on the disclosure of otherwise accessible records" [Xerox Corporation v. Town of Webster, 65 NY 131, 490 NYS 2d 488, 489 (1985)].

In my opinion, as in the case of §51 of the General Municipal Law, the exceptions appearing in the Freedom of Information Law should be considered as having been "engrafted" onto §2116 of the Education Law. As you know, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12965

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 25, 2001

Mr. John Panos
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Panos:

I have received your letter of August 26 and the materials attached to it. You raised questions concerning your effort to gain access to records from the Department of Motor Vehicles in relation to a summons issued in the Town of Chester.

Although the Department sent you a copy of Part 91 of its regulations, you indicated that those provisions did not include the information of your interest, and thereafter, you requested

"1) Procedures governing how a court may suspend someone's drivers license.

2) What actually defines a 'Failure to answer a summons.'

3) Any related information."

In addition, you later requested the entirety of the Department's regulations, which consist of some 600 pages.

From my perspective, the items numbered 1 through 3 likely do not constitute 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 legal research. For the purpose of illustration, 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 provisions would "govern" or define "failure to answer a summons" would involve an attempt to render a judgment involving interpretations of law. As in the case of locating "applicable law", equally reasonable people, even those within the same agency, may reach different conclusions regarding which provision may tend to govern or support certain needs, actions or functions.

Lastly, despite the Department's offer to make copies of its regulations available upon payment of the requisite fee, I note that the Warren County Courthouse library likely has a copy of the New York Code of Rules and Regulations, which includes the regulations of the Department of Motor Vehicles. If that is so, you would have the ability to review them and determine which provisions may be of interest to you.

I hope that the foregoing serves to clarify your understanding of the matter and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: George Christian
Thomas B. Quinn

FOIL-AO-12966

From: Robert Freeman
To: [redacted]
Date: 9/26/01 9:40AM
Subject: Dear Ms. Bamford:

Dear Ms. Bamford:

I have received your inquiry in which you asked whether provisions dealing with access to vital records, particularly those dealing with genealogical searches, "have been toughened."

I know of no recent changes in law. However, the statute within the advisory jurisidiction of this office, the Freedom of Information Law, is one among many that deals with access to records. That law deals with access to government records generally; if another statute deals with particular records, it prevails over the Freedom of Information Law.

In brief, birth and death records are confidential under sections 4173 and 4174 of the Public Health Law; they may be disclosed only under certain circumstances, one of which involves genealogical searches. Rules regarding those searches have been adopted by the State Department Department of Health, and it is suggested that you contact its Bureau of Vital Records to obtain the latest rules concerning the matter. The phone number is (518)474-3077, and the Health Department's website address is <www.health.state.ny.us>.

It is also noted that some aspects of marriage records (basic information, such as the names of those involved and the municipality of residence) have been found to be available under the Freedom of Information Law when read in conjunction with section 19 of the Domestic Relations Law, which deals specifically with marriage records.

With respect to land records, deed, wills and the like, I believe that they generally remain available. Deeds are maintained by county clerks; wills are maintained by the clerks of Surrogate's Courts and are available under the Surrogate's Court Procedure Act unless sealed by the court.

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-12967

41 State Street, Albany, New York 12231
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Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 26, 2001

Mr. Roland Ivers
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Ivers:

I have received your letter of August 26, as well as the materials attached to it. You have objected to the treatment of your request made under the Freedom of Information Law to the Town of Cicero.

In your request, you raised the following question:

> "Is there any Town ordinance or code that compels one property owner to mow any portion of a [sic] adjacent property under any circumstances including when the Town mis-marks the boundary?"

In response to your inquiry, the Town Attorney wrote that he is "aware of no Town Code or Ordinance that requires one property owner to mow the land of another." Thereafter, you wrote to the Town Supervisor, stating that "the response is inappropriate", that the "FOIL request was not for the respondent's opinions, musings, awareness' or personal interpretations" and that "This is a yes or a no question."

Based on the foregoing, it appears that you misunderstand the Freedom of Information Law. That statute deals with requests for records; it does not require that government agency officers or employees respond to questions or conduct legal research. They may do so, as the Town Attorney did in this instance, but they are not required to do so.

From my perspective, your question directed to the Supervisor does not constitute a request for records as envisioned by the Freedom of Information Law. In short, 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 legal research. For the purpose of illustration, 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 provisions would "govern" would involve an attempt to render a judgment involving interpretations of law. As in the case of locating "applicable law", equally reasonable people, even those within the same agency, may reach different conclusions regarding which provision may tend to govern or support certain needs, actions or functions.

I hope that the foregoing serves to clarify your understanding of the matter and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Francis Kip
Scott F. Chatfield

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12968

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 26, 2001

Mr. Julio Cesar Borrell
98-A-6799
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. Borrell:

I have received your letter in which you sought assistance in obtaining your "legal file" from the Wende Correctional Facility. According to your correspondence, you submitted your first request for such records in May of 2000.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of the correspondence, 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 [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of 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,

David Treacy

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12969

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 26, 2001

Mr. Michael W. Stabell
00-B-0746
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. Stabell:

I have received your letter in which you sought assistance in obtaining records from a variety of agencies.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of the correspondence, I offer the following comments.

First, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been

constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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 title of the Freedom of Information Law may be somewhat misleading, for it is not a vehicle that requires the disclosure of information per se; rather, it is a vehicle that pertains to rights of access to existing records. Similarly, while that statute may require an agency to disclose records it does not require that an agency provide answers in response to questions or to create records. Having reviewed your correspondence, I would conjecture that some of the records you sought do not exist. If that is so, the request would not involve existing records, and the Freedom of Information Law would not apply.

Lastly, it is suggested that the request originally submitted to the Genesee County Office of Management Services be resubmitted to the records access officer at the Genesee County Sheriff's Department.

I hope that I have been of assistance.

Sincerely,

David Treacy

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12970

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 26, 2001

Mr. Pedro Gutierrez
96-A-4182
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. Gutierrez:

I have received your letter in which you sought assistance in obtaining records from the New York City Police Department.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of the correspondence, 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 [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of 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 of some assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1297

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 26, 2001

Mr. Ramon Abreu
97-A-7538 B-T-39
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. Abreu:

I have received your letter in which you sought "an opinion as to the appropriateness" of your request for statements made by a particular individual who apparently was a witness in connection with your case.

In this regard, I offer the following comments.

First, in a decision concerning a request for records maintained by the office of a district attorney that would ordinarily be exempted from disclosure under the Freedom of Information Law, it was held that "once the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public" [see Moore v. Santucci, 151 AD 2d 677, 679 (1989)]. Based upon that decision, it appears that records introduced into evidence or disclosed during a public judicial proceeding should be available.

However, in the same decision, it was also found that:

> "...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his

> counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

Second, assuming that the records sought involve the interview of a witness and have not been previously disclosed, I believe that the Freedom of Information Law would determine rights of access. As a general matter, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, several of the grounds for denial could be pertinent.

Section 87(2)(b) permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". From my perspective, the propriety of a denial of access would, under the circumstances, be dependent upon the nature of statements by witnesses or the contents of other records have already been disclosed. If disclosure of the records in question would not serve to infringe upon witnesses' privacy in view of prior disclosures, §87(2)(b) might not justifiably serve as a basis for denial. However, if the statements in question include substantially different information, that provision may be applicable.

Also potentially relevant is §87(2)(e), which permits an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my view, the foregoing indicates that records compiled for law enforcement purposes can be withheld to the extent that disclosure would result in the harmful effects described in subparagraphs (i) through (iv) of §87(2)(e).

Section 87(2)(f) permits an agency to withhold records to the extent that disclosure would "endanger the life or safety of any person." Without knowledge of the facts and circumstances of your case, I could not conjecture as to the relevance of that provision.

Lastly, §87(2)(g) authorizes an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12972

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 26, 2001

Mr. Frederick Davis
99-A-6213
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. Davis:

I have received your letter in which you sought assistance in obtaining "records requested in F.O.I.L."

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of the correspondence, I offer the following comments.

By way of background, §89(1) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural implementation of that statute (21 NYCRR Part 1401). In turn, §87(1) requires the governing body of a public corporation to adopt rules and regulations consistent those promulgated by the Committee and with the Freedom of Information Law. Further, §1401.2 of the regulations provides in relevant part that:

> "(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so."

Based on the foregoing, it is suggested that any requests for records be submitted to the appropriate records access officer.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions

thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Since I am unfamiliar with the contents of the records sought, I cannot conjecture as to their availability.

Lastly, it is recommended that you seek the advice of your attorney for assistance in any judicial proceeding.

I hope that I have of some assistance.

Sincerely,

David Treacy

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12973

41 State Street, Albany, New York 12231
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September 26, 2001

Mr. Mark Anderson
86-B-1575
Cayuga Correctional Facility
P.O. Box 1186
Moravia, NY 13118

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Anderson:

I have received your letter in which you sought assistance in obtain certain "housing area" and "holding area" log books indicating your whereabouts on a particular date. According to your letter, the New York City Department of Correction has not acknowledged the receipt of your requests.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of the correspondence, I offer the following comments.

First, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) require that each agency designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests. While I believe that the person in receipt of your request should have responded directly in a manner consistent with the Freedom of Information Law or forwarded your request to the records access officer, it is suggested that your resubmit your request to the records access officer. I believe that such a request may be addressed to Mr. Thomas Antenen, Records Access Officer, Department of Correction, 60 Hudson Street, 6th Floor, New York, NY 10013. I note, too, that responses to requests may be further delayed due to the attack on September 11.

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 [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Lastly, in relation to the substance of your request, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Insofar as entries in the records in question pertain to you, it does not appear that any of the grounds for denial would apply.

I hope that I have of some assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12974

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September 26, 2001

Mr. Michael Mathie
90-T-1282
Auburn Correctional Facility
P.O. Box 618
Auburn, NY 13024

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Mathie:

I have received your letter in which you sought assistance in obtaining a variety of records from the Elmira Correctional Facility. According to your letter, you have not received a response to your request.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of the correspondence, I offer the following comments.

First, 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 [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body,

> who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. While some aspects of the records sought might properly be withheld, relevant is a decision by the Court of Appeals concerning complaint follow up reports and police officers' memo books in which it was held that a denial of access based on their characterization as intra-agency materials would be inappropriate.

The provision at issue, §87(2)(g) of the Freedom of Information Law, enables an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

In its analysis of the matter, the decision states that:

> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)...

"...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][i]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182).

"Against this backdrop, we conclude that the complaint follow-up reports contain substantial factual information available pursuant to the provisions of FOIL. Sections of the report are devoted to such purely factual data as: the names, addresses, and physical descriptions of crime victims, witnesses, and perpetrators; a checklist that indicates whether the victims and witnesses have been interviewed and shown photos, whether crime scenes have been photographed and dusted for fingerprints, and whether neighborhood residents have been canvassed for information; and a blank space denominated 'details' in which the officer records the particulars of any action taken in connection with the investigation.

"However, the Police Department argues that any witness statements contained in the reports, in particular, are not 'factual' because there is no assurance of the statements' accuracy and reliability. We decline to read such a reliability requirement into the phrase 'factual data', as the dissent would have us do, and conclude that a witness statement constitutes factual data insofar as it embodies a factual account of the witness's observations. Such a statement, moreover, is far removed from the type of internal government exchange sought to be protected by the intra-agency exemption (see, Matter of Ingram v. Axelrod, 90 AD2d 568, 569 [ambulance records, list of interviews, and reports of interviews available under FOIL as 'factual data']). By contrast, any impressions, recommendations, or opinions recorded in the complaint follow-up report would not constitute factual data and would be exempt from disclosure. The holding herein is only that these reports are not categorically exempt as intra-agency material. Indeed, the Police Department is entitled to withhold complaint follow-up reports, or specific portions thereof, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" [Gould, Scott and DeFelice v. New York City Police Department, 653 NY2d 54, 89 NY2d 267 (1996); emphasis added by the Court].

Based on the foregoing, neither the Police Department nor an office of a district attorney could claim that complaint follow up reports can be withheld in their entirety on the ground that they constitute intra-agency materials. However, the Court was careful to point out that other grounds for denial might apply in consideration of those records, as well as others that you requested.

For instance, of potential significance is §87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". That provision might be applicable relative to the deletion of identifying details in a variety of situations, i.e., where a record identifies a confidential source or a witness, for example.

Often the most relevant provision concerning access to records maintained by law enforcement agencies is §87(2)(e), which permits an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in sub-paragraphs (i) through (iv) of §87(2)(e).

Another possible ground for denial is §87(2)(f), which permits withholding to the extent that disclosure "would endanger the life or safety of any person". The capacity to withhold on that basis is dependent upon the facts and circumstances concerning an event.

Lastly, I point out that a decision rendered in 1989 might have dealt with the kinds of records concerning transfers in which you are interested. In that case, it was stated that:

> "The petitioner seeks disclosure of unredacted portions of five Program Security and Assessment Summary forms, prepared semi-annually or upon the transfer of an inmate from one facility to another, which contain information to assist the respondents in determining the placement of the inmate in the most appropriate facility. The respondents claim that these documents are exempted from disclosure under the intra-agency memorandum exemption contained in the Freedom of Information Law (Public Officers Law, section 87[2][g]). We have examined in camera unredacted copies of the documents at issue (see Matter of Nalo v. Sullivan, 125 AD 2d 311, 509 NYS 2d 53; see also Matter of Allen Group, Inc. v. New York State Dept. of Motor Vehicles, App. Div., 538 NYS 2d 78), and find that they are exempted as intra-agency material, inasmuch as they contain predecisional evaluations, recommendations and conclusions concerning the petitioner's conduct in prison (see Matter of Kheel v.

Ravitch, 62 NY 2d 1, 475 NYS 2d 814, 464 NE 2d 118; Matter of Town of Oyster Bay v. Williams, 134 AD 2d 267, 520 NYS 2d 599)" [Rowland D. v. Scully, 543 NYS 2d 497, 498; 152 AD 2d 570 (1989)].

Insofar as the records sought are equivalent to those described in Rowland D., it appears that they could be withheld.

I hope that I have of some assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12975

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September 27, 2001

Mr. John J. Sheehan
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Sheehan:

I have received your letter of August 29 and a letter addressed to you by Jeffrey Eichner, an attorney for the City of Rochester, concerning the fees that the City charges when making accident reports available.

Specifically, Mr. Eichner wrote that the Rochester Police Department:

> "...purchased special equipment in order to be able to respond electronically to requests made by insurance companies and adjusters for accident reports. When an electronic response is made, a fee of $2.00 has been established per report (regardless of the number of pages). This fee helps offset the cost involved in this type of response. The Rochester Police Department believes that the insurance companies and adjusters are very satisfied with this type of response. However, the Rochester Police Department also maintains a window at which citizens can obtain accident reports at the cost of 25 cents per page."

You wrote that it is your understanding that "no matter how a report is produced, the charge is twenty five cents per page."

It appears that you may misunderstand the Freedom of Information Law. In this regard, §87(1)(b)(iii) of that statute deals with the fees that agencies may charge for reproducing records, and it contains two components. One deals with photocopies of records up to nine by fourteen inches, in which case, as you are aware, an agency may charge a maximum of twenty-five cents per

photocopy. The other involves any other records, i.e., those larger than nine by fourteen inches or those that cannot be reproduced by means of photocopying, such as tape recordings or computer tapes or disks, in which case the fee is based on the "actual cost" of reproduction.

Further, as I interpret Mr. Eichner's remarks, the fee of two dollars for accident reports does not involve the reproduction of records, but rather a service provided by the City in which insurance companies and adjusters may gain online access to accident reports. From my perspective, there is nothing in the Freedom of Information Law that requires agencies to make records available online via the Internet. When they choose to do so, they would be acting above and beyond the responsibilities imposed upon them by law, and in those cases, the provisions in the Freedom of Information Law pertaining to fees, in my view, do not apply.

I hope that the foregoing serves to enhance your understanding of the matter and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Jeffrey Eichner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12976

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September 28, 2001

E-Mail

TO: Daria Golazeski [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. Golazeski:

I have received your letter in which you asked whether "judicial conduct complaints" are subject to the Freedom of Information Law.

In this regard, in brief, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Relevant in this instance is §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §45 of the Judiciary Law, which deals with records of the Commission on Judicial Conduct and is entitled "Confidentiality of records." Subdivision (1) of that statute provides that:

> "Except as hereinafter provided, all complaints, correspondence, commission proceedings and transcripts thereof, other papers and data and records of the commission shall be confidential and shall not be made available to any person except pursuant to section forty-four of this article, the commission and its designated staff personnel shall have access to confidential material in the performance of their powers and duties. If the judge who is the subject of a complaint so requests in writing, copies of the complaint, the transcripts of hearings by the commission thereon, if any, and the dispositive action of the commission with respect to the complaint, such copies with

> any reference to the identity of any person who did not participate at any such hearing suitably deleted therefrom, except the subject judge or complainant, shall be made available for inspection and copying to the public, or to any person, agency or body designated by such judge."

The provision in §44 relating to public access to records states in relevant part that:

> "After a hearing, the commission may determine that a judge be admonished, censured, removed or retired. The commission shall transmit its written determination, together with its findings of fact and conclusions of law and the record of the proceedings upon which its determination is based, to the chief judge of the court of appeals who shall cause a copy thereof to be served either personally or by certified mail, return receipt requested, on the judge involved. Upon completion of service, the determination of the commission, its findings and conclusions and the records of its proceedings shall be made public and shall be made available for public inspection at the principal office of the commission and at the office of the clerk of the court of appeals."

Based on the foregoing, only after the completion of a proceeding and service upon a judge who is the subject of a proceeding in which it is determined that he or she should be "admonished, censured, removed or retired" would records of the Commission be accessible to the public. If no such determination has yet been reached, or if a complaint is dismissed, I believe that the records must remain confidential.

I hope that I have been of assistance.

RJF:jm

FOIL-AO-12977

From: Robert Freeman
To: [redacted]
Date: 9/28/01 12:02PM
Subject: Dear Mr. Nichols:

Dear Mr. Nichols:

I have received your inquiry concerning the procedure for seeking records under the Freedom of Information Law to every county for "budget numbers" relating to "tobacco control program spending."

By way of background, the regulations promulgated by this office (21 NYCRR Part 1401) require that each agency designate one or more persons as "records access officer." That person has the duty of coordinating an agency's response to requests for records, and requests should generally be directed to the records access officer.

In my experience, there is no certainty as to who is designated as records access officer at the county level. In some instances, it may be the county clerk; in others, it may be clerk of the county legislature; and in some, each department may have its own records access officer. My suggestion is that you probably would be well served by sending requests to the clerks of legislative bodies in counties that do not have county executives, and to "Records Access Officer, Office of the County Executive" in counties that do. Whether you send them with a return receipt requested is your choice. When there is uncertainty as to the correct addressee, it may be a good idea to do so. Also, to attempt to ensure that the request reaches the proper person, it is suggested that the outside of the envelope be marked: "Freedom of Information Request".

It is noted that the FOIL pertains to existing records, and that section 89(3) states in part that an agency is not required to create a record in response to a request. If a county does not have the budget numbers of your interest, it would not be required to prepare a new record containing those numbers on your behalf. If you know that certain numbers exist, certainly being as precise as possible in your request is helpful. If it is unclear that the numbers exist, it is suggested that the request be phrased in a manner that would lead to disclosure of information pertinent to you. By means of example, it has been recommended that a request should not be made for "the total amount spent to heat the county office building", for there may be no total. Instead, there may be 12 monthly bills. The county would not be required to prepare a total, but by asking for records indicating monies expended by the county to heat the county office building duriing the year 2000, an applicant would be assured that records exist that fall within the scope of the request, even though there may be no "total."

I hope that I have been of assistance. If you have additional questions, please feel free to contact me.

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-12978

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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 1, 2001

Mr. Ralph R. Martinelli
Martinelli Publications
40 Larkin Plaza
Yonkers, NY 10701

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Martinelli:

I have received your letter of August 27 in which you requested an opinion concerning the Freedom of Information Law.

You wrote that you have attempted without success to obtain "credit card statements of elected officials for expenditures paid for by the taxpayers", and that you want to obtain the "monthly billing statements on their public credit cards" relating to Westchester County Clerk Leonard Spano, State Senator Nicholas Spano, and Assemblyman Michael Spano.

In this regard, I offer the following comments.

First, the County, the Senate, and the Assembly may have different responsibilities in relation to disclosure and under the Freedom of Information Law. Section 86(3) of that statute defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Agency records, such as those maintained by a county, may be treated differently from those maintained by the State Legislature.

Second, with respect to rights of access, in brief, as the Freedom of Information Law applies to agencies, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. As the Law applies to the State Legislature, §88(2) and (3) include reference to certain categories of records that must be disclosed. Therefore, unless records of the Legislature fall within one or more of those categories of accessible records, there is no obligation to disclose.

I point out that Assembly Rule VIII deals with public access to Assembly records and that §1 states that:

> "It is the intent of the Assembly that central administrative records maintained by the Assembly be governed by the same presumption of disclosure which governs access to executive agency records, with similar enumerated exceptions."

As such, the Assembly, by rule, has chosen to disclose or withhold its records based on standards analogous to those applicable to state and local government agencies. I am unaware of any similar rule that may have been promulgated by the Senate.

Third, perhaps most pertinent with respect to standards applicable to agencies in the context of your request is §87(2)(b), which states that agencies may withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." While the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public officers and employees. It is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public officers and employees are required to be more accountable than others. Further, with regard to records pertaining to public officers and employees, the courts have found that, as a general rule, records that are relevant to the performance of their official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)].

Items that are irrelevant to the performance of one's official duties ordinarily would result in an unwarranted invasion of personal privacy if disclosed [see e.g., Matter of Wool (Supreme Court, Nassau County, NYLJ, November 22, 1977, Minerva v. Village of Valley Stream (Supreme Court, Nassau County, May 20, 1981), Seelig v. Sielaff, 201 AD2d 298 (1994)].

In conjunction with the foregoing, records indicating the expenditure of public monies by public officers and employees, in my view, should be accessible from the County and the Assembly, for they clearly relate to the performance of one's official duties, particularly if the expenditure was made by means of a government issued credit card. I note, however, that I am unaware of the specific contents of the records of your interest. It has been advised that the credit card account number may ordinarily be withheld; that kind of item has no relation to the performance of one's official duties. Further, a credit card account number might, if disclosed, be used for fraudulent or illegal purposes by others. Often that number serves as an access code that might enable a person with the code to gain unauthorized access information or to make purchases or transfers without the authority to do so. Consequently, I believe that §87(2)(i), which enables an agency (or in this situation, the Assembly as well) to withhold computer access codes, would permit a denial of access to portions of the records sought that include account numbers.

In considering its intent and utility in relation to the accountability of government officers, I note that the Court of Appeals has 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, 67 NY2d 562, 565-566 (1986)].

Lastly, assuming that the Senate has not adopted a rule similar to Assembly Rule VIII, I believe that §88(2) of the Freedom of Information Law would govern. Again, that provision lists certain categories of records that must be made available by the State Legislature. None in my opinion focus directly on the records of your interest. However, of possible significance is paragraph (e) of §88(2), which requires the disclosure of "internal and external audits and statistical or factual tabulations of, or with respect to, material otherwise available for inspection or copying pursuant to this section or any other applicable provision of law." Insofar as the records in question consist of "statistical or factual tabulations of, or with respect to" other records available for inspection and copying pursuant to §88 or any other provision of law, I believe that they must be disclosed [see Weston v. Sloane, 84 NY2d 462 (1994)]. On the other hand, if they could not be so characterized, it does not appear that the Senate would be obliged to disclose the records.

As you requested, copies of this opinion will be forwarded to the officials to whom you referred, as well as others.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Nicholas Spano
Hon. Michael Spano
Hon. Leonard Spano
Steven M. Boggess, Secretary of the Senate
Sharon Walsh, Assembly Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12979

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 1, 2001

Mr. Freddy Arroyo
98-A-1426
Woodbourne Correctional Facility
P.O. Box 1000
Woodbourne, NY 12788-1000

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Arroyo:

I have received your letters in which you requested an opinion "on the subject matter" of your request for records from the New York City Department of Correction. You have sought records relating to your housing location and transportation from February 18 - 24th, 1998.

In this regard, I offer the following comments.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Of relevance to records relating to transfers is §87(2)(g), which permits an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

I point out that a decision rendered in 1989 might have dealt with the kinds of records concerning transfers in which you are interested. In that case, it was stated that:

> "The petitioner seeks disclosure of unredacted portions of five Program Security and Assessment Summary forms, prepared semi-annually or upon the transfer of an inmate from one facility to another, which contain information to assist the respondents in determining the placement of the inmate in the most appropriate facility. The respondents claim that these documents are exempted from disclosure under the intra-agency memorandum exemption contained in the Freedom of Information Law (Public Officers Law, section 87[2][g]). We have examined in camera unredacted copies of the documents at issue (see Matter of Nalo v. Sullivan, 125 AD 2d 311, 509 NYS 2d 53; see also Matter of Allen Group, Inc. v. New York State Dept. of Motor Vehicles, App. Div., 538 NYS 2d 78), and find that they are exempted as intra-agency material, inasmuch as they contain predecisional evaluations, recommendations and conclusions concerning the petitioner's conduct in prison (see Matter of Kheel v. Ravitch, 62 NY 2d 1, 475 NYS 2d 814, 464 NE 2d 118; Matter of Town of Oyster Bay v. Williams, 134 AD 2d 267, 520 NYS 2d 599)" [Rowland D. v. Scully, 543 NYS 2d 497, 498; 152 AD 2d 570 (1989)].

Insofar as the records sought are equivalent to those described in Rowland D., it appears that they could be withheld. If, on the other hand, the records of your request merely indicate the locations where you were housed and the dates or times that you were transported, I believe that they would be accessible.

I hope that I have been of some assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12980

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October 2, 2001

Mr. Peter J. Molinaro
General Counsel
NYS Workers' Compensation Board
20 Park Street
Albany, NY 12207

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence, unless otherwise indicated.

Dear Mr. Molinaro:

I have received your letter in which you sought an opinion "as to whether records containing certain financial information pertaining to group self-insured trusts must be disclosed under the Freedom of Information Law."

Attached to your letter are new regulations concerning group trusts that include requirements that trusts file annual financial statements indicating that a group "maintains an aggregate net worth of at least one million dollars and a combined annual payroll of at least five hundred thousand dollars." To enable trusts "to gradually come into compliance with the financial portions of the new regulations by January 2002", pursuant to §317.19 of the regulations, the Board is requiring the trusts "to file reports evidencing proper capitalization and integrity of trust funds no later than 120 days after the close" of their fiscal year. You stressed that "[i]t is the during the period from today until January 2002, that the groups will be the most vulnerable to competition, and allegations of less than adequate financial footing." That being so, you wrote that the Board "prefers not to subject the group self-insured trusts to competitive harm" by means of disclosure, and you questioned whether the records in question could be withheld until January, 2002. At that point, the records would be "subject to existing exceptions contained in the Public Officers Law", and any group not in compliance would be subject to possible revocation of group self-insured status.

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.

If my recollection is accurate, we discussed the issue several months ago, and I suggested at that time that most of the grounds for denial appearing in §87(2) are based on an intent to enable government agencies to withhold records insofar as disclosure would result in some sort of harm. In many instances, the harm that the Legislature sought to avoid is expressed by means of a standard presented in an exception. I believe that it was also suggested that often the harmful effects of disclosure may diminish or even disappear due to the occurrence of certain events or the passage of time. Those kinds of considerations are, in my opinion, relevant to the matter at issue.

The pertinent exception, §87(2)(d), permits an agency to withhold records or portions thereof that:

> "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise..."

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).

Based on my understanding of the matter and our discussion, disclosure of certain financial statements now, as those groups are attempting to reach the levels compliance required by the regulations in 2002, could result in a perception that those groups may be weak and, therefore, vulnerable vis a vis their competition. If that is so, disclosure could apparently "cause substantial injury to the competitive position" of a group, and §87(2)(d) would serve as a valid basis for a denial of access.

I note that I have been contacted by attorneys who represent group self-insured trusts. They expressed agreement with the notion that the public should have the right to know whether a group meets the requirements concerning aggregate net worth and combined annual payroll, but it was suggested that other aspects of the records submitted by a group to the Workers' Compensation

Board might properly be withheld under §87(2)(d). In short, while there is a public interest in knowing that a group is solvent, some of the information transmitted to the Board would, in their view, have no purpose if disclosed other than marketing by competitors. For instance, it is my understanding some of those records include information relating to particular members of a group, items involving contribution rates and insurance experience. I was also informed that, in some cases, the by-laws of a group are unique and analogous to operating procedures, and that they may contain specific information in the nature of workers' compensation history and other items which, if disclosed, could result in an advantage to competitors. Insofar as those contentions are accurate, it appears that portions of the records could be withheld, even after the period of vulnerability to which you referred in your letter.

As you are aware, pursuant to §89(5) of the Freedom of Information Law, a commercial enterprise required to submit records to a state agency may identify those portions of records considered to be deniable under §87(2)(d) at the time of their submission. If the agency accepts the claim made by that entity, it essentially would agree to keep the records confidential. If a request is later made under the Freedom of Information Law, or if the Board, on its own initiative, seeks to disclose records that had been accorded protection, the Board would be required to inform the entity claiming the exemption from disclosure and offer the entity an opportunity to explain why disclosure would "cause substantial injury" to its competitive position. If, following the exhaustion of administrative remedies by either a person seeking the records claimed to be exempt or by the entity claiming the exemption, a judicial proceeding is commenced, it would have to be proven that the records would cause substantial injury to the entity's competitive position if disclosed. The burden would be on the Board if it has denied access based on its agreement with the entity that the records are exempt under §87(2)(d). On the other hand, if the Board believes that the record should be disclosed, the entity would have the burden of proof.

Perhaps guidance regarding the Freedom of Information Law, particularly §§87(2)(d) and 89(5), could be offered to group trusts prior to their submission of documentation to the Board. In my view, any such communication should emphasize that a mere assertion that records are proprietary or confidential is insufficient, that those portions believed to fall within the exception should be identified, and that an exception may not be permanent. As we discussed, with time, often the harmful effects of disclosure described in an exception to rights of access diminish; disclosure of current information concerning a trust's financial condition could be damaging, but disclosure of the same information two years from now may be innocuous.

If you would like to discuss the matter, please feel free to contact me.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Barbara J. Ahern
Thomas J. Gosdeck

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1298

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October 2, 2001

Mr. Steven M. Kilgore
92-B-2135
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. Kilgore:

I have received your letter in which you sought assistance in obtaining your mental health records from the Onondaga County Jail during the period of your incarceration at that facility. You wrote that you submitted requests under the Freedom of Information Law to the mental health records coordinator at the County Jail.

In this regard, I offer the following comments.

Although the Freedom of Information Law provides broad rights of access, the first ground for denial, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute." One such statute is §33.13 of the Mental Hygiene Law, which generally requires that clinical records pertaining to persons receiving treatment in a mental hygiene facility be kept confidential.

However, §33.16 of the Mental Hygiene Law pertains specifically to access to mental health records by the subjects of the records. Under that statute, a patient may direct a request for inspection or copies of his or her mental health records to the "facility", as that term is defined in the Mental Hygiene Law, which maintains the records. If the Onondaga County Jail maintains the records as a facility, I believe that it would be required to disclose the records to you to the extent required by §33.16 of the Mental Hygiene Law. Alternatively, it is possible that the records in

question were transferred when you were placed in a state correctional facility. If that is so, the records may be maintained by a different agency. It is my understanding that mental health "satellite units" that operate within state correctional facilities are such "facilities" and are operated by the New York State Office of Mental Health. Further, I have been advised that requests by inmates for records of such "satellite units" pertaining to themselves may be directed to the Director of Sentenced Services, Bureau of Forensic Services, Office of Mental Health, 44 Holland Avenue, Albany, NY 12229. Lastly, it is noted that under §33.16, there are certain limitations on rights of access.

I hope that I have been of some assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12982

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 2, 2001

Mr. David Donhauser
99-B-1868
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. Donhauser:

I have received your letter in which you sought assistance in obtaining records from the Department of Correctional Services. You wrote that you have not received a response from the appeals officer.

In this regard, the I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, I offer the following comments.

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 [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of 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 of some assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12983

41 State Street, Albany, New York 12231
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October 3, 2001

Mr. Frederick J. Davis
99-A-6213
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. Davis:

I have received your letter in which you sought assistance in obtaining records from the Clinton Correctional Facility. You wrote that the Inmate Records Coordinator, Deborah Jarvis, has refused to waive the cost of fifty cents and provide two pages of requested records at no cost, despite your "status of indigence."

In this regard, I offer the following comments.

While the federal Freedom of Information Act, which applies only to federal agencies, 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 regret that I cannot be of further assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12984

Committee Members

Randy A. Daniels
Mary O. Donohue
Alan Jay Gerson
Gary Lewi
Warren Mitofsky
Wade S. Norwood
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

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October 3, 2001

[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. [redacted]:

I have received your letter in which you referred to difficulty in obtaining your "medical and departmental files" from the Chautauqua County Jail.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of the correspondence, I offer the following comments.

First, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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, by way of background, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Third, with regard to medical records, the Freedom of Information Law, in my view, likely permits that some of those records may be withheld in whole or in part, depending upon their contents. For instance, medical records prepared by Hospital personnel could be characterized as "intra-agency materials" that fall within the scope of §87(2)(g) of the Freedom of Information Law. To the extent that such materials consist of advice, opinion, recommendation and the like, I believe that the Freedom of Information Law would permit a denial.

Nevertheless, a different statute, §18 of the Public Health Law, generally grants rights of access to medical records to the subjects of the records. As such, that statute may provide greater access to medical records than the Freedom of Information Law. It is suggested that you send your request to the hospital and make specific reference to §18 of the Public Health Law when seeking medical records.

To obtain additional information concerning access to medical records and the fees that may be charged for searching and copying those records, you may write to:

Access to Patient Information Program
New York State Department of Health
Hedley Park Place
Suite 303
433 River Street
Troy, NY 12180

Lastly, with regard to the variety of other records you sought, the Freedom of Information Law, again, in my view, likely permits some of those records to be withheld in whole or in part, depending on their contents.

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 persons other than yourself.

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,

David Treacy

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12985

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 4, 2001

Mr. Gilbert Moye
95-A-3034
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. Moye:

I have received your letter in which you sought assistance in obtaining "copies of any and all package lists and commissary receipts" from the Shawangunk Correctional Facility. You wrote that the inmate record coordinator's response indicated that the facility does not have the records you requested and you have not received a response from the appeals officer.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of the correspondence, I offer the following comments.

First, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body,

> who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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 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 for information. In the event that your request does not involve existing records, in my view, the Freedom of Information Law would not apply.

Lastly, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search."

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12986

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October 4, 2001

Mr. Felix Laporte
86-A-2761
Clinton Correctional Facility
P.O. Box 2001
Dannemora, NY 12929

Dear Mr. Laporte:

I have received your letter in which you appealed to this office following a denial of access to records by the office of a district attorney.

In this regard, the Committee on Open Government is authorized to offer advice and opinions concerning the Freedom of Information Law. It is not empowered to determine appeals or compel an agency to grant or deny access to records. The provision pertaining to the right to appeal, §89(4)(a) of the Freedom of Information Law, states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

You wrote that you are interested in obtaining videotaped statements made by prosecution witnesses, but that the office of the district attorney "cites privacy agreements and safety as their reason" for a denial of access. Nevertheless, you added that you have copies of the written statements by the same individuals that were provided to the police, and that you were given assurances years ago that "what was contained in the written statements was the duplicative equivalent of the videotapes."

In this regard, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In 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.

In sum, if indeed the contents of the videotapes are equivalent to the content of written statements previously made available to you, it is doubtful in my view that the district attorney could justify a denial of access. If, however, the contents differ, I believe that the grounds for denial of access described above would be relevant in determining rights of access.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12982

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October 4, 2001

Mr. Scott DeSimone
Attorney at Law
41780 Route 25
Peconic, NY 11958

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. DeSimone:

As you are aware, I have received your letter of September 2 in which you described a series of difficulties in your attempts to gain access to records relating to real property tax assessments in the City of Mount Vernon and raised questions concerning the matter.

In this regard, I offer the following comments.

First, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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 questioned the extent of an appeals officer's jurisdiction when there was no response to an initial request. In my view, the failure to respond initially has no impact on the scope of the appeals officer's determination. In the decision cited above, Floyd, there was no response to an appeal. That being so, the petitioner contended that none of the grounds for denial of access appearing in §87(2) of the Freedom of Information Law could be asserted in a judicial proceeding. The Appellate Division, however, disagreed. In short, I do not believe that the appeals officer is bound by the reasons offered in an initial denial of access or the absence thereof.

Second, you asked whether the facts that you presented "are sufficient to support an award of attorney fees..." Under §89(4)(c) of the Freedom of Information Law, certain conditions must be met before a court can assert its discretionary authority to award attorney's fees. Even if each of those conditions is met, there is no guarantee that a court would make such an award. As such, I cannot conjecture as to the likelihood that an award would be granted.

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.

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 any minor buildings" [Sears Roebuck & Co. v. Hoyt, supra, 758; see also Property Valuation Analysts v. Williams, 164 AD 2d 131 (1990)].

I note that the reasons for which a request is made and an applicant's potential use of records are generally 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 inventory data, different provisions of the Real Property Tax Law offer direction. Section 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, it appears that the inventory could be withheld if it would be used for a commercial or fund-raising purpose.

That is the conclusion, as I interpret the decision, that was reached in 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:jm
cc: Hina Sherwani

STATE OF NEW YORK
DEPARTMENT OF STATE
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October 4, 2001

Mr. James D. Hyde
[redacted]

The staff of the Committee 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. Hyde:

I have received your letters of August 30 and October 1 in which you asked whether this office can "influence" the Office of the State Comptroller to respond to your requests made under the Freedom of Information Law.

In this regard, the Comptroller's records access officer was contacted on your behalf, and I was informed that your request is currently being reviewed by counsel.

With respect to the delay in dealing with your request, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

While an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days, when such acknowledgement is given, there is no precise time period within which an agency must grant or deny access to records. The time needed to do so may be dependent upon the volume of a request, the possibility that other requests have been made, the necessity to conduct legal research, the search and retrieval techniques used to locate the records and the like. In short, when an agency acknowledges the receipt of a request because more than five

business days may be needed to grant or deny a request, so long as it provides an approximate date indicating when the request will be granted or denied, and that date is reasonable in view of the attendant circumstances, I believe that the agency would be acting in compliance with law.

Having reviewed the correspondence attached to your letters, an issue of possible significance involves the extent to you which your request "reasonably describes" the records as required by §89(3) of the Freedom of Information Law. Although some aspects of the request appear to be specific, another involves "communications between" a named individual "or any other Department of Environmental Conservation employee...and any Office of the State Comptroller employee with regard to...." you. I note that it has been held by the Court of Appeals that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

The Court in Konigsberg found that the agency could not reject the request due to its breadth and also stated that:

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency'])" (id. at 250).

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping system. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number.

While I am unfamiliar with the recordkeeping systems of the Office of the State Comptroller, 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 fails to meet the standard of reasonably describing the records, I believe that it may be rejected.

I hope that I have been of assistance and that the foregoing serves to clarify your understanding of the Freedom of Information Law.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Shelly Brown

STATE OF NEW YORK
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October 4, 2001

Mr. Frank Ioli, 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. Ioli:

I have received your letter of August 31. Once again, you have sought assistance concerning your efforts in obtaining certain records from the Village of Mayville.

In this regard, having reviewed the opinion addressed to you on July 23, I do not believe that I can add to the substance of that communication. However, I note that the Freedom of Information Law provides direction concerning the time and manner in which an agency, such as a village, 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 [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body,

> who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of 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 will be of use to you.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees
Charles I. Kelsey

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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October 4, 2001

Ms. Shirley J. Motyl
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Motyl:

I have received your letter of September 4 and the correspondence attached to it. You have sought assistance in relation to your attempts to obtain medical and other records and other items from the Fulton County Department of Social Services and the Nathan Littauer Nursing Home relating to your deceased father.

In this regard, I offer the following comments.

First, for purposes of clarification, the Freedom of Information Law and the other statutes to which you referred pertain to existing records. As a general matter, a government agency is not required to create a record in response to a request. For instance, some aspects of your requests involve "lists." If no such records exist, an agency would not be required to prepare a new record on your behalf that contains the information sought. In a related vein, there is no obligation under the Freedom of Information Law to answer questions. While agency staff may do so, again, that statute deals with records and does not require that official supply information in response to questions. I note, too, that your requests include "the contents of small and large tin boxes." As the child of the deceased, it is possible that you may have the ability to obtain or inspect the contents of those items; nevertheless, the capacity to do so would not be based on laws dealing with records. In short, the boxes and their contents are not records.

Second, the Freedom of Information Law is one among many provisions of law dealing with access to records, and I do not believe that it would govern rights of access in context of the situation described in your requests. By way of background, the Freedom of Information Law, in brief, is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

With respect to records maintained by a social services agency, §87(2)(a) of the Freedom of Information Laws pertains to records that "are specifically exempted from disclosure by state or federal statute." Several statutes within the Social Services Law prohibit public disclosure of records identifiable to either applicants for or recipients of public assistance (see e.g., Social Services Law, §§136 and 372). In my view, because the records in question are exempted from disclosure to the public, the Freedom of Information Law does not govern rights of access to them; rather, any rights of access would be conferred by the Social Services Law and applicable regulations.

With respect to access to case files, state regulations, 18 NYCRR §357.3, provide in relevant part that:

> "(c) Disclosure to applicant, recipient, or persons acting in his behalf.
> (1) The case record shall be available for examination at any reasonable time by the applicant or recipient or his authorized representative upon reasonable notice to the local district. The only exceptions to access are:
>
> > (i) those materials to which access is governed by separate statutes, such as child welfare, foster care, adoption or child abuse or neglect or any records maintained for the purposes of the Child Care Review Services;
> >
> > (ii) those materials being maintained separate from public assistance files for purposes of criminal prosecution and referral to the district attorney's office; and
> >
> > (iii) the county attorney or welfare attorney's files.
>
> (2) Information may be released to a person, a public official, or another social agency from whom the applicant or recipient has requested a particular service when it may properly be assumed that the client has requested the inquirer to act in his behalf and when such information is related to the particular service requested."

Based on the foregoing, if you can be characterized as an "authorized representative" of the subject of a case file, it appears that you would have a right of access to the file.

With respect to medical records, since you referred to §4174 of the Public Health Law, I note that the cited provision deals only with death records. Section 18 of the Public Health Law deals with medical records maintained by both public and private providers of medical care. That statute prohibits disclosure of medical records to all but "qualified persons." Subdivision (1)(g) of §18 defines the phrase "qualified person" to mean:

> "any properly identified subject, committee for an incompetent appointed pursuant to article seventy-eight of the mental hygiene law, or a parent of an infant, a guardian of an infant appointed pursuant to article seventeen of the surrogate's court procedure act or other legally appointed guardian of an infant who may be entitled to request access to a clinical record pursuant to paragraph (c) of subdivision two of this section, or an attorney representing or acting on behalf of the subject or the subjects estate."

To obtain additional information regarding access to medical records, it is suggested that you contact Mr. Peter Farr, NYS Department of Health, Hedley Park, Suite 303, Troy, NY 12180.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Doug Bradt
Jason A. Brott

STATE OF NEW YORK
DEPARTMENT OF STATE
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October 4, 2001

Mr. Michael A. Kless
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Kless:

I have received your letter of August 28 and the materials attached to it. You have asked whether a reply in response to your request under the Freedom of Information Law "stating yes or no is required."

In this regard, the title of the Freedom of Information Law may be misleading, for it is not a vehicle that requires government agency officials to provide information in response to questions. Rather, it is a statute that requires agencies to grant or deny access to records in response to requests for existing records. In short, that statute, in my view, does not require agency staff to provide a "yes or no." Certainly I believe that your requests for the subject matter list and job descriptions involve existing records that must be disclosed. However, I do not believe that County officials are required to answer the question that you raised: "Who is Ms. Sue Quinn."

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: Leonard Lenihan
Frederick A. Wolf

FOIL-AO-12992

From: Robert Freeman
To: [redacted]
Date: 10/9/01 10:21AM
Subject: Dear Mr. Bagge:

Dear Mr. Bagge:

I have received your inquiry concerning the difficulty that you have encountered in obtaining the names of the members of the Board of Directors of the Visiting Nurse Association in Utica directly from the Association.

In this regard, although that organization may choose to disclose the information sought to the public, I know of no law that requires that it must do so.

I note that the Freedom of Information Law is applicable to agency records and that the term "agency" is defined, in brief, to mean an entity of state or local government. Since the Association is not a governmental entity, it would not be subject to or required to comply with the Freedom of Information Law. However, as you suggested, when an agency subject to that statute acquires records from the kind of entity of your interest, the agency would be required to disclose those records in accordance with law.

I hope that the foregoing serves to enhance your understanding of the Freedom of Information Law and that I have been of assistance.

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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October 9, 2001

Mr. Jeffrey Dicks
99-R-7789
Lincoln Correctional Facility
31-33 West 110th Street
New York, NY 10026-4398

Dear Mr. Dicks:

I have received your letter in which you sought a "determination on the appeal of the District Attorney of Queens 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 have the power 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 thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

I hope that the foregoing serves to enhance your understanding of the matter and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
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October 9, 2001

Ms. Rita Randall
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Randall:

I have received your letter of September 11 in which you sought an advisory opinion concerning the procedure for responding to requests apparently implemented by the Warren County Board of Supervisors. In short, you wrote that you visited the office of the Board of Supervisors on September 5 and asked to inspect a certain local law. You were informed that the request must be made and writing and approved by a person identified as Mr. Robillard. He was out of the office that day, and you were told that you would be contacted, perhaps on the next day, at which time you "would have to make another trip to the office to look at the law, if he did in fact approve [your] request."

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 the Board of Supervisors, 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 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..."

In short, the records access officer has the authority and duty to "coordinate" an agency's response to requests. That person need not be present to respond to or approve every request. 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 Mr. Robillard. For instance, if it is clear and established that certain records are always public, such as local laws, 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. 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 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..."

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, thirty days, in view of those and perhaps the other kinds of factors mentioned earlier, might be reasonable. On the other hand, if a record or report is clearly public and can be found easily, there would appear to be no rational basis for delaying disclosure.

Lastly, since you indicated that you completed a form, I do not believe that an agency can require that a request be made on a prescribed form. As indicated earlier, the Freedom of Information Law, §89(3), as well as the regulations promulgated by the Committee (§1401.5), require that an agency respond to a request that reasonably describes the record sought within five business days of the receipt of a request. Further, the regulations indicate that "an agency may require that a request be made in writing or may make records available upon oral request" [§1401.5(a)]. As such, neither the Law nor the regulations refer to, require or authorize the use of standard forms. Accordingly, it has consistently been advised that any written request that reasonably describes the records sought should suffice.

It has also been advised that a failure to complete a form prescribed by an agency cannot serve to delay a response or deny a request for records. A delay due to a failure to use a prescribed form might result in an inconsistency with the time limitations imposed by the Freedom of Information Law. For example, assume that an individual requests a record in writing from an

agency and that the agency responds by directing that a standard form must be submitted. By the time the individual submits the form, and the agency processes and responds to the request, it is probable that more than five business days would have elapsed, particularly if a form is sent by mail and returned to the agency by mail. Therefore, to the extent that an agency's response granting, denying or acknowledging the receipt of a request is given more than five business days following the initial receipt of the written request, the agency, in my opinion, would have failed to comply with the provisions of the Freedom of Information Law.

While the Law does not preclude an agency from developing a standard form, as suggested earlier, I do not believe that a failure to use such a form can be used to delay a response to a written request for records reasonably described beyond the statutory period. However, a standard form may, in my opinion, be utilized so long as it does not prolong the time limitations discussed above. For instance, a standard form could be completed by a requester while his or her written request is timely processed by the agency. In addition, an individual who appears at a government office and makes an oral request for records could be asked to complete the standard form as his or her written request.

In sum, it is my opinion that the use of standard forms is inappropriate to the extent that is unnecessarily serves to delay a response to or deny a request for records.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Supervisors
Mr. Robillard
Marie Edmunds

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3373
FOIL-AO-12995

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October 9, 2001

Donald R. Gerace, Esq.
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Gerace:

I have received your letter of September 6. In your capacity as the attorney for the Oneida-Herkimer-Madison Board of Cooperative Educational Services, you indicated that a member of the Board asked whether voting for officers on the Board should be conducted "by secret ballot, or by a show of hands, i.e., public ballot." You added that the Board follows Roberts Rules of Order, which, according to your letter, "allows for either balloting procedure." You have sought an opinion "as to whether a secret or paper ballot with respect to the election of Board President and Vice President is authorized by the Public Officers Law."

In this regard, first, Roberts Rules of Order do not constitute law, and insofar as such rules are inconsistent with law, I believe that they are superseded.

Second, the Freedom of Information Law, which preceded the passage of the Open Meetings Law, has always included what some have characterized as an "open vote" provision. Section 87(3)(a) provides that:

> "Each agency shall maintain:
>
> (a) a record of the final vote of each member in every agency proceeding in which the member votes..."

Based upon the foregoing, when a final vote is taken by an "agency", which is defined to include a state or municipal board [see §86(3)], such as a BOCES, a record must be prepared that indicates the manner in which each member who voted cast his or her vote. Ordinarily, records of votes will appear in minutes.

In terms of the rationale of §87(3)(a), it appears that the State Legislature in precluding secret ballot voting sought to ensure that the public has the right to know how its representatives may have voted individually with respect to particular issues. Although the Open Meetings Law does not refer specifically to the manner in which votes are taken or recorded, I believe that the thrust of §87(3)(a) of the Freedom of Information Law is consistent with the Legislative Declaration that appears at the beginning of the Open Meetings Law and states that:

> "it is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants."

Moreover, in an Appellate Division decision that was affirmed by the Court of Appeals, it was found that "The use of a secret ballot for voting purposes was improper." In so holding, the Court stated that: "When action is taken by formal vote at open or executive sessions, the Freedom of Information Law and the Open Meetings Law both require open voting and a record of the manner in which each member voted [Public Officers Law §87[3][a]; §106[1], [2]" Smithson v. Ilion Housing Authority, 130 AD 2d 965, 967 (1987); aff'd 72 NY 2d 1034 (1988)]. In addition, in a case that dealt specifically with the election of officers, 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).

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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October 9, 2001

Mr. and Mrs. Eugene Rocco
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. and Mrs. Rocco:

I have received your letter and the materials attached to it. You referred to your continuing efforts to obtain records from the Village of Frankfort and complained that an appeal had not been answered. The records sought involve moneys paid to certain employees of the Village when they retired, including "vacation pay, comp time pay, personal time pay, current and old sick time pay."

For reasons considered in an advisory opinion addressed to you on August 30, I believe that the information sought, insofar as it exists in the form of a record or records, must be disclosed. 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. In addition, each agency shall immediately forward to the committee on open government a copy of such appeal and the ensuing determination thereon."

Based on the foregoing, the person or body that determines appeals must either grant access to the records sought or fully explain in writing the reasons for further denial within ten business days of the receipt of an appeal.

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 hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Fred Pumilio
Sharon Carlesimo

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12997

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October 9, 2001

Mr. Charles G. Theiss
President
Rombout Exempt Fireman's
Benevolent Association
50 Cherry Lane
Fishkill, NY 12524

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence, unless otherwise indicated.

Dear Mr. Theiss:

I have received your letter of September 7 and the correspondence attached to it. You have sought assistance in relation to a request made under the Freedom of Information Law to the State Insurance Department. In a letter to Mr. Michael J. Bridgeford, Principal Account Clerk for the Department, you expressed "concern over diminishing fire tax distributions over the past several years, particularly in view of consistent increases in assessed valuation for [y]our fire district over this same period of time." Consequently, you requested a "five-year summary of fire tax distributions for the Rombout Fire District and for the Village of Fishkill Fire Department..."

In an effort to learn more of the matter, I contacted Mr. Bridgeford and had a lengthy discussion with him. He indicated that he has made available virtually all of the records maintained by the Department relating to your request, including breakdowns dating to 1994. The difficulty, as I understand the matter, is that the Department's records are based solely on reports reflective of total premiums paid to foreign insurance carriers (out of state carriers), which in turn serve as the basis for determining the amount of fire tax paid. Separate and distinct is data consisting of or derived from assessment records. In short, as I understand the matter, the Department's records are not based on assessed valuation, but rather on the payment of premiums. Mr. Bridgeford added that premiums for multi-year policies may in some instances be paid in full at the beginning of the period of coverage, thereby resulting in what may appear to be high or inflated figures one year and low figures in ensuing years.

With respect to the Freedom of Information Law, that statute pertains to existing records, and an agency is not required to create a new record or acquire records on behalf of an applicant in an

effort to supply the information sought. Based on my conversation with Mr. Bridgeford, the Department has satisfied its obligations under the Freedom of Information Law; it does not collect the kind of information or perform the kinds of analyses that appear to be the subjects of your interest.

I hope that the foregoing serves to clarify your understanding of the matter and that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Michael J. Bridgeford
Hon. Stephen Saland
Hon. Patrick Manning

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12998

Committee Members

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October 9, 2001

Scott J. Rubin, Esq.
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Rubin:

I have received your letter of September 6 and the materials attached to it. You have sought an advisory opinion in relation to a denial of access to records by the Long Island Power Authority (LIPA). Some of the records were determined to be "fully exempt from disclosure under Section 87(2)(g) of FOIL, and...'approximately one half of the documents' also would qualify for an exemption under Section 87(2)(d)."

In your first area of inquiry, you questioned the propriety of LIPA's conclusion that "predecisional intra-agency documents" could be withheld in their entirety. In this regard, as you are likely aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. It is emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In my view, the phrase quoted in the preceding sentence evidences a recognition on the part of the Legislature that a single record or report, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld. That being so, I believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

The Court of Appeals expressed its general view of the intent of the Freedom of Information Law in a decision cited in your letter, 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.).

LIPA has apparently engaged in a blanket denial of access with respect to several records. While I am not suggesting that the records sought must be disclosed in full, based on the direction given by the Court of Appeals, the records must be reviewed by the LIPA 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).

With specific respect to the exception 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.

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 in Gould dealt with the issue of what constitutes "factual data" that must be disclosed under §87(2)(g)(i). In its consideration of the matter, the Court found that:

> "...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][i]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182) id., 276-277).]

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, unless a different exception may properly be asserted.

Second, you asked whether it is proper for LIPA to deny access to records that it prepares based on §87(2)(d), the "trade secret" exception to rights of access. In the determination of your

appeal, it was stated that the records at issue "set forth LIPA's proprietary forecasts of future electric market prices, fuel costs, and the costs of operating the Nine Mile Point Two plant", that the "electricity market in which LIPA participates as both a buyer and seller is highly competitive", that "competitors could not obtain this information elsewhere", and that, therefore, "release of these documents is not required..."

While LIPA, as a government 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 electricity 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 LIPA is engaged in competition with private firms engaged in the same area of commercial activity, I believe that §87(2)(d) could 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.

Relevant to the analysis is a decision rendered by the Court of Appeals, 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 contemplated as part of FOIA's principal aim of promoting openness in government (id., 419-420)."

In consideration of the foregoing, insofar as the records involve LIPA as a participant in a competitive market and would, if disclosed, cause substantial injury to its competitive position, they may, in my view, be withheld. It is emphasized, however, as in the case of the discussion of intra-agency materials, that LIPA is required to review the records in their entirety to determine which portions of the records may justifiably be withheld.

Lastly, you asked whether it is "proper for LIPA to deny access to documents, but fail to provide a list of those documents to which it denied access." While §89(4)(a) of the Freedom of Information Law requires that an agency "fully explain in writing...the reasons for further denial", there is nothing in the statute or its judicial construction that would require that such a list be prepared. A requirement of that nature has been imposed under the federal Freedom of Information Act, which may involve the preparation of a so-called "Vaughn index" [see Vaughn v. Rosen, 484 F.2D 820 (1973)]. Such an index provides an analysis of documents withheld by an agency as a means of justifying a denial and insuring that the burden of proof remains on the agency. Again, I am unaware of any decision involving the New York Freedom of Information Law that requires the preparation of a similar index. Further, one decision suggests the preparation of that kind of analysis might in some instances subvert the purpose for which exemptions are claimed. In that decision, an inmate requested records referring to him as a member of organized crime or an escape risk. In affirming a denial by a lower court, the Appellate Division found that:

> "All of these documents were inter-agency or intra-agency materials exempted under Public Officers Law section 87(2)(g) and some were materials the disclosure of which could endanger the lives or safety of certain individuals, and thus were exempted under Public Officers Law section 87(2)(f). The failure of the respondents and the Supreme Court, Westchester County, to disclose the underlying facts contained in these documents so as to establish that they did not fall 'squarely within the ambit of [the] statutory exemptions' (Matter of Farbman & Sons v. New York City Health and Hosps. Corp., 62 NY 2d 75, 83; Matter of Fink v. Lefkowitz, 47 NY 2d 567, 571), did not constitute

error. To make such disclosure would effectively subvert the purpose of these statutory exemptions which is to preserve the confidentiality of this information" [Nalo v. Sullivan, 125 AD 2d 311, 312 (1987)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Seth D. Hulkower
Stanley B. Klimberg

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12999

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October 9, 2001

Hon. George L. Cooke
Sullivan County Clerk
Sullivan County Government Center
Monticello, NY 12701

Dear Mr. Cooke:

I have received your letter in which you sought advice relating to a request pursuant to §255 of the Judiciary Law for certain items relating to a divorce proceeding.

In this regard, as you are aware, the primary function of this office involves offering advice and opinions concerning the Freedom of Information Law. That statute, in my view, is not pertinent in the context of your inquiry.

By way of brief background, the Freedom of Information is applicable to agency records, and §86(3) of that statute defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines the term "judiciary" to mean:

> "the courts of the state, including any municipal or district court, whether or not of record."

Based on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law may grant broad public access to those records.

Notwithstanding the foregoing, I offer the following comments.

The provision cited in the request, §255 of the Judiciary Law, generally provides that records maintained by the clerk of a court must be made available. However, a separate statute deals directly with records concerning divorce and other matrimonial actions or proceedings. Specifically, I believe that access to records relating to matrimonial proceedings is governed by §235(1) of the Domestic Relations Law, which states that:

> "An officer of the court with whom the proceedings in a matrimonial action or a written statement of separation or an action or proceeding for custody, visitation or maintenance of a child are filed, or before whom the testimony is taken, or his clerk, either before or after the termination of the suit, shall not permit a copy of any of the pleadings, affidavits, findings of act, conclusions of law, judgment of dissolution, written agreement of separation or memorandum thereof, or testimony, or any examination of perusal thereof, to be taken by any other person than a party, or the attorney or counsel of a party, except by order of the court."

Based on the foregoing, as a general matter, the details of a matrimonial proceeding are considered confidential.

As you are likely aware, subdivision (3) of §235 states that:

> "Upon the application of any person to the county clerk or other officer in charge of public records within a county for evidence of the disposition, judgment or order with respect to a matrimonial action, the clerk or other such officer shall issue a 'certification of disposition', duly certifying the nature and effect of such disposition, judgment or order and shall in no manner evidence the subject matter of the pleadings, testimony, findings of fact, conclusions of law or judgment of dissolution derived in any such action."

While any person may request a "certification of disposition" which indicates that a divorce has been granted, I believe that other records involving separation and divorce are exempt from disclosure, except as provided in subdivision (1) of §235.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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October 9, 2001

Mr. Roman Kevilly
97-A-0654
Oneida Correctional Facility
P.O. Box 4580
Rome, NY 13440-4580

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. Kevilly:

I have received your letter in which you sought assistance in obtaining copies of oaths of office for several judges and a district attorney, which may be filed in the Nassau County Clerk's Office. You wrote that you have not received a response to your Freedom of Information Law request from that office.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of the correspondence, 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 [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body,

> who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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 applicable to agency records, and §86(3) defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines the term "judiciary" to mean:

> "the courts of the state, including any municipal or district court, whether or not of record."

Based on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law (see e.g., Judiciary Law, §255) may grant broad public access to those records. Even though other statutes may deal with access to court records, the procedural provisions associated with the Freedom of Information Law (i.e., those involving the designation of a records access officer or the right to appeal a denial) would not ordinarily be applicable.

County clerks perform a variety of functions some of which involve county records that are subject to the Freedom of Information Law and others of which involve records held in the capacity as court clerk. If the records in question may be considered as "agency records", I believe that the Freedom of Information Law would govern. On the other hand, if the records are kept by the clerk acting in his or her capacity as a clerk of a court, the Freedom of Information Law would not in my opinion apply. Moreover, it is likely that, under those circumstances, the provisions of §8020 of the Civil Practice Law and Rules, entitled "County clerks as clerks of a court" would govern the fees that may be assessed for copies.

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

FOIL-AO-13001

From: Robert Freeman
To: [redacted]
Date: 10/11/01 12:22PM
Subject: Dear Ms. Mosser:

Dear Ms. Mosser:

I have received your letter in which you asked whether "a school board must release to the public a document as part of a public meeting under correspondence agenda items." You wrote that the board acknowledged the receipt of a letter from its counsel in public, and that the letter "supposedly contained guidelines for the board in conducting its tuition negotiations during public and closed meetings."

In this regard, there is nothing in the Open Meetings Law or the Freedom of Information Law that would necessarily require that an item of correspondence referenced during an open meeting be made available. In short, the nature and contents of the correspondence would determine whether or the extent to which those records must be disclosed under the Freedom of Information Law.

In the context of your inquiry, if the letter in question consists of legal advice rendered by the attorney to the board, I believe that it would be exempt from disclosure, for it would fall within the scope of the attorney-client privilege. However, if, for example, a portion of that letter is read aloud at an open meeting, that portion would be accessible, for the privilege would have been waived.

In an effort to provide further clarification via examples, if the PTA sent a letter to the board regarding a bake sale at the upcoming middle school concert, the letter would be public; none of the grounds for a denial of access appearing in the Freedom of Information Law would apply. If you wrote to the Board regarding the educational program of your child, the board could not disclose it to the public without your consent due to confidentiality requirements imposed by federal law. Again, the reference to an item of correspondence alone does not make the correspondence public; the nature of the correspondence is the determining factor in considering whether or the extent to which a document is public or, conversely, may be withheld.

The text of open government laws and a variety of materials relating them are available via the website identified below, and you might find them to be useful.

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-13002

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 11, 2001

Mr. William Cherry
Schoharie County Treasurer
P.O. Box 9
Schoharie, NY 12157

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence, unless otherwise indicated.

Dear Mr. Cherry:

I have received your letter of September 10 in which you referred to an advisory opinion of August 30 addressed to Stanley France, the Director of Data Processing for Schoharie County. In brief, based on the information provided by Mr. France, it was advised that software developed by the County constitutes a "record" subject to the Freedom of Information Law and that it must be disclosed.

In his letter to me, Mr. France indicated that the software was developed "partially with grant money" and "partially with county funds." You wrote, however, that the grant money totaled just over $37,000, while the County's funding was nearly $827,000. Additionally, Mr. France wrote that the software was or would be developed "with the intent that it be freely shared with other counties." Nevertheless, you wrote that the software in question was offered in an RFP process initiated by Albany County, and that Albany County in fact selected the software at issue. In consideration of the information that you have offered, you asked whether my opinion would change.

Two points were made in the opinion of August 30. First, it was advised that software constitutes a "record" that falls within the coverage of the Freedom of Information Law, and I continue to believe that to be so. Second, it was also advised that the Freedom of Information Law is based on a presumption of access and that none of the grounds for a denial of access would apply "based on the facts that [Mr. France] presented." It was suggested, however, that when a government agency "acts, in essence, as a competitor with private entities", §87(2)(d) might serve as a basis for withholding. While Mr. France inferred that the County would not be acting as competitor in a marketplace with private entities, according to your letter, that is not so. Based on the information that you have provided, the exception cited above might be asserted as a means of a denying a request for the software if it is sought under the Freedom of Information Law.

As indicated in the opinion addressed to Mr. France, §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."

It was also stated that when a government agency carries out certain of its functions as an entity in competition with private firms, there is precedent stating that 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).

For purposes of offering guidance concerning the scope of §87(2)(d) and by way of background, 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.

Perhaps most relevant 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 contemplated as part of FOIA's principal aim of promoting openness in government (id., 419-420)."

In sum, if it can be concluded that the software developed by Schoharie County is being used as a commercial product in a competitive market, it would appear that it might justifiably be withheld pursuant to §87(2)(d).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Stanley France

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13003

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 11, 2001

Mr. Mike Henriquez
96-A-2731
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. Henriquez:

I have received your letter in which you appealed a denial of access to records by the Jacobi Hospital and the Office of the Chief Medical Examiner of New York City.

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 render determinations on appeal or otherwise compel an agency to grant or deny access to records. The provision dealing with the right to appeal, §89(4)(a) of the Freedom of Information Law, states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

I am unaware of whether Jacobi Hospital is a private or a governmental entity. If it is not part of government of the state or the City of New York, its records would not be subject to the Freedom of Information Law. It is also noted that medical records pertaining to a person other than yourself may be withheld under the Freedom of Information Law on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see §89(2)(b)]. Moreover, medical records are generally confidential under §18 of the Public Health Law and may be disclosed only to those characterized in that statute as "qualified persons." If your request involves autopsy reports,

I point out that such reports maintained by the Office of the Chief Medical Center are exempt from disclosure under the Freedom of Information Law [see e.g., Mullady v. Bogard, 583 NYS2d 744 (1992)].

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-13004

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 12, 2001

Mr. David Nicholson
[redacted]

Dear Mr. Nicholson:

I have received your letter of October 10 addressed to my assistant, Janet Mercer. While it may be more efficient to gain access to a certificate of incorporation directly from a corporation, that kind of entity is not required to comply with the Freedom of Information Law.

That statute is applicable to agency records, and §86(3) defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, the Freedom of Information Law, in brief, is applicable to records maintained by entities of state and local government in New York. Similarly, the federal Freedom of Information Act is applicable to records maintained by federal agencies.

I hope that the foregoing serves to clarify your understanding of the application 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-13005

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 16, 2001

Ms. Janice Mortimer Pennington
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Pennington:

I have received your letter of September 11and the materials attached to it. You have sought an opinion concerning a denial of your request for a photograph of an employee of the Erie County Department of Health.

It had been advised on July 24 in an opinion addressed to you that, except in rare instances, photographs of public employees used for purposes of identification must be disclosed, for there is nothing intimate or personal about the photograph in that circumstance. The exception that was cited pertained to the situation in which a law enforcement employee is involved in undercover or similar work and disclosure would endanger his or her life or safety. In that instance, §87(2)(f) of the Freedom of Information Law might justifiably be cited as a basis for a denial of access. In the letter denying your request, it was stated that the subject of the photo "performed an autopsy on a homicide victim in 1992", that your husband "was accused of fatally wounding the victim" and that the subject of the photo "testified for the prosecution in the trial against your husband." That person and his attorney have expressed concern that disclosure of the photo could place him "at risk of imminent personal harm", and the County cited the provision referenced above as the basis for its denial of access.

In this regard, in a case in which a defendant sought materials from the office of a district attorney that ordinarily could be withheld under the Freedom of Information Law, it was determined that "once the [records] have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public" [Moore v. Santucci, 151 AD2d 677,679 (1989)]. While the record at issue was not used in evidence in a public judicial proceeding, it appears that the principle expressed above would be applicable, that the photo of a public employee who testified at a public proceeding during which any person could have been present and seen his face should be accessible, except perhaps in extraordinary circumstances. In my view, those

circumstances might involve a situation in which a threat has been made or, again, where a person works undercover or in a manner in which his or identity could, if disclosed, jeopardize that person's safety. On the other hand, if the subject of the photo frequently testifies at public proceedings, which often is so when he or she performs autopsies, that person's identity is effectively made known, and I do not believe that a denial of access to his or her photo could be justified.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Leon I. Nadler
Carl J. Calabrese

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13006

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 16, 2001

Mr. Theodore Howard
76-A-2921
Woodbourne Correctional Facility
Box 1000
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. Howard:

I have received your letter in which you sought an opinion regarding the availability of "parole summaries prepared for parole release hearings." According to your correspondence, Part I of parole summaries is provided to inmates prior to their parole hearings, but Freedom of Information Law requests for "Part II of the summary" are being denied.

Since I am unfamiliar with the contents of "Part II" of a parole summary, I cannot conjecture as to their availability. However, I offer the following general comments.

The regulations promulgated by the Division of Parole state, in relevant part, that you may obtain "those portions of the case record which will be considered by the board or authorized hearing officer or pursuant to an administrative appeal of a final decision of the board..." [9 NYCRR §8000.5(c)(2)(i)]. The exceptions described in the regulations are, in my view, consistent with the grounds for withholding records appearing in §87(2) of the Freedom of Information Law. For instance, diagnostic opinions could likely be withheld under §87(2)(g) of the Freedom of Information Law; records identifying sources of information obtained upon a promise of confidentiality could likely be withheld under §87(2)(b) or (e)(iii); information which if disclosed would endanger the life or safety of any person could be withheld pursuant to §87(2)(f); and pre-sentence reports and memoranda are exempt from disclosure pursuant to §390.50 of the Criminal Procedure Law and, therefore, §87(2)(a) of the Freedom of Information Law.

In short, if the Division has disclosed the records to be considered at the hearing that are not exempt form disclosure, I believe that the response was consistent with law. Otherwise, however, the Division, in my opinion, would be required to disclose all other records to be considered at the hearing that are not deniable under the regulations or the Freedom of Information Law.

Lastly, you inquired as to whether certain provisions of a "parole manual" are still in effect. Since I have no knowledge of the manual, it is suggested that you seek guidance from the Division of Parole.

I hope that I have been of some assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

FOIL-AO-13007

From: Robert Freeman
To: [redacted]
Date: 10/16/01 4:43PM
Subject: Dear Mr. Hemminger:

Dear Mr. Hemminger:

With respect to your question concerning email sent by a mayor at his home two trustees and the clerk regarding issues relating to the local fire department, I believe that the email constitutes a "record" that falls within the coverage of the Freedom of Information Law.

The kind of communication to which you referred would be treated in the same manner as an inter-office memorandum appearing on paper. In terms of rights of access, in brief, those portions of the email communications between or among the officials to whom you referred consisting of advice, opinion, recommendation and the like could be withheld. Other aspects of the communications, such as statistical or factual information, would likely be available. In short, as in the case of paper records, the content of email communications determines the extent to which they must be disclosed or, conversely, may be withheld.

It is suggested that you log on to our website identified below and click on to "publications". One of the items there is an article dealing with email in relation to both the Freedom of Information Law and the Open Meetings Law.

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
(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-13008

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 17, 2001

Mr. Grant Williams
98-A-2077
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. Williams:

I have received your letter in which you sought assistance in obtaining records from the Richmond County District Attorney's Office.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of the correspondence, I offer the following comments.

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 [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of 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 of some assistance.

Sincerely,

David Treacy

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13009

41 State Street, Albany, New York 12231
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October 17, 2001

Mr. Herbert McGriff
91-A-7595
Washington Correctional Facility
P.O. Box 180
Comstock, NY 12821-0180

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. McGriff:

I have received your letter in which you requested an opinion as to the availability of a "Parole Master Index" and revocation guidelines in effect prior to 1997. Upon review of the attachments to your correspondence, it is noted that the Division of Parole denied your request because it does not "maintain out of date regulations or a 'Master Index'."

In this regard, I offer the following comments. The phrase "master index" is used in the regulations promulgated by the Department of Correctional Services, and I do not believe that it is used by any other agency. The "master index" is the record also known as "subject matter list."

By way of background, I point out that the Freedom of Information Law pertains to existing records and that §89(3) of that statute states in part that an agency is not required to create records in response to requests. Therefore, insofar as the records of your interest do not exist, the Freedom of Information Law would not apply. However, §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.

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13010

41 State Street, Albany, New York 12231
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Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 17, 2001

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.

I have received your inquiry in which you sought guidance concerning a delay by the New York City Department of Environmental Protection in responding to your request for records.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which an agency 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 [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of 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: Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13011

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 17, 2001

Mr. Emanuel Cooper
94-A-1266
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. Cooper:

I have received your letter in which you sought assistance in obtaining records from the Metropolitan Transportation Authority (MTA) relating to a homicide at a train station. You wrote that the response you received acknowledged receipt of your request and indicated that the MTA would "have the documents shortly." However, despite three additional letter to the MTA, you have received no further response.

From my perspective, although the MTA acknowledged the receipt of your requests, it may not have fully complied with the requirements of the Freedom of Information Law. In this regard, I offer the following comments.

As you are aware, §89(3) of the Freedom of Information Law provides in relevant part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

It has been held that agency officials "did not conform to the mandates" of the provision quoted above "when they did not...furnish a written acknowledgement of the receipt of...requests *along with a statement of the approximate date when action would be taken*" [Newton v. Police Department, 585 NYS2d 5, 8, 183 AD2d 621 (1992), emphasis added]. In the context of your correspondence, the acknowledgement of receipt of your request did not include an approximate date indicating when access would be granted or denied. Further, no determinations had been made as of the date of your letter to this office.

In a case that described an experience similar to yours, the court cited §89(3) ~~of~~ the Freedom of Information Law and wrote that:

> "The acknowledgement letters in this proceeding neither granted nor denied petitioner's request nor approximated a determination date. Rather, the letters were open ended as to time as they stated, 'that a period of time would be required to ascertain whether such documents do exist, and if they did, whether they qualify for inspection.
>
> "This court finds that respondent's actions and/or inactions placed petitioner in a "Catch 22" position. The petitioner, relying on the respondent's representation, anticipated a determination to her request...this court finds that this petitioner should not be penalized for respondent's failure to comply with Public Officers Law §89 (3), especially when petitioner was advised by respondent that a decision concerning her application would be forthcoming.
>
> It should also be noted that petitioner did not sit idle during this period but rather made numerous efforts to obtain a decision from respondent including the submission of a follow up letter to the Records Access Officer and submission of various requests for said records with the Department of Transportation" (Bernstein v. City of New York, Supreme Court, Supreme Court, New York County, November 7, 1990).

In Bernstein, the court determined that the agency "is estopped from asserting that this proceeding is improper due to petitioner's failure to appeal the denial of access to records within 30 days to the agency head, as provided in Public Officers Law, §89(4)(a)."

Based on the foregoing, I believe that your request has been constructively denied and that you may appeal the denial pursuant to §89(4)(a). That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reason for further denial, or provide access to the record sought."

Alternatively, based on the holding in Bernstein, it appears that you could seek judicial review of the denials now. I suggest, however, that you appeal in an effort to avoid the time and cost of litigation.

Lastly, while I am unfamiliar with the contents of the records or the effects of their disclosure, it is noted as a general matter that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. It is likely in my view that portions of records relating to a homicide may be withheld.

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

cc: Victoria Clement, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13012

41 State Street, Albany, New York 12231
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October 18, 2001

Mr. Robert Rose
95-A-4297
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. Rose:

I have received your letter in which you sought assistance relating to a Freedom of Information Law request and explained that you have not received response to similar requests previously directed to the New York City Police Department. You also requested "information on where to obtain the proper form to request documents."

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of the correspondence, I offer the following comments.

First, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body,

> who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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, there is no particular form that must be used when seeking records under the Freedom of Information Law. So long as a written request reasonably describes the records as required by §89(3), it should be adequate.

Lastly, in an effort to assist you, enclosed is a copy of "Your Right to Know" which includes a sample letter of request.

I hope that I have been of assistance.

Sincerely,

David Treacy

David M. Treacy
Assistant Director

DMT:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13013

41 State Street, Albany, New York 12231
(518) 474-2518
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October 18, 2001

Mr. Anthony Roundtree
93-B-2335
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. Roundtree:

I have received your letters in which you sought assistance in obtaining a variety of records from the City of Niagara Falls Police Department and the Niagara County Clerk's Office. Your requests refer to the federal Freedom of Information and the Privacy Acts.

It is noted that the federal Freedom of Information and Privacy Acts apply only to records maintained by federal agencies; they do not apply to entities of state and local government in New York. The statute most pertinent in this instance is the New York Freedom of Information Law.

Based on a review of the correspondence, I offer the following comments.

First, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. While some aspects of the records sought might properly be withheld, relevant is a decision by the Court of Appeals concerning complaint follow up reports and police officers' memo books in which it was held that a denial of access based on their characterization as intra-agency materials would be inappropriate.

The provision at issue, §87(2)(g) of the Freedom of Information Law, enables an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

In its analysis of the matter, the decision states that:

> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter

of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)...

"...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][i]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182).

"Against this backdrop, we conclude that the complaint follow-up reports contain substantial factual information available pursuant to the provisions of FOIL. Sections of the report are devoted to such purely factual data as: the names, addresses, and physical descriptions of crime victims, witnesses, and perpetrators; a checklist that indicates whether the victims and witnesses have been interviewed and shown photos, whether crime scenes have been photographed and dusted for fingerprints, and whether neighborhood residents have been canvassed for information; and a blank space denominated 'details' in which the officer records the particulars of any action taken in connection with the investigation.

"However, the Police Department argues that any witness statements contained in the reports, in particular, are not 'factual' because there is no assurance of the statements' accuracy and reliability. We decline to read such a reliability requirement into the phrase 'factual data', as the dissent would have us do, and conclude that a witness statement constitutes factual data insofar as it embodies a factual account of the witness's observations. Such a statement, moreover, is far removed from the type of internal government exchange sought to be protected by the intra-agency exemption (see, Matter of Ingram v. Axelrod, 90 AD2d 568, 569 [ambulance records, list of interviews, and reports of interviews available under FOIL as 'factual data']). By contrast, any impressions, recommendations, or opinions recorded in the complaint follow-up report would not constitute factual data and would be exempt from disclosure. The holding herein is only that these reports are not categorically exempt as intra-agency material. Indeed, the Police Department is entitled to withhold complaint follow-up reports, or specific portions thereof, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" [Gould, Scott and DeFelice v. New York City Police

> Department, 653 NYS2d 54, 89 NY2d 267 (1996); emphasis added by the Court].

Based on the foregoing, neither the Police Department nor an office of a district attorney can claim that complaint follow up reports can be withheld in their entirety on the ground that they constitute intra-agency materials. However, the Court was careful to point out that other grounds for denial might apply in consideration of those records, as well as others that you requested.

For instance, of potential significance is §87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". That provision might be applicable relative to the deletion of identifying details in a variety of situations, i.e., where a record identifies a confidential source or a witness, for example.

Often the most relevant provision concerning access to records maintained by law enforcement agencies is §87(2)(e), which permits an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in sub-paragraphs (i) through (iv) of §87(2)(e).

Another possible ground for denial is §87(2)(f), which permits withholding to the extent that disclosure "would endanger the life or safety of any person". The capacity to withhold on that basis is dependent upon the facts and circumstances concerning an event.

Third, in a decision concerning a request for records maintained by the office of a district attorney that would ordinarily be exempted from disclosure under the Freedom of Information Law, it was held that "once the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public" [see Moore v. Santucci, 151 AD 2d 677, 679 (1989)]. Based upon that decision, it appears that records introduced into evidence or disclosed during a public judicial proceeding should be available.

However, in the same decision, it was also found that:

> "...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The

> respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

Another provision of law pertinent to your request for records relating to a particular police officer is §50-a of the Civil Rights Law. In brief, that statute provides that personnel records of police and correction officers that are used to evaluate performance toward continued employment or promotion are confidential. The Court of Appeals, the State's highest court, in reviewing the legislative history leading to its enactment, has held that the exemption from disclosure conferred by §50-a of the Civil Rights Law "was designed to limit access to said personnel records by criminal defense counsel, who used the contents of the records, including unsubstantiated and irrelevant complaints against officers, to embarrass officers during cross-examination" [Capital Newspapers v. Burns, 67 NY2d 562, 568 (1986)]. In another decision which dealt with unsubstantiated complaints against correction officers, the Court of Appeals held that the purpose of §50-a "was to prevent the release of sensitive personnel records that could be used in litigation for purposes of harassing or embarrassing correction officers" [Prisoners' Legal Services v. NYS Department of Correctional Services, 73 NY 2d 26, 538 NYS 2d 190, 191 (1988)]. The Court in an opinion rendered earlier this year reiterated its view of §50-a, citing that decision and stating that:

> "...we recognized that the decisive factor in determining whether an officer's personnel record was exempted from FOIL disclosure under Civil Rights Law § 50-a was the potential use of the information contained therein, not the specific purpose of the particular individual requesting access, nor whether the request was actually made in contemplation of litigation.
>
> > 'Documents pertaining to misconduct or rules violations by corrections officers – which could well be used in various ways against the officers – are the very sort of record which *** was intended to be kept confidential. *** The legislative purpose underlying section 50-a *** was *** to protect the officers from the use of records *** as a means for harassment and reprisals and for the purpose of cross-examination' (73 NY2d, at 31 [emphasis supplied])" (Daily Gazette v. City of Schenectady, 93 NY2d 145, 156- 157 (1999)].

In consideration of the foregoing, I believe that portions of the records of your interest would be exempt from disclosure pursuant to §50-a of the Civil Rights Law.

In regard to your request directed to the Niagara County Clerk, it is noted that the New York Freedom of Information Law is applicable to agency records, and §86(3) defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or

> proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines the term "judiciary" to mean:

> "the courts of the state, including any municipal or district court, whether or not of record."

Based on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law (see e.g., Judiciary Law, §255) may grant broad public access to those records. Even though other statutes may deal with access to court records, the procedural provisions associated with the Freedom of Information Law (i.e., those involving the designation of a records access officer or the right to appeal a denial) would not ordinarily be applicable.

An office of a district attorney, or a police or sheriff's department, would clearly constitute an "agency" required to comply with the Freedom of Information Law. However, I note that in Moore v. Santucci [151 AD 2d 677(1989)], it was found that the office of a district attorney "is not required to make available for inspection or copying any suppression hearing or trial transcripts of a witness' testimony in its possession, because the transcripts are court records, not agency records" (id. at 680).

County clerks perform a variety of functions, some of which involve county records that are subject to the Freedom of Information Law, others of which may be held in the capacity as clerk of a court. An area in which the distinction between agency records and court records may be significant involves fees. Under the Freedom of Information Law, an agency may charge up to twenty-five cents per photocopy, "except when a different fee is otherwise prescribed by statute". In the case of fees that may be assessed by county clerks, §§8018 through 8021 of the Civil Practice Law and Rules require that county clerks charge certain fees in their capacities as clerks of court and other than as clerks of court. Since those fees are assessed pursuant to statutes other than the Freedom of Information Law, the fees may exceed those permitted by the Freedom of Information Law. Section 8019 of the Civil Practice Law and Rules provides in part that "The fees of a county clerk specified in this article shall supersede the fees allowed by any other statute for the same services...".

Lastly, you wrote that because of your incarceration "the first two hundred copies are free." In this regard, I note that while the federal Freedom of Information 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,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13014

41 State Street, Albany, New York 12231
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October 22, 2001

Mr. Lenward Breedlove
[redacted]

Dear Mr. Breedlove:

Your letter of August 24 addressed to Attorney General Spitzer has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State, is authorized to provide advice and opinions concerning the Freedom of Information Law. You have sought assistance relating to an unanswered request for records made to the Town of Gates. Based on a review of the correspondence sent to this office, I offer the following comments.

First, one of the items refers to the request being made under the Freedom of Information Act, 5 USC §552. That statute is federal, and it applies only to federal agencies. The statute dealing with rights of access to records of entities of state and local government in New York is this state's Freedom of Information Law, Public Officers Law, Article 6, §§84 to 90.

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 [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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 letter will be sent to the Town Clerk.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Richard A. Warner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13015

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October 22, 2001

Mr. Alan Campbell
99-B-1515
Marcy Correctional Facility
Box 3600
Marcy, NY 13403-3600

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Campbell:

I have received your letter in which you sought assistance with respect to several Freedom of Information Law requests to various agencies. You wrote that you have not received responses from most of these agencies.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of the correspondence, 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 [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body,

> who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

With respect to a response in which it was stated that your "request could not be granted because it is non-specific", it appears that the issue may involve whether the records sought were "reasonably described" as required by §89(3) of the Freedom of Information Law. In my view, whether a request reasonably describes the records sought is dependent upon the terms of the request and the agency's filing system. It is suggested that you resubmit your request and provide sufficient detail to enable agency officials to locate the records.

I hope that I have of some assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13016

41 State Street, Albany, New York 12231
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October 22, 2001

Mr. Peter L. Rattley
85-B-1075
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. Rattley:

I have received your letter in which you sought assistance in obtaining records from the Department of Correctional Services. You wrote that you received some of the requested records but that they were not "certified." In addition, your "request for the original grievance complaint and the grievance investigation report" was "denied since the information is personal and confidential in nature."

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records.

With respect to your request for records that are certified, I believe that an agency is required, on request, to provide the kind of certification envisioned by §89(3) of the Freedom of Information Law. That provision states in relevant part that, in response to a request for a record, "the entity shall provide a copy of such record and certify to the correctness of such copy if so requested..." From my perspective, the certification required by the Freedom of Information Law does not involve an assertion that the contents of a record are accurate, but rather that a copy of a record made available in response to a request is a true copy.

In consideration of your request for a grievance complaint and investigative report, since I am unfamiliar with the contents of those records, I cannot conjecture as to their availability. However, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

If the grievance complaint you sought was filed by someone other than yourself, in my view, portions of the record may be withheld insofar as disclosure would constitute an unwarranted invasion of personal privacy under §87(2)(b). In relation to a grievance complaint you filed and the investigative report, it is my view that the records could be withheld only to the extent that they would fall within a different ground for denial appearing in the Law.

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13017

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 22, 2001

Mr. Mario Zanghi
96-A-5881
Elmira Correctional Facility
P.O. Box 500
Elmira, NY 14902

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Zanghi:

I have received your letter in which you sought an advisory opinion concerning a denial of your request for records by the Erie County District Attorney's Office. You wrote that the reason for the denial is that the agency is not obligated to provide documents that were already sent to you or your attorney. You have appealed the denial "on the basis that the foregoing reasons do not fall within the exemptions permitted under the N.Y. Public Officers Law §87(2)."

In this regard, I offer the following comments.

You are correct in your assertion that the above mentioned basis for denial does not appear in any of the grounds for denial listed in the Freedom of Information Law. However, in a court decision concerning a request for records maintained by an office of a district attorney, it was held 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" [Moore v. Santucci, 151 AD2d 677, 678 (1989)].

In consideration of the foregoing, it is suggested that you contact your attorney for records previously provided by the District Attorney's Office.

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13018

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 22, 2001

Mr. Zachary Villa
95-A-4597
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. Villa:

I have received your letter in which you sought assistance in obtaining your medical records. You wrote that you have not received responses from the Queens Hospital Center, Nassau University Medical Center, Hempstead General Hospital and Mercy Medical Center.

In this regard, if a facility is a governmental entity, its records would be subject to the Freedom of Information Law. I would conjecture, however, that in consideration of their names, some of the facilities are not governmental. In those instances, the Freedom of Information Law would not apply.

Assuming that the Freedom of Information applies, in terms of rights granted by that statute, it is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

With regard to medical records, the Freedom of Information Law, in my view, likely permits that some of those records may be withheld in whole or in part, depending upon their contents. For instance, medical records prepared by Hospital personnel could be characterized as "intra-agency materials" that fall within the scope of §87(2)(g) of the Freedom of Information Law. To the extent that such materials consist of advice, opinion, recommendation and the like, I believe that the Freedom of Information Law would permit a denial.

Nevertheless, a different statute, §18 of the Public Health Law, generally grants rights of access to medical records maintained by hospitals (public or private) or physicians to the subjects of the records. As such, that statute may provide greater access to medical records than the Freedom

of Information Law. It is suggested that you send your request to the hospitals and make specific reference to §18 of the Public Health Law when seeking medical records.

To obtain additional information concerning access to medical records and the fees that may be charged for searching and copying those records, you may write to:

Access to Patient Information Program
New York State Department of Health
Hedley Park Place
Suite 303
433 River Street
Troy, NY 12180

I hope that I have been of some assistance.

Sincerely,

David Treacy

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
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FOIL-AO-13019

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 24, 2001

Mr. Mike Henriquez
96-A-2731
Box 149
Attica, NY 14011-0149

Dear Mr. Henriquez:

I have received your letter in which you cited the Freedom of Information Law as your basis for requesting "information on how to go about procuring" certain medical records pertaining to a person other than yourself, as well as examinations of the deceased performed by the Medical Examiner.

From my perspective, your request in actuality seeks guidance rather than records; it is not, in my view, a request made under or consistent with the Freedom of Information Law. Nevertheless, I offer the following comments.

First, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Second, with respect to both medical records and those prepared in relation to a death by the Medical Examiner, relevant is §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute.

Section 18 of the Public Health Law deals specifically with access to patient records. In brief, that statute prohibits disclosure of medical records to all but "qualified persons." Subdivision (1)(g) of §18 defines the phrase "qualified person" to mean:

> "any properly identified subject, committee for an incompetent appointed pursuant to article seventy-eight of the mental hygiene law, or a parent of an infant, a guardian of an infant appointed pursuant to article seventeen of the surrogate's court procedure act or other legally appointed guardian of an infant who may be entitled to request access to a clinical record pursuant to paragraph (c) of subdivision two of this section, or an attorney representing or acting on behalf of the subject or the subjects estate."

If you are not a "qualified person", I believe that the medical records of your interest would be exempt from disclosure. To obtain additional information regarding access to patient information, it is suggested that you contact Mr. Peter Farr, NYS Department of Health, Hedley Park, Suite 303, Troy, NY 12180.

When an autopsy report or other record of an examination of a death is prepared in New York City by the Office of the Chief Medical Examiner, it has been held that §557(g) of the New York City Charter has the effect of a statute and that it exempts those records from the Freedom of Information Law [see Mullady v. Bogard, 583 NYS 2d 744 (1992); Mitchell v. Borakove, Supreme Court, New York County, NYLJ, September 16, 1994]. I note that in Mitchell, the court found that the applicant was "not making his request merely as a public citizen" under the Freedom of Information Law, "But, rather, as someone involved in a criminal action that may be affected by the content of these records and thereby has a substantial interest in them." On the basis of Mitchell, it would appear that your ability to gain access to autopsy reports and related records in question would be dependent upon your capacity to demonstrate that you have a substantial interest in the records in accordance with §557(g) of the New York City Charter.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13020

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 26, 2001

Ms. Charlene M. Lathrop
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Lathrop:

I have received your letter of September 10, as well as the correspondence attached to it. You have sought assistance concerning unanswered requests for records pertaining to your son made under the Freedom of Information Law to Utica College and Marcellus High School.

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 mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, in brief, entities of state and local government in New York fall within the coverage of the Freedom of Information Law. Therefore, while a public school district would be subject to that statute, a private institution, such as a private college or university, would not. I believe that Utica College is a private institution, and if that is so, it would not be required to comply with the Freedom of Information Law.

Second, when a request is made to an agency, such as a school district, 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 [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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 suggested in the attachments to your letter, also relevant may be the Family Educational Rights and Privacy Act, also known as "FERPA" (20 USC §1232g). FERPA applies to all educational agencies or institutions that participate in funding, loan or grant programs administered by the United States Department of Education. As such, FERPA includes within its scope virtually all public educational institutions and many private educational institutions. The focal point of the Act is the protection of privacy of students. It provides, in general, that any "education record," a term that is broadly defined, that is personally identifiable to a particular student or students is confidential, unless the parents of students under the age of eighteen waive their right to confidentiality, or unless a student eighteen years or over similarly waives his or her right to confidentiality. The federal regulations promulgated under FERPA define the phrase "personally identifiable information" to include:

> "(a) The student's name;
> (b) The name of the student's parents or other family member;
> (c) The address of the student or student's family;
> (d) A personal identifier, such as the student's social security number or student number;
> (e) A list of personal characteristics that would make the student's identity easily traceable; or
> (f) Other information that would make the student's identity easily traceable" (34 CFR Section 99.3).

Based upon the foregoing, references to students' names or other aspects of records that would make a student's identity easily traceable must in my view be withheld from the public in order to comply with federal law. Concurrently, if a parent of a student requests records pertaining to his or her child, the parent ordinarily will have rights of access to those portions of records that are personally identifiable to their children. Upon reaching the age of eighteen, students acquire the rights of their parents.

It is unclear on the basis of your correspondence whether your son is or has enrolled at Utica College. If he is not or has not been enrolled at the College, it my understanding that FERPA would not apply. Again, that statute pertains to educational records identifiable to students, and the regulations implementing FERPA define the term "student" to mean:

> "... any individual who is or has been in attendance at an educational agency or institution and regarding whom the agency or institution maintains education records" (34 CFR 99.3).

Attached for your review is a copy of an opinion rendered by this office that may be useful to you, for it deals with the application of and the relationship between the Freedom of Information Law and FERPA.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Office of Admissions, Utica College

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13021

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 26, 2001

Mr. Benjamin Arnold
86-A-4777
Mid-Orange Correctional Facility
900 Kings Highway
Warwick, NY 10990

Dear Mr. Arnold:

I have received your letter of October 23 in which you appealed a denial of access to records by the New York City Police Department on the ground that the Department failed to respond to your request.

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. Nevertheless, in an effort to provide guidance, I offer the following comments.

The Freedom of Information Law contains direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

For your information, the person designated to determine appeals at the Department is Leo Callahan, Records Access Appeals Officer.

I hope that the foregoing serves to enhance your understanding of the Freedom of Information Law and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13022

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 29, 2001

Ms. Donna I. Kianka
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Kianka:

I have received your letter in which you sought my views concerning a response by the North Shore School District to your request for records pertaining to your daughter. You wrote that the District offered no "concrete reason" for her rejection from a certain program, and that you then sought records, some of which you read, including "written statements from the principal and from her teacher at the time..." In response to the request, you were informed that the records "were not in her file", that they are not available to parents, and that they might have been destroyed.

From my perspective, three provisions of law are pertinent to an analysis of the situation that you described. In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to all agency records, such as those maintained by or for a school district. Specifically, that statute pertains to agency records and defines the term "record" expansively to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

The Court of Appeals, the State's highest court, has construed the definition as broadly as its specific language suggests. The first such decision that dealt squarely with the scope of the term

"record" involved documents pertaining to a lottery sponsored by a fire department. Although the agency contended that the documents did not pertain to the performance of its official duties, i.e., fighting fires, but rather to a "nongovernmental" activity, the Court rejected the claim of a "governmental versus nongovernmental dichotomy" [see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581 (1980)] and found that the documents constituted "records" subject to rights of access granted by the Law. Moreover, the Court determined that:

> "The statutory definition of 'record' makes nothing turn on the purpose for which it relates. This conclusion accords with the spirit as well as the letter of the statute. For not only are the expanding boundaries of governmental activity increasingly difficult to draw, but in perception, if not in actuality, there is bound to be considerable crossover between governmental and nongovernmental activities, especially where both are carried on by the same person or persons" (id.).

In another decision rendered by the Court of Appeals, the Court focused on an agency claim that it could "engage in unilateral prescreening of those documents which it deems to be outside of the scope of FOIL" and found that such activity "would be inconsistent with the process set forth in the statute" [Capital Newspapers v. Whalen, 69 NY 2d 246, 253 (1987)]. The Court determined that:

> "...the procedure permitting an unreviewable prescreening of documents - which respondents urge us to engraft on the statute - could be used by an uncooperative and obdurate public official or agency to block an entirely legitimate request. There would be no way to prevent a custodian of records from removing a public record from FOIL's reach by simply labeling it 'purely private.' Such a construction, which would thwart the entire objective of FOIL by creating an easy means of avoiding compliance, should be rejected" (id., 254).

Further, in a case involving notes taken by the Secretary to the Board of Regents that he characterized as "personal" in conjunction with a contention that he took notes in part "as a private person making personal notes of observations...in the course of" meetings. In that decision, the court cited the definition of "record" and determined that the notes did not consist of personal property but rather were records subject to rights conferred by the Freedom of Information Law [Warder v. Board of Regents, 410 NYS 2d 742, 743 (1978)].

Second, significant under the circumstances is the Family Education Rights and Privacy Act (20 U.S.C. §1232g), which is commonly known as "FERPA". In brief, FERPA applies to all educational agencies or institutions that participate in funding, loan or grant programs administered by the United States Department of Education. As such, FERPA includes within its scope virtually all public educational institutions and many private educational institutions. The focal point of the Act is the protection of privacy of students. It provides, in general, that any "education record," a term that is broadly defined, that is personally identifiable to a particular student or students is

confidential, unless the parents of students under the age of eighteen waive their right to confidentiality, or unless a student eighteen years or over similarly waives his or her right to confidentiality. The federal regulations promulgated under FERPA define the phrase "personally identifiable information" to include:

> "(a) The student's name;
> (b) The name of the student's parents or other family member;
> (c) The address of the student or student's family;
> (d) A personal identifier, such as the student's social security number or student number;
> (e) A list of personal characteristics that would make the student's identity easily traceable; or
> (f) Other information that would make the student's identity easily traceable" (34 CFR Section 99.3).

Based upon the foregoing, references to students' names or other aspects of records that would make a student's identity easily traceable must in my view be withheld from the public in order to comply with federal law. Concurrently, if a parent of student requests records pertaining to his or her child, the parent ordinarily will have rights of access to those portions of records that are personally identifiable to their children.

I point out that the federal regulations exclude from the definition of "education records" :

> "Records of instructional, supervisory, and administrative personnel and educational personnel ancillary to those persons that are kept in the sole possession of the maker of the record, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record..." [34 CFR 99.3(b)(1)].

Therefore, if, for example, an administrator or teacher prepares notes of a meeting and does not share or disclose the notes to any other person, FERPA would not apply. In that scenario, even though FERPA would not apply to the notes, due to the breadth of the definition of "record" in the Freedom of Information Law, the notes would fall within the scope of that statute. In brief, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Assuming that the Freedom of Information Law governs rights of access rather than FERPA, two of the grounds for denial would likely be pertinent to an analysis of rights of access to notes or similar records. Section 87(2)(b) permits an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." If, for instance, a parent requests notes and the notes include reference to several students, I believe that a school district could withhold those portions pertaining to the students other than the child or children of the person making the request in order to protect privacy.

The other provision of significance is §87(2)(g), which permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

If notes taken at a meeting merely consist of a factual rendition of what was said or what transpired, they would consist of factual information available under §87(2)(g)(i), except to the extent that a different ground for denial could be asserted [i.e., §87(2)(b) concerning the protection of privacy]. Insofar as notes might include expressions of opinion, or conjecture on the part of the author, they would fall within the scope of the exception.

Third, the Freedom of Information Law does not deal with the retention, disposal or destruction of records. Relevant with respect to that issue in my view is the "Local Government Records Law", Article 57-A of the Arts and Cultural Affairs Law, which deals with the management, custody, retention and disposal of records by local governments. For purposes of those provisions, §57.17(4) of the Arts and Cultural Affairs Law defines "record" to mean:

> "...any book, paper, map, photograph, or other information-recording device, regardless of physical form or characteristic, that is made, produced, executed, or received by any local government or officer thereof pursuant to law or in connection with the transaction of public business. Record as used herein shall not be deemed to include library materials, extra copies of documents created only for convenience of reference, and stocks of publications."

With respect to the retention and disposal of records, §57.25 of the Arts and Cultural Affairs Law states in relevant part that:

> "1. It shall be the responsibility of every local officer to maintain records to adequately document the transaction of public business and the services and programs for which such officer is responsible; to retain and have custody of such records for so long as the records are needed for the conduct of the business of the office; to adequately protect such records; to cooperate with the local government's records management officer on programs for the orderly and efficient management of records including identification and management of inactive records and identification and preservation of records of enduring value; to dispose of records in accordance with legal requirements; and to pass on to his successor records needed for the continuing conduct of business of the office...
>
> 2. No local officer shall destroy, sell or otherwise dispose of any public record without the consent of the commissioner of education. The commissioner of education shall, after consultation with other state agencies and with local government officers, determine the minimum length of time that records need to be retained. Such commissioner is authorized to develop, adopt by regulation, issue and distribute to local governments retention and disposal schedules establishing minimum retention periods..."

In view of the foregoing, records cannot be destroyed without the consent of the Commissioner of Education, and local officials cannot destroy or dispose of records until the minimum period for the retention of the records has been reached. I note that the provisions relating to the retention and disposal of records are carried out by a unit of the State Education Department, the State Archives and Records Administration. It is suggested that you might contact that agency to seek guidance regarding the destruction of records.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer
Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13023

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October 29, 2001

Mr. Herminio Maldonado
00-A-2159
Mohawk Correctional Facility
P.O. Box 8451
Rome, NY 13442

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Maldonado:

I have received your letter in which you described difficulty in attempting to obtain your "grievance records from Marcy Correctional Facility." It is not clear whether you requested those records from your current facility or from Marcy Correctional Facility. You have sought assistance in obtaining the records and requested this office to "monitor the FOIL program" of both facilities.

In this regard, the Committee on Open Government is authorized to provide information concerning the Freedom of Information Law. The Committee is not empowered to enforce the Freedom of Information Law or compel an agency to grant or deny access to records. Nevertheless, in an effort to provide guidance, I offer the following comments.

First, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests and appeals. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges

that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

While I am unfamiliar with the contents of "grievance records", it is likely that portions of the records sought, to the extent that they exist, should be made available. Assuming that the records were transferred with you to your facility, it is suggested that the request be made to the facility superintendent or his designee.

I hope that I have been of some assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13024

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 30, 2001

Bob and Jenny Petrucci
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. and Mrs. Petrucci:

As you are aware, I have received your letter in which you asked what may be "a reasonable amount of time" for an agency to determine to grant or a deny a request for records following its acknowledgment that the request has been received. You questioned specifically whether thirty or perhaps as much as sixty days would be reasonable.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

While an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days, when such acknowledgement is given, there is no precise time period within which an agency must grant or deny access to records. The time needed to do so may be dependent upon the volume of a request, the possibility that other requests have been made, the necessity to conduct legal research, the search and retrieval techniques used to locate the records and the like. In short, when an agency acknowledges the receipt of a request because more than five business days may be needed to grant or deny a request, so long as it provides an approximate date indicating when the request will be granted or denied, and that date is reasonable in view of the attendant circumstances, I believe that the agency would be acting in compliance with law.

Notwithstanding the foregoing, in my view, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible.*" Therefore, if records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a lengthy delay in disclosure. As the Court of Appeals has asserted:

> "...the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objectives cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" [Westchester News v. Kimball, 50 NY 2d 575, 579 (1980)].

Further, in my opinion, if, as a matter of practice or policy, an agency acknowledges the receipt of requests and indicates in every instance that it will determine to grant or deny access to records "within thirty days" or some other particular period, following the date of acknowledgement, such a practice or policy would be contrary to the thrust of the Freedom of Information Law. If a request is voluminous and a significant amount of time is needed to locate records and review them to determine rights of access, thirty days, in view of those and perhaps the other kinds of factors mentioned earlier, might be reasonable. On the other hand, if a record or report is clearly public and can be found easily, there would appear to be no rational basis for delaying disclosure for as much as thirty days. In a case in which it was found that an agency's "actions demonstrate an utter disregard for compliance set by FOIL", it was held that "[t]he records finally produced were not so voluminous as to justify any extension of time, much less an extension beyond that allowed by statute, or no response to appeals at all" (Inner City Press/Community on the Move, Inc. v. New York City Department of Housing Preservation and Development, Supreme Court, New York County, November 9, 1993).

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13025

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October 30, 2001

Mr. Bebatt Smith
00-A-5225
Marcy Correctional Facility
Box 3600
Marcy, NY 13403-3600

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Smith:

I have received your letter in which you requested "action" to be taken on your Freedom of Information Law request because you have not received a response from the Queens General Hospital.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of the correspondence, I offer the following comments.

In this regard, if a facility is a governmental entity, its records would be subject to the Freedom of Information Law. That statutes provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body,

> who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Assuming that the Freedom of Information applies, in terms of rights granted by that statute, it is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

With regard to medical records, the Freedom of Information Law, in my view, likely permits that some of those records may be withheld in whole or in part, depending upon their contents. For instance, medical records prepared by Hospital personnel could be characterized as "intra-agency materials" that fall within the scope of §87(2)(g) of the Freedom of Information Law. To the extent that such materials consist of advice, opinion, recommendation and the like, I believe that the Freedom of Information Law would permit a denial.

Nevertheless, a different statute, §18 of the Public Health Law, generally grants rights of access to medical records to the subjects of the records, whether the records are maintained by a governmental facility or a private facility. As such, that statute may provide greater access to medical records than the Freedom of Information Law. It is suggested that you send your request to the hospital and make specific reference to §18 of the Public Health Law when seeking medical records.

To obtain additional information concerning access to medical records and the fees that may be charged for searching and copying those records, you may write to:

> Access to Patient Information Program
> New York State Department of Health
> Hedley Park Place
> Suite 303
> 433 River Street
> Troy, NY 12180

I hope that I have of some assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13026

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October 30, 2001

Mr. Blake Wingate
00-A-2160
Fishkill Correctional Facility
Box 1245
Beacon, NY 12508

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Wingate:

I have received your letter in which you asked that this office investigate correction officers at your facility that have acted inappropriately. It also appears that you are interested in obtaining personnel records of correction officers.

In this regard, the Committee on Open Government is authorized to provide advice relating to public access to government records, primarily under the Freedom of Information Law. The Committee does not have the authority to conduct investigations concerning the conduct of public employees. It is suggested that you contact the proper officials at the Department of Correctional Services in relation to your allegations.

With respect to access to personnel records, by way of background, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

The first ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §50-a of the Civil Rights Law. In brief, that statute provides that personnel records of police and correction officers that are used to evaluate performance toward continued employment or promotion are confidential. The Court of Appeals, the State's highest court, in reviewing the legislative history leading to its enactment, has held that the exemption from disclosure conferred by §50-a of the Civil Rights Law "was designed to limit access to said personnel records by criminal defense counsel, who used the contents of the records, including unsubstantiated and irrelevant complaints against officers, to embarrass officers during

cross-examination" [Capital Newspapers v. Burns, 67 NY2d 562, 568 (1986)]. In another decision which dealt with unsubstantiated complaints against correction officers, the Court of Appeals held that the purpose of §50-a "was to prevent the release of sensitive personnel records that could be used in litigation for purposes of harassing or embarrassing correction officers" [Prisoners' Legal Services v. NYS Department of Correctional Services, 73 NY 2d 26, 538 NYS 2d 190, 191 (1988)]. The Court in an opinion rendered in 1999 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 consideration of the foregoing, it appears that the records of your interest would be exempt from disclosure pursuant to §50-a of the Civil Rights Law.

I regret that I cannot be of greater assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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November 1, 2001

Mr. Ronald Davidson
76-A-1166
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. Davidson:

I have received your letter in which you sought an advisory opinion regarding the denial of your appeal for materials "consisting, in your words, of "an alleged message from a John Mosher, M.D. to an employee(s) of the DOCS concerning a scheduled surgery that was cancelled, etc." Your appeal was denied pursuant to §87(2)(g) of the Freedom of Information Law.

Since I am unfamiliar with the contents of the records sought, I cannot conjecture as to their availability. However, I offer the following general comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Second, the provision cited as the basis for denial deals with "inter-agency and intra-agency materials." In this regard, §86(3) of the Freedom of Information Law defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, the exception pertains to communications between or among state or local government officials at two or more agencies ("inter-agency materials"), or communications between

or among officials at one agency ("intra-agency materials"). If the record sought consists of a communication sent to the Department by a physician who is not an agency employee or consultant, it would not constitute inter-agency or intra-agency material, and the exception cited by the Department, in my view, would not apply.

If, however, §87(2)(g) is applicable, it permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13028

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November 1, 2001

Mr. Shamgod Thompson
01-B-0848
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. Thompson:

I have received your letter in which you sought assistance in locating a variety of records related to a crime for which you were convicted in Wayne County.

In this regard, I offer the following comments.

First, pursuant to the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), each agency is required to designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests. It is suggested that you direct your request to the appropriate police 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. While some aspects of the records sought might properly be withheld, relevant is a decision by the Court of Appeals concerning complaint follow up reports and police officers' memo books in which it was held that a denial of access based on their characterization as intra-agency materials would be inappropriate.

The provision at issue, §87(2)(g) of the Freedom of Information Law, enables an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

In its analysis of the matter, the decision states that:

"...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)...

"...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][i]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of

Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182).

"Against this backdrop, we conclude that the complaint follow-up reports contain substantial factual information available pursuant to the provisions of FOIL. Sections of the report are devoted to such purely factual data as: the names, addresses, and physical descriptions of crime victims, witnesses, and perpetrators; a checklist that indicates whether the victims and witnesses have been interviewed and shown photos, whether crime scenes have been photographed and dusted for fingerprints, and whether neighborhood residents have been canvassed for information; and a blank space denominated 'details' in which the officer records the particulars of any action taken in connection with the investigation.

"However, the Police Department argues that any witness statements contained in the reports, in particular, are not 'factual' because there is no assurance of the statements' accuracy and reliability. We decline to read such a reliability requirement into the phrase 'factual data', as the dissent would have us do, and conclude that a witness statement constitutes factual data insofar as it embodies a factual account of the witness's observations. Such a statement, moreover, is far removed from the type of internal government exchange sought to be protected by the intra-agency exemption (see, Matter of Ingram v. Axelrod, 90 AD2d 568, 569 [ambulance records, list of interviews, and reports of interviews available under FOIL as 'factual data']). By contrast, any impressions, recommendations, or opinions recorded in the complaint follow-up report would not constitute factual data and would be exempt from disclosure. The holding herein is only that these reports are not categorically exempt as intra-agency material. Indeed, the Police Department is entitled to withhold complaint follow-up reports, or specific portions thereof, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" [Gould, Scott and DeFelice v. New York City Police Department, 653 NYS2d 54, 89 NY2d 267 (1996); emphasis added by the Court].

Based on the foregoing, neither the Police Department nor an office of a district attorney can claim that complain follow up reports can be withheld in their entirety on the ground that they constitute intra-agency materials. However, the Court was careful to point out that other grounds for denial might apply in consideration of those records, as well as others that you requested.

For instance, of potential significance is §87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". That provision might be applicable relative to the deletion of identifying details in a variety of situations, i.e., where a record identifies a confidential source or a witness, for example.

Often the most relevant provision concerning access to records maintained by law enforcement agencies is §87(2)(e), which permits an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in sub-paragraphs (i) through (iv) of §87(2)(e).

Another possible ground for denial is §87(2)(f), which permits withholding to the extent that disclosure "would endanger the life or safety of any person". The capacity to withhold on that basis is dependent upon the facts and circumstances concerning an event.

In a decision concerning a request for records maintained by the office of a district attorney that would ordinarily be exempted from disclosure under the Freedom of Information Law, it was held that "once the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public" [see Moore v. Santucci, 151 AD 2d 677, 679 (1989)]. Based upon that decision, it appears that records introduced into evidence or disclosed during a public judicial proceeding should be available.

However, in the same decision, it was also found that:

> "...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to

> demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

Lastly, with regard to the availability of a "911 report", I note that §87(2)(a) relates to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §308(4) of the County Law, which states that:

> "Records, in whatever form they may be kept, of calls made to a municipality's E911 system shall not be made available to or obtained by any entity or person, other than that municipality's public safety agency, another government agency or body, or a private entity or a person providing medical, ambulance or other emergency services, and shall not be utilized for any commercial purpose other than the provision of emergency services."

I hope that I have been of some assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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November 1, 2001

Mr. Steven Brantley
96-A-8069
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. Brantley:

I have received your letter in which you questioned "how much information the public" may know about your criminal history and "how much the public can find out about sex charges" concerning "levels 1, 2, and 3."

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 a person is convicted, the record of the conviction is generally available to the public from the clerk of the court in which the proceeding was conducted.

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.

With respect to records related to "levels 1, 2 and 3" sex offenders, issues involving the disclosure of those records are governed by the "Sex Offenders Registration Act" (hereafter "the Act"), Article 6-C of the Correction Law, also know as "Megan's Law."

By way of brief background, subdivision (1) of §168-b of the Act directs the Division of Criminal Justice Services to "establish and maintain a file of individuals required to register" under the Act and includes guidelines concerning the content of what is characterized as the "registry." Although the Act does not specifically define the term "registry", subdivision (1) of §168-b of the Correction Law states that:

> "The division shall establish and maintain a file of individuals required to register pursuant to the provisions of this article which shall include the following information of each registrant:
>
> (a) The sex offender's name, all aliases used, date of birth, sex, race, height, weight, eye color, driver's license number, home address and/or expected place of domicile.
>
> (b) A photograph and set of fingerprints.
>
> (c) A description of the offense for which the sex offender was convicted, the date of conviction and the sentence imposed.
>
> (d) Any other information deemed pertinent by the division."

Further, the first and last sentences of subdivision (2) provide that:

> "The division is authorized to make the registry available to any regional or national registry of sex offenders for the purpose of sharing information...The division shall require that no information included in the registry shall be made available except in the furtherance of the provisions of this article."

Based on the foregoing, it is clear in my view that the information described in paragraphs (a) through (d) ofsubdivision (1) comprises the content of and is the registry, and that information contained in the registry may be made available only in accordance with the provisions of the Act.

While the Freedom of Information Law deals generally with access to records, agencies' obligations to disclose records, and their ability to deny access, according to the rules of statutory construction (see McKinney's Statutes, §32), the different or "special" statute prevails when such a statute pertains to particular records. Since information contained in the registry may be disclosed only in furtherance of the Act, the Freedom of Information Law, in my view, does not apply to that information.

Certain aspects of the contents of the registry are forwarded to local government agencies in conjunction with notification requirements imposed upon the "Board of Examiners of Sex Offenders" pursuant to §168-l of the Act. In subdivision (6) of that provision, reference is made to "three levels of notification...depending upon the degree of the risk of re-offense by the sex offender."

Paragraph (a) of §168-l(6) provides that "[i]f the risk of repeat offense is low, a level one designation shall be given to such sex offender." In that instance, certain law enforcement agencies are notified. Paragraph (b) states that "[i]f the risk of repeat offense is moderate, a level two designation shall be given..." Pursuant to paragraph (c), "[i]f the risk of repeat offense is high and there exists a threat to the public safety, such sex offender shall be deemed a 'sexually violent predator' and a level three designation shall be given..." In both of those instances, local law enforcement agencies are authorized to disclose various kinds of information pertaining to sex offenders to entities, such as school districts. Those entities "may disclose or further disseminate such information at their discretion."

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13030

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November 1, 2001

Mr. Carlos Weeks
95-A-4115
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. Weeks:

I have received your letter in which you requested "the name and title of the person who may be in charge of information at Brookdale Hospital." You wrote that the hospital has not responded to your request. You also requested the name of an individual whom you may direct "a request for the informant's mental history."

In this regard, I offer the following comments.

First, the statute within the Committee's advisory jurisdiction, the Freedom of Information Law, pertains to records maintained by governmental entities; that statute does not apply to private entities, such as a private hospital. Consequently, a private hospital is not required to respond to a Freedom of Information Law request.

Second, another statute, §33.13 of the Mental Hygiene Law generally prohibits the disclosure of clinical records maintained by mental health providers to the public.

I regret that I cannot be of greater assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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41 State Street, Albany, New York 12231
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November 1, 2001

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear

I have received your letter of October 11 in which you sought guidance concerning your right to obtain various kinds of records pertaining to your children.

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 mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, while records of a county, city or a school district, for example, would constitute agency records, those maintained by a private entity, such as a private hospital or physician, would fall outside the coverage of the Freedom of Information Law.

Second, most of the records of your interest cannot be disclosed to the public under the Freedom of Information Law or other provisions of law. However, as a parent of minor children, you might have rights of access to 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 grounds for denial appearing in §87(2)(a) through (i) of the Law. Relevant in the context of your inquiry is §87(2)(a), the first ground for denial. That provision

pertains to records that "are specifically exempted from disclosure by state or federal statute." The kinds of records to which you referred are exempt from disclosure to the public at large, but again, it is possible that they may be accessible to you as a parent of minor children.

Relevant with respect to school records identifiable to your children is the Family Education Rights and Privacy Act (20 U.S.C. §1232g), which is commonly known as "FERPA". In brief, FERPA applies to all educational agencies or institutions that participate in funding, loan or grant programs administered by the United States Department of Education. As such, FERPA includes within its scope virtually all public educational institutions and many private educational institutions. The focal point of the Act is the protection of privacy of students. It provides, in general, that any "education record," a term that is broadly defined, that is personally identifiable to a particular student or students is confidential, unless the parents of students under the age of eighteen waive their right to confidentiality, or unless a student eighteen years or over similarly waives his or her right to confidentiality. 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 his or her children.

Section 18 of the Public Health Law deals specifically with access to medical or patient records. In brief, that statute prohibits disclosure of medical records to all but "qualified persons." Subdivision (1)(g) of §18 defines the phrase "qualified person" to mean:

> "any properly identified subject, committee for an incompetent appointed pursuant to article seventy-eight of the mental hygiene law, or a parent of an infant, a guardian of an infant appointed pursuant to article seventeen of the surrogate's court procedure act or other legally appointed guardian of an infant who may be entitled to request access to a clinical record pursuant to paragraph (c) of subdivision two of this section, or an attorney representing or acting on behalf of the subject or the subjects estate."

To obtain additional information regarding access to patient information, it is suggested that you contact Mr. Peter Farr, NYS Department of Health, Hedley Park, Suite 303, Troy, NY 12180.

Lastly, §33.13 of the Mental Hygiene Law prohibits mental health facilities from disclosing clinical records pertaining to a patient or client. A different statute, however, deals directly with rights of access to mental health records by the subject of those records or other "qualified persons." Specifically, §33.16 of the Mental Hygiene Law provides rights of access to clinical mental health records, with certain exceptions, to "qualified persons." I note that the right of a qualified person to obtain records is not absolute, for subdivision (c)(1) of §33.16 provides that such records may be withheld insofar 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..."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13032

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November 1, 2001

Mr. Peter Bauer
Executive Director
Residents' Committee to Protect
the Adirondacks
P.O. Box 27
North Creek, NY 12853-0027

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Bauer:

I have received your letter of October 2. You wrote that the organization that you represent "has been researching building permit data from towns in the Adirondack Park" and that requests were made for permits issued in 2000 by those towns and villages in the Park. Although you were able to obtain the records sought from some 100 towns and villages, three have failed to grant access to the records. In your requests, you specified that, in lieu of copies of the building permits themselves, you would accept information from a municipality indicating the number of permits issued and their nature, i.e., residential, commercial or industrial.

You have asked that I inform the municipalities that have not granted access "of their responsibility to provide this information." I will do so by transmitting copies of this response to them. 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 section 87(2)(a) through (i) of the Law. In my view, a building permit or permits should ordinarily be disclosed, for none of the grounds for denial would apply.

As a general matter, when records are accessible under the Freedom of Information Law, it has been held that they should be made equally available to any person, regardless of one's status, interest or the intended use of the records [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Moreover, the Court of Appeals, the State's highest court, has held that:

> "FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on government decision-making, its ambit is not confined to records actually used in the decision-making process. (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request" [Farbman v. New York City Health and Hospitals Corporation, 62 NY 2d 75, 80 (1984)].

The only exception to the principles described above involves one provision pertaining to the protection of personal privacy. By way of background, §87(2)(b) of the Freedom of Information Law permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." 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)].

Based upon your request, and particularly the option to provide figures rather than actual permits, it is clear that your requests would not have involved the use or preparation of a list of names and addresses for a commercial or fund-raising purpose. That being so, I do not believe that any ground for denial of access would be applicable.

Second, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Again, in an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this opinion will be forwarded to the municipalities that have not provided the information sought.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Anthony Glebus
Hon. Dale French
Hon. Roger Hassler

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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November 1, 2001

Mr. Robert F. Reninger
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Reninger:

I have received your letter in which you wrote that the "Town of Greenburgh insisting that Town does not need to hold an appeal hearing because they have verbally told [you] documents are lost, missing or destroyed." It is your view that the Town's response is "wrong", and you sought my opinion concerning the matter.

From my perspective, if indeed records are "lost, missing or destroyed", the Town's response would not be "wrong." When a person seeks a record under the Freedom of Information Law, and an agency possesses the record but chooses to withhold it, it denies access and the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. A denial of access to a record must be based on one or more of the exceptions to rights of access appearing in §87(2). If, however, a record cannot be found, if it is not maintained by or for an agency, or if it no longer exists, an agency would not be informing the applicant that it is withholding the record on the basis of an exception to rights of access; no denial of access to a record maintained and retrieved by an agency would have occurred, and consequently, in my view, there would be no right to appeal.

In the situation at issue, rather than pursuing an appeal, the applicant could seek a certification pursuant to §89(3). Under that provision, the applicant may request a certification in writing in which the agency asserts that the record is not maintained by the agency, or that the agency could not locate that record after having made a diligent search.

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 Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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November 1, 2001

Mr. John M. Condon
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Condon:

I have received your letter of October 10 in which you asked that I "overturn" a denial of access to a record by the Town of East Fishkill.

According to your letter, you were:

> "denied access to the environmental information relative to a parcel of land currently owned by the IBM Corporation that the Town of East Fishkill desires to use for park purposes. The Town Supervisor indicated during a public meeting that the report stated that the area was not contaminated. This was in spite of the fact that a tanker truck provides drinking water to the facility and there are signs that read 'Don't drink the water'.
>
> "The grounds of this denial were listed as 'interagency' and not subject to FOIL until such time as negotiations regarding the issue are complete. I did not ask for any information regarding the negotiations, only the environmental aspects of the report."

You added that the denial of your request did not advise you of the right to appeal the denial. Nevertheless, you appealed to the Town Board on September 13. As of the date of your letter to this office, however, no determination had been made.

In this regard, it is emphasized at the outset that 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 "overturn" an agency's grant or denial of access to records or otherwise compel an agency to comply with law. However, in an effort to assist you, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

As you 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 a decision rendered by the Court of Appeals, the state's highest court, was that certain reports could be withheld because they are not final and because they relate to incidents for which no final determination had been made. The Court of Appeals rejected that finding and stated that:

> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter

> of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)..." [Gould et al. v. New York City Police Department, 87 NY2d 267, 276 (1996)].

In short, that a record is "predecisional" or "non-final" would not represent an end of an analysis of rights of access or an agency's obligation to review the contents of a record.

The Court also dealt with the issue of what constitutes "factual data" that must be disclosed under §87(2)(g)(i). In its consideration of the matter, the Court found that:

> "...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][i]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182) id., 276-277).]

In my view, insofar as the record at issue consists of recommendations, advice or opinions, for example, it may be withheld; insofar as it consists of statistical or factual information, I believe that it 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).

Second, when a person is denied access to records, that person has the right to appeal. Section 89(4)(a) of the Freedom of Information Law states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Further, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), which govern the procedural aspects of the Law, state that:

> "(a) The governing body of a public corporation or the head, chief executive or governing body of other agencies shall hear appeals or shall designate a person or body to hear appeals regarding denial of access to records under the Freedom of Information Law.
>
> (b) Denial of access shall be in writing stating the reason therefor and advising the person denied access of his or her right to appeal to the person or body established to hear appeals, and that person or body shall be identified by name, title, business address and business telephone number. The records access officer shall not be the appeals officer" (§1401.7).

It is noted that the state's highest court has held that a failure to inform a person denied access to records of the right to appeal enables that person to seek judicial review of a denial. Citing the Committee's regulations and the Freedom of Information Law, the Court of Appeals in Barrett v. Morgenthau held that:

> "[i]nasmuch as the District Attorney failed to advise petitioner of the availability of an administrative appeal in the office (see, 21 NYCRR 1401.7[b]) and failed to demonstrate in the proceeding that the procedures for such an appeal had, in fact, even been established (see, Public Officers Law [section] 87[1][b], he cannot be heard to complain that petitioner failed to exhaust his administrative remedies" [74 NY 2d 907, 909 (1989)].

In sum, an agency's records access officer has the duty individually, or in that person's role of coordinating the response to a request, to inform a person denied access of the right to appeal as well as the name and address of the person or body to whom an appeal may be directed.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this opinion will be sent to Town officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Hon. Dorothy Mekeel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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November 1, 2001

Mr. John O'Connor
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. O'Connor:

I have received your letter of September 28 in which you questioned the propriety of a denial of access to records by the Carmel Police Department. You requested various records pertaining to an incident involving your son between midnight and 4 a.m. on a certain date, such as a complaint or incident report, police blotter entries, telephone or radio logs and the like. You wrote that your son was charged with "crossing a double line and DWI." The Department denied the request on the ground that the records are "part of investigatory files."

In this regard, I offer the following comments.

First, the basis for denial offered by the Police Department, that the records sought are "part of investigatory files", has not appeared in the Freedom of Information Law since 1978. That phrase existed in the Freedom of Information Law as originally enacted in 1974, but that legislation was later repealed and replaced with the current version of the law.

Second, since 1978, the Freedom of Information Law has been based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 state's highest court, 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 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.).

If the Department 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.

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 Department 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. 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 (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.

Also of potential significance is §87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". That provision might be applicable relative to the deletion of identifying details in a variety of situations, i.e., where a record identifies a confidential source or a witness, for example.

Often the most relevant provision concerning access to records maintained by law enforcement agencies is §87(2)(e), which permits an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in sub-paragraphs (i) through (iv) of §87(2)(e). In the context of an arrest for DWI that occurred more than a month ago, it is doubtful in my view that the harmful effects described in §87(2)(e) would arise by means of disclosure.

Lastly, I note that the form attached to your letter indicates that the Police Chief denied your request, and that the appeal of the denial should be made to him. Under the regulation promulgated by the Committee on Open Government, which have the force and effect of law, the official who initially determines to grant or deny access to records cannot also be the person to whom an appeal may be made (21 NYCRR §1401.7).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Bruce Hart, Chief of Police
Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13036

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 1, 2001

Mr. John E. Greer
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Greer:

I have received your letter and the correspondence attached to it. You have sought an opinion concerning your right to obtain a copy of a certain report pursuant to the Freedom of Information Law form the Union Springs Central School District.

As I understand the matter, the District contracted with an entity known as "Making the Connections" to prepare a "comprehensive curriculum audit report." Although you were permitted to "review the document" at issue, your request for a copy was constructively denied by means of the District's failure to respond.

In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to state and local government 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, as soon as a document is prepared by or for an agency, such as a school district, it constitutes a "record" that falls within the coverage of the Freedom of Information Law.

Second, when records are accessible under the Freedom of Information Law, they must be made available for inspection and copying [see §87(2)]. Moreover, under §89(3), an agency must make a copy of a record at the request of an applicant upon payment of the requisite fee. In this instance, since the report was made available in response to your request to inspect its contents, I believe that the District would be required to make a copy available.

Third, with respect to rights of access, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

One of the grounds for denial, due to its structure often requires that certain records be made available in whole or in part. That provision, §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. Since the record in question appears to be an "external audit", I believe that it must be made available for inspection and copying pursuant to subparagraph (iv) of §87(2)(g).

Lastly, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests and appeals. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of 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: Stuart Mattey
Whitney Vantine

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13037

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 1, 2001

Ms. Jean M. Walker
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Walker:

I have received your letter of September 25, which, for reasons unknown, did not reach this office until October 9. You have sought an opinion concerning rights of access under the Freedom of Information Law in relation to denials of requests by "birth mothers of adopted children" seeking records indicating the dates of birth of their children.

As I understand the issue that you raised, the Freedom of Information Law would not determine the extent to which the information in question may be available.

By way of background, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

The first exception to rights 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 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-13038

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 1, 2001

Mr. Randy Campney
97-B-1214
Greene Correctional Facility
P.O. Box 975
Coxsackie, NY 12231

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Campney:

I have received your letter in which you requested an opinion on the availability of records related to a DNA sample you were required to provide as an inmate. You also inquired about the "proper procedures" for requesting these records and indicated that the Department of Correctional Services has not responded to your appeal.

In this regard, I offer the following comments.

First, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests and appeals. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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 access to records pertaining to your DNA sample, by way of background, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

The first ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §995-c of the Executive Law, which authorizes the Division of Criminal Justice Services to establish a state DNA identification index. Subdivision (6) of that statute provides in pertinent part that:

> "DNA records contained in the state DNA identification index shall be released only for...(b) criminal defense purposes, to a defendant or his or her representative, who shall also have access to sample and analyses performed in connection with the case in which such defendant is charged..."

Considering that the Division of Criminal Justice Services is the agency responsible for maintaining the state DNA index, it is unlikely that your facility or the Department of Correctional Services maintains the records of your interest. Further, it appears that the Division could release the records to you only for "criminal defense purposes."

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13039

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November 1, 2001

Mr. Joseph L. Cullen
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Cullen:

I have received your letter of October 5 and the correspondence attached to it. You have sought "suggestions in order to resolve [the] matter" of requests for records directed to the Superintendent of the Central Islip School District and an official of the State Education Department whose duties involve "special education quality assurance." In both instances, you asked to "review all documents regarding the placement of students in Special Education [in the Central Islip School District] during the past four years."

In this regard, I offer the following comments.

First, the statute that you cited as the basis for your requests is the federal Freedom of Information Act, which applies only to records maintained by federal agencies. The statute that generally pertains to access to records of units of state and local government in New York is the New York Freedom of Information Law.

Second, before considering rights of access, a significant issue may involve 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, the state's highest court, that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

The Court in Konigsberg found that the agency could not reject the request due to its breadth and also stated that:

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency'])" (id. at 250).

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping system. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number.

While I am unfamiliar with the recordkeeping systems of the agencies to which you referred, to extent that the records sought can be located with reasonable effort, I believe that the requests would have met the requirement of reasonably describing the records. On the other hand, if the records are not maintained in a manner that permits their retrieval except by reviewing hundreds or perhaps thousands of records individually in an effort to locate those falling within the scope of the request, to that extent, the request would not in my opinion meet the standard of reasonably describing the records. In some instances, a real question involves, very simply, where does an agency begin to look for records. In the case of the Department of Education, it is possible that records falling within the scope of your request may be maintained in various offices at both regional and main offices. Further, records pertaining to students may be kept in a variety of locations by means of a variety of filing systems. Insofar as those records falling with the scope of your requests cannot be found with reasonable effort, the request in my view would not meet the requirement of reasonably describing 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.

Pertinent in relation to your requests is the first ground for denial concerning records that "are specifically exempted from disclosure by state or federal statute." One such statute is the federal Family Educational Rights and Privacy Act ("FERPA", 20 USC §1232g). 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. I note, too, that the regulations promulgated under FERPA were recently amended to include within its coverage an educational agency "authorized to direct and control public elementary or secondary,

or postsecondary institutions" (see34 CFR §99.1). 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 any other aspects of records that would make a student's identity easily traceable must in my view be withheld from the public in order to comply with federal law. Concurrently, if a parent of student requests records pertaining to his or her child, the parent ordinarily will have rights of access to those portions of records that are personally identifiable to their children.

Based on the foregoing, insofar as the records sought are personally identifiable to students other than your own children, I believe that they must be withheld to comply with federal law.

Since your request involves a "review" of records, I point out that no fee may be charged for the inspection of a record when the record is available in its entirety. However, if a record includes items that the public has no right to see, such as personally identifiable information pertaining to students, an applicant would have no right to inspect or review the record free of charge. In that circumstance, it has been held that the record may be photocopied and that accessible portions may be made available following appropriate deletions by an agency. However, the applicant would be required to pay a fee of up to twenty-five cents per photocopy (see VanNess v. Center for Animal Care and Control, Supreme Court, New York County, January 28, 1999).

Lastly, even if personally identifiable portions of the records in question are deleted, there may be other aspects of the records that may be withheld. Of likely significance is §87(2)(g) of the Freedom of Information Law, which permits an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

I hope that the foregoing serves to enhance your understanding of the matter and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Jerry Jackson
Rebecca Court
Leslie Templeman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13040

41 State Street, Albany, New York 12231
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November 2, 2001

Mr. Roy Green
96-A-8020
Sullivan Correctional Facility
P.O. Box 116
Fallsburg, NY 12733

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Green:

I have received your letter in which you sought an advisory opinion concerning a Freedom of Information Law request for the "amount of inmate grievances/complaints that were filed against a correction officer within a specified time period." You further wrote that you are not requesting "any factual statements or other information from any of the grievances/complaints themselves", and you contend that the Civil Rights Law, §50-a, does not prohibit the release of the information of your interest.

In this regard, it is emphasized that the Freedom of Information Law pertains to existing records and that §89(3) of that statute provides in relevant part that an agency is not required to create a record in response to a request for information. I would conjecture that the Department of Correctional Services has not prepared a record that indicates the number of inmate complaints filed against a correction officer. If that is so, the request would not involve existing records, and the Freedom of Information Law would not apply.

If such a record does exist, by way of background, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

The first ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §50-a of the Civil Rights Law. In brief, that statute provides that personnel records of police and correction officers that are used to evaluate performance toward continued employment or promotion are confidential. The Court of Appeals,

the State's highest court, in reviewing the legislative history leading to its enactment, has held that the exemption from disclosure conferred by §50-a of the Civil Rights Law "was designed to limit access to said personnel records by criminal defense counsel, who used the contents of the records, including unsubstantiated and irrelevant complaints against officers, to embarrass officers during cross-examination" [Capital Newspapers v. Burns, 67 NY2d 562, 568 (1986)]. In another decision which dealt with unsubstantiated complaints against correction officers, the Court of Appeals held that the purpose of §50-a "was to prevent the release of sensitive personnel records that could be used in litigation for purposes of harassing or embarrassing correction officers" [Prisoners' Legal Services v. NYS Department of Correctional Services, 73 NY 2d 26, 538 NYS 2d 190, 191 (1988)].

In my view, if the record of your interest exists, §50-a of the Civil Rights Law would govern and, absent the written consent of the correction officer, a court order would be needed to obtain the record.

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

FOIL-AO-13041

From: Robert Freeman
To: "gsimonds@pls-net.org".GWIA.DOS1
Date: 11/2/01 12:35PM
Subject: Re: FW: Information Gathering

Dear Ms. Simonds:

I would like to offer the following comments regarding the practices described to you by the President of the Board of Education.

First, the basis for his statement is not expressed. In this regard, I do not believe that the president of a board of education has the authority to adopt a policy or procedure unilaterally. Under section 1709 of the Education Law, the Board, by means of a majority vote of its total membership, is authorized to adopt rules, policies and procedures.

Second, any person may seek records under the Freedom of Information Law, and it has been held that records accessible under that statute must be made equally available, without regard to one's status or interest. Stated differently, I believe that you may seek records under the Freedom of Information Law from any agency subject to that statute. However, if you do, you would have the same rights of access as any member of the public.

I hope that I have been of assistance.
>>> Grace Simonds <gsimonds@pls-net.org> 11/02/01 12:08PM >>>
Hi Mr. Freeman,
This is a note I got from my Board of Education president regarding gathering information. Is his statement correct?
It hardly seems to be in accordance with freedom of information ideology.
Please let me know your opinion, and where I can find law pertaining to this. Thank You,

Sincerely,
Grace J.Simonds
Honeoye Central School
Board of Education Trustee

-----Original Message-----
From: Honeoye5@aol.com [SMTP:Honeoye5@aol.com]
Sent: Thursday, November 01, 2001 11:15 AM
To: gsimonds@pls-net.org
Subject: Information Gathering

Hi, Grace-just a note to let you know of how the BOE gathers some information. If any member needs any legal information or needs to know something from one of the outside agencies that the district deals with (ex. BOCES), that member can ask
either the BOE president(myself) or the Supt. (Tim) to contact that particular agency for the requested materials, info, etc. Officially, only these two people should be contacting these groups. If you have any questions about this, please feel free to call me. Sincerely-Jerry

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-3380
FOIL-AO-13042

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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 2, 2001

Ms. Elizabeth Kalil
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Kalil:

As you are aware, I have received your letter and a variety of materials relating to your efforts in gaining access to records from the Utica School District. You have sought my views and advice concerning the issues raised in the correspondence. My comments will focus on applicable law rather than the specifics of the information that you provided, and in most instances, they will be general. Further, to attempt to enhance compliance with and understanding of the issues, copies of this response will be forwarded to District officials.

With respect to procedures and the timeliness of responses to requests for records, it is noted at the outset that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests 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 [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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 you referred to certifying copies of records, §89(3) of the Freedom of Information Law states in relevant part that, in response to a request for a record, "the entity shall provide a copy of such record and certify to the correctness of such copy if so requested..." From my perspective, the certification required by the Freedom of Information Law does not involve an assertion that the contents of a record are accurate, but rather that a copy of a record made available in response to a request is a true copy. In essence, the certification is supposed to signify that the applicant received an actual copy of a record maintained by an agency, irrespective of the accuracy or the "factuality" of the contents of the record. There is no requirement in the law that the signature of the person who certifies that a copy of a record is a true copy be notarized.

Before considering rights of access to records, I note that the Freedom of Information Law pertains to existing records, and that §89(3) provides that an agency need not create a record in response to a request for information or supply answers to questions. For instance, in one request, you sought information indicating "proof of posting." If such a record exists, I believe that it would be accessible. If, however, no record containing the information sought exists, the District would not be obliged to prepare a new record containing proof of posting.

An exception to the general rule that an agency need not create a record to comply with the Freedom of Information Law relates to one of the areas of your concern. 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 District. Alternatively, you could request a copy of the schedule from the State Archives and Records Administration by calling (518)474-6926.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. It is emphasized that the introductory language of §87(2) refers to an agency's authority to withhold "records or portions thereof" that fall within the grounds for denial that follow. The phrase quoted

in the preceding sentences indicates that a single record or report may be available or deniable in whole or in part, and that an agency is required to review the contents of records in their entirety to determine which portions, if any, may justifiably be withheld.

Since you requested records concerning events relating to a student, relevant is the initial ground for denial, §87(2)(a), which pertains to records that are "specifically exempted from disclosure by state or federal statute." Insofar as disclosure of the records sought would or could identify a student or students, I believe that they must be withheld. A statute that exempts records from disclosure is the Family Education Rights and Privacy Act (20 U.S.C. section 1232g), which is commonly known as "FERPA." In brief, FERPA applies to all educational agencies or institutions that participate in grant or loan programs administered by the United States Department of Education. As such, FERPA includes within its scope virtually all public educational institutions and many private educational institutions. The focal point of the Act is the protection of privacy of students. It provides, in general, that any "education record," a term that is broadly defined, that is personally identifiable to a particular student or students is confidential, unless the parents of students under the age of eighteen waive their right to confidentiality, or unless a student eighteen years or over similarly waives his or her right to confidentiality. Further, the federal regulations promulgated under FERPA define the phrase "personally identifiable information" to include:

> "(a) The student's name;
> (b) The name of the student's parents or other family member;
> (c) The address of the student or student's family;
> (d) A personal identifier, such as the student's social security number or student number;
> (e) A list of personal characteristics that would make the student's identity easily traceable; or
> (f) Other information that would make the student's identity easily traceable" (34 CFR Section 99.3).

Based upon the foregoing, references to students' names or other aspects of records that would make a student's identity easily traceable must in my view be withheld in order to comply with federal law.

In a related vein, some aspects of the materials involve records that deal with a particular individual in relation to her status as a foreign national. While I am unfamiliar with the substance of those records, insofar as they include information of a personal or intimate nature, particularly items relating to her nationality or immigration status, it is likely that they may be withheld pursuant to §87(2)(b) and/or §89(2)(b) on the ground that disclosure would constitute "an unwarranted invasion of personal privacy."

You also referred to delays in the disclosure of minutes of meetings of the Board of Education and minutes of executive sessions. Here I direct your attention to §106 of the Open Meetings Law which 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." It is also clear that minutes not consist of a verbatim account of what is said at a 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.

I point out that 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 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 §106(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 records identifiable to students may be withheld, minutes containing information of that nature would not be accessible to the public.

Also in relation to the Open Meetings Law, you referred to executive sessions held to discuss "personnel." In this regard, by way of background, the Open Meetings Law is based upon a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, unless there is a basis for entry into executive session. Moreover, the Law requires that

a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed, and the motion must be carried by majority vote of a public body's total membership before such a session may validly be held. The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session.

Although it is used frequently, the term "personnel" appears nowhere in the Open Meetings Law. Although one of the grounds for entry into executive session often relates to personnel matters, from my perspective, the term is overused and is frequently cited in a manner that is misleading or causes unnecessary confusion. To be sure, some issues involving "personnel" may be properly considered in an executive session; others, in my view, cannot. Further, certain matters that have nothing to do with personnel may be discussed in private under the provision that is ordinarily cited to discuss personnel.

The language of the so-called "personnel" exception, §105(1)(f) of the Open Meetings Law, is limited and precise. In terms of legislative history, as originally enacted, the provision in question permitted a public body to enter into an executive session to discuss:

> "...the medical, financial, credit or employment history of any person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of any person or corporation..."

Under the language quoted above, public bodies often convened executive sessions to discuss matters that dealt with "personnel" generally, tangentially, or in relation to policy concerns. However, the Committee consistently advised that the provision was intended largely to protect privacy and not to shield matters of policy under the guise of privacy.

To attempt to clarify the Law, the Committee recommended a series of amendments to the Open Meetings Law, several of which became effective on October 1, 1979. The recommendation made by the Committee regarding §105(1)(f) was enacted and states that a public body may enter into an executive session to discuss:

> "...the medical, financial, credit or employment history of a <u>particular</u> person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a <u>particular</u> person or corporation..." (emphasis added).

Due to the insertion of the term "particular" in §105(1)(f), I believe that a discussion of "personnel" may be considered in an executive session only when the subject involves a particular person or persons, and only when at least one of the topics listed in §105(1)(f) is considered.

It has been advised that a motion describing the subject to be discussed as "personnel" or "specific personnel matters" is inadequate, and that the motion should be based upon the specific language of §105(1)(f). For instance, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in my opinion have to identify the person or persons who may be the subject of a discussion. By

means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

It is noted that the Appellate Division 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:

> "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; 267 AD 2d 55 (1994)].

I hope that the foregoing serves to enhance your understanding of issues that you have raised and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
David Bruno
Donald Gerace

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13043

41 State Street, Albany, New York 12231
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November 2, 2001

Mr. Charles Millson
81-D-0019
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. Millson:

I have received your letter in which you sought an opinion concerning the availability of a variety of records related to "mandatory programming."

Since I am unfamiliar with the contents of the records sought, I cannot conjecture as to their availability. However, I offer the following general comments.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Of potential significance is §87(2)(g), which states that an agency may withhold records that:

"are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1304

41 State Street, Albany, New York 12231
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November 5, 2001

Mr. Larry G. Campbell
79-C-0029
Upstate Correctional Facility
309 Bare Hill 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. Campbell:

I have received your letter in which you sought "appropriate intervention" from this office concerning a request for records maintained by your facility.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of the correspondence, 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 [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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, as requested, enclosed a copy of the current summarization of judicial decisions rendered under the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13045

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November 14, 2001

Ms. Julie Penny
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Penny:

I have received your letter of October 15, which reached this office on October 22. You wrote that you "have experienced a brazen disregard" for the Freedom of Information Law in your efforts to obtain records from the Town of Southampton. Based on a review of the materials attached to your letter, it appears that requests directed to various Town officials were not answered, and that disclosure of numerous records has been delayed because the records were sent to the Town's consultant.

In this regard, first, since requests were made to several Town officials, I note that the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) require that each agency designate one or more persons as "records access officer." The records access officer has the duty to coordinate an agency's response to requests for records, and requests should ordinarily be made to that person. If a request is made to a Town officer or employee other than the records access officer, I believe that the recipient of the request must either respond directly in a manner consistent with law or forward the request to the records access officer.

Second, in a related vein, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Third, the Freedom of Information Law is applicable to all agency records, and §86(4) defines the term "record" expansively to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

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 received by a corporation providing services for a branch of the State University that were kept on behalf of the University constituted "records" falling with the coverage of the Freedom of Information Law. I point out that the Court rejected "SUNY's contention that disclosure turns on whether the requested information is in the physical possession of the agency", for such a view "ignores the plain language of the FOIL

definition of 'records' as information kept or held 'by, with or for an agency'" [see Encore College Bookstores, Inc. v. Auxiliary Services Corporation of the State University of New York at Farmingdale, 87 NY2d 410, 417 (1995)]. Therefore, if documents are kept or produced for an agency, as in the case of the records ordinarily maintained at town offices that have been sent to a consultant, or records that are typically filed with an agency are sent directly to the agency's consultant, they constitute agency records, even if they are not in the physical possession of the agency.

From my perspective, insofar as Town records are in the physical possession of the Town's consultant, in response to a request for any such records, I believe that the records access officer, in carrying out his or her duty to "coordinate" the Town's response to requests, must either direct the consultant to make the records available in a manner consistent with law, or acquire the records in order that they may be disclosed in accordance with 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.

In my view, records submitted by an applicant, either to the Town or its agent, would, in the context of the information that you provided, ordinarily be available under the law, for none of the grounds for denial would appear to be pertinent or applicable.

I note that Xerox Corporation v. Town of Webster [65 NY2d 131 (1985)] dealt with reports prepared by "outside consultants retained by agencies" (id. 133). In such cases, it was found by the Court of Appeals that the records prepared by consultants should be treated as if they were prepared by agency staff and should, therefore, be considered intra-agency materials that fall within the scope of §87(2)(g).

Although that provision potentially serves as a basis for a denial of access, due to its structure it often requires disclosure. Section 87(2)(g) permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

In its discussion of the issue in Xerox, 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 hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
David Gilmartin, Jr.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13046

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November 15, 2001

Mr. John Henry Kelley
97-B-0241
Livingston Correctional Facility
P.O. Box 1991
Sonyea, NY 14556-1991

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Kelley:

I have received your letter in which you sought assistance in obtaining a copy of a "Certificate of Release to Parole Supervision" from the Division of Parole. You wrote that while you received a document in response to your Freedom of Information Law request, you are interested in obtaining the document in its "original form" as you signed it.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records.

Having reviewed your correspondence, it is suggested that you submit another Freedom of Information Law request, reasonably describing the exact document that you are interested in obtaining.

Lastly, it is noted that the Freedom of Information Law applies only to existing records. In the event a response indicates that a record cannot be found, you may request a certification to that effect under §89(3) in which agency staff must indicate that it has made a diligent search for the records.

I hope that I have of some assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13017

41 State Street, Albany, New York 12231
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November 15, 2001

Mr. Alfonso Rizzuto
00-A-2600
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. Rizzuto:

I have received your letter in which you explained that you have not received responses to requests for a variety of records from your facility and the Department of Correctional Services. You asked that this office to "investigate."

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of the correspondence, 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 [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body,

> who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

The person designated by the Department of Correctional Services to determine appeals is Anthony J. Annucci, Counsel to the Department.

I hope that I have been of assistance.

Sincerely,

David Treacy

David M. Treacy
Assistant Director

DMT:jm

FOIL-AO-13048

From: Robert Freeman
To: Itras@dmv.state.ny.us
Date: 11/16/01 4:22PM
Subject: Hi Ida - -

Hi Ida - -

With respect to the request for the winning bid, I do not believe that the provision that would likely have been applicable prior to the award of the contract, section 87(2)(c), would remain applicable. As you are aware, that provision permits an agency to withhhold insofar as disclosure would "impair present or imminent contract awards..." Since the contract has been awarded, again, I do not believe that that provision would be pertinent.

The only other exception that might be cited to withhold portions of the documentation would be section 87(2)(d), the "trade secret" exception. In short, to the extent that you believe that disclosure would "cause substantial injury to the competitive position" of the winning bidder, you would have the authority to deny access. I would conjecture that substantial portions of the bid would be accessible, but that portions might justifiably be withheld under section 87(2)(d).

I hope that this helps. If you would like to discuss the issue, I will be out of the office on Monday, but in on Tuesday.

Bob Freeman

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-AO-13049

From: Robert Freeman
To: [redacted]
Date: 11/16/01 5:06PM
Subject: Dear Mr. Hillier:

Dear Mr. Hillier:

In response to your question, section 89(7) of the Freedom of Information Law specifies that the home address of a present or former public employee need not be disclosed. I note that a local government agency may choose disclose the home addresses of its employees, but again, it is not required to do so.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
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FOIL-AO-13050

From: Robert Freeman
To: mpasciak@buffnews.com
Date: 11/16/01 5:01PM
Subject: Hi Mary - -

Hi Mary - -

Sorry it has taken me so long to respond. Believe it or not, I have been in Peru - - to try to assist in enacting an access to records law there.

I am not familiar with the rule to which you referred. However, I would like to offer several points.

First, there is nothing in the FOIL that would prohibit an agency from contacting a person or entity that is the subject of a request for records.

Second, notwithstanding its capacity to do so, the agency must comply with the time limitations imposed by the law. It must, at the very least, acknowledge the receipt of a request within five business days and offer of an estimate of when the request will be granted or denied.

Third and perhaps most importantly, the subject of the record may be consulted, but that person or entity has no authority to determine the extent to which an agency may grant or deny access. In short, the law determines what is available and what is not, not the desire or whim of the subject of the record or the agency. You used the phrase "veto power", but there is no such power. In a case in which a sheriff's department gave individuals the ability to choose whether they wanted their names disclosed to the news media, the Appellate Division held that, as a matter of law, the agency could not offer that kind of choice and that the individual has no voice in the matter. Again, the law determines rights of access and the government's ability to deny access.

On a different note - - Are you still teaching at Buffalo State? You might recall that I have daughter in Buffalo who graduated from law school last year. Well....she's working in a law office...and teaching 3 sections of English Comp to freshmen at Buff State...and loving it.

I hope that this helps. Keep in touch.

Bob

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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From: Robert Freeman
To: [redacted]
Date: 11/21/01 11:18AM
Subject: Dear Ms. Krieger:

Dear Ms. Krieger:

I have received your communication and apologize for the delay in responding; I have been out of the office.

A copy of the brochure given out at the NYSBBA gathering, "Your Right to Know", will be sent to you. I note that it is also available via our website (the address is indicated below) by clicking on to "publications."

With respect to your question concerning the disclosure of reasons for a resignation, a denial of tenure or the outcome of a disciplinary proceeding under section 3020-a of the Education Law, there are several possibilities.

It is important to stress at the outset that the Freedom of Information Law (FOIL) pertains to existing records. If there is no written reason indicating the basis of a resignation, for instance, a school district would not be obliged to prepare a record indicating the reason.

In the case of a resignation, as in many situations, the content of the record serves as the basis for ascertaining rights of access. If a letter of resignation states, for example, that a person has accepted a teaching position in another district, there is nothing intimate or personal about such a disclosure. On the other hand, if a person resigns due to heart problems or another health related condition, information of that nature may be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy."

With respect to a denial of tenure, if there is a reason expressed in writing, I believe that it would be accessible to the public, again, except to the extent that disclosure would result in an unwarranted invasion of personal privacy.

In the case of a tenure proceeding in which there is a finding of misconduct, it has been advised that portions of the records indicating the reasons, such as the charges that were sustained, must be disclosed. Insofar as charges are dismissed because the allegations could not substantiated, those portions of the records may, in my view, be withheld.

You might want to review our index to advisory opinions rendered under the FOIL, click on to "T" and scroll down to "Tenure - 3020-a of the Education Law". The high numbered opinions are available in full text and are more expansive than the preceding commentary.

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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Website - www.dos.state.ny.us/coog/coogwww.html

From: Robert Freeman
To: [redacted].DOS1
Date: 11/21/01 10:19AM
Subject: Re:

Good morning - -

Sorry that I'm taking so long to respond - - I've been out of the office.

With respect to your questions, first, the courts are not subject to the Freedom of Information Law, and I know of no provision that includes a specific time within which a court or court clerk must respond to a request for records. It is suggested that you "remind" them that requests are pending. Most court fees are described in the CPLR beginning at section 8018. Often clerks may charge search fees and copying fees well in excess of those permitted to be charged by agencies subject to the FOIL.

Second, with regard to charges that have been dropped, section 160.50 generally requires that records be sealed when charges against an accused have been dismissed.

Lastly, some DMV records are public, but others are restricted under a federal law, the Drivers' Privacy Protection Act. If you want records of accidents or violations, I believe that they would be available. Other information derived from the license itself typically may be withheld.

I hope that I have been of assistance.

Have a great holiday.

Bob Freeman

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

>>> Dave Mack [redacted]> 11/18/01 07:11PM >>>

Gov. Freeman,

I am currently trying to get some records from the City of Niagara Falls, NY Police Department and City Criminal Court and these questions came up: Is there a time frame for Court Reocord requests? Meaning does the court clerk have a specified time to respond? Can they charge for searches? I was charges $10.00 per name for 3 names. The City of Niagara Falls Police Department Law Guardian told me that if the charges pertaining to the police report I requested through FOIL had been dropped against the guy I was doing a background check on, He could not give me the report. Is that true? In an unrelated case, can I get DMV records from the DMV...like a person license history? Thank you very much.

Dave Mack

PS. This is my other e-mail address

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13053

Committee Members

Randy A. Daniels
Mary O. Donohue
Alan Jay Gerson
Gary Lewi
Warren Mitofsky
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Michelle K. Rea
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Carole E. Stone

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
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November 27, 2001

[redacted]
Wallkill Correctional Facility
Box G
Wallkill, NY 12589

Dear Mr. [redacted]

I have received your letter of June 14 in which you referred to difficulty in obtaining records related to your medical condition under the Freedom of Information Law from your facility.

In this regard, I offer the following comments.

First, by way of background, the Freedom of Information Law pertains to agency records, including those maintained by a State correctional facility. In terms of rights granted by the Freedom of Information Law, the Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

With regard to medical records, the Freedom of Information Law, in my view, likely permits that some of those records may be withheld in whole or in part, depending upon their contents. For instance, medical records prepared by Department personnel could be characterized as "intra-agency materials" that fall within the scope of §87(2)(g) of the Freedom of Information Law. To the extent that such materials consist of advice, opinion, recommendation and the like, I believe that the Freedom of Information Law would permit a denial.

Second, §18 of the Public Health Law, generally grants rights of access to medical records to the subjects of the records. As such, that statute may provide greater access to medical records than the Freedom of Information Law. It is suggested that you refer to §18 of the Public Health Law in any request for medical records.

To obtain additional information concerning access to medical records and the fees that may be charged for searching and copying those records, you may write to:

Access to Patient Information Coordinator
New York State Department of Health
433 Hedley Park Place
Troy, NY 12180

I hope that I have been of some assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13054

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 27, 2001

Mr. David G. Ritter
00-B-1858
Groveland Correctional Facility
Route 36 South
Sonyea, NY 14556

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Ritter:

I have received your letter in which you sought assistance in obtaining records relating to the status of your retirement pension from the New York City Transit Authority. You wrote that you had not received a response to your request for records under the Freedom of Information Law.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of the correspondence, 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 [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of 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,

David M. Treacy
Assistant Director

DMT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13055

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 27, 2001

Mr. Falon B. Davis
91-A-5371
Attica Correctional Facility
Box 149
Attica, NY 14011

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Davis:

I have received your letter in which you sought assistance in obtaining records related to a prosecution witness who testified against you at your trial. You wrote that you have not received responses to your requests for records from the *New York Post* and carpenters' unions, and that your request for records from the Workers' Compensation Board has been denied.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of the correspondence, I offer the following comments.

It is emphasized at the outset that the Freedom of Information Law pertains to agency records, and that §86(3) of that statute defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, 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. Neither the *New York Post* nor a union is an "agency" subject to the Freedom of Information Law. Therefore, neither would be required to respond to requests for records under that statute.

With respect to the denial of your request for records by the Workers' Compensation Board, I note that §110-a of the Workers' Compensation Law restricts the disclosure of the records that you are seeking. Section 110-a generally provides that workers' compensation records shall not be disclosed except upon order of a court or subpoena, upon authorization by the person who is the subject of the records, or for other specified purposes set forth in that statute. It appears that you would not be entitled to the records sought from the Workers' Compensation Board.

Lastly, as requested, enclosed please find a copy of your letter to this office.

I hope that the foregoing serves to clarify your understanding of the Law and that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13056

41 State Street, Albany, New York 12231
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November 27, 2001

Mr. Richard W. Dunnigan
90-B-3027/9-2-58
Tappan Correctional Facility
354 Hunter Street
Ossining, NY 10562-5442

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Dunnigan:

I have received your letter in which you sought an opinion concerning whether you are entitled to a variety of records from the City of Canandaigua and the Ontario County District Attorney's Office.

In this regard, I offer the following comments.

As a general matter, the Freedom of Information is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. While some aspects of the records sought might properly be withheld, relevant is a decision by the Court of Appeals concerning "complaint follow up reports" and police officers' memo books in which it was held that a denial of access based on their characterization as intra-agency materials would be inappropriate.

The provision at issue, §87(2)(g) of the Freedom of Information Law, enables an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

In its analysis of the matter, the decision states that:

> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)...
>
> "...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][i]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182).

> "Against this backdrop, we conclude that the complaint follow-up reports contain substantial factual information available pursuant to the provisions of FOIL. Sections of the report are devoted to such purely factual data as: the names, addresses, and physical descriptions of crime victims, witnesses, and perpetrators; a checklist that indicates whether the victims and witnesses have been interviewed and shown photos, whether crime scenes have been photographed and dusted for fingerprints, and whether neighborhood residents have been canvassed for information; and a blank space denominated 'details' in which the officer records the particulars of any action taken in connection with the investigation.
>
> "However, the Police Department argues that any witness statements contained in the reports, in particular, are not 'factual' because there is no assurance of the statements' accuracy and reliability. We decline to read such a reliability requirement into the phrase 'factual data', as the dissent would have us do, and conclude that a witness statement constitutes factual data insofar as it embodies a factual account of the witness's observations. Such a statement, moreover, is far removed from the type of internal government exchange sought to be protected by the intra-agency exemption (see, Matter of Ingram v. Axelod, 90 AD2d 568, 569 [ambulance records, list of interviews, and reports of interviews available under FOIL as 'factual data']). By contrast, any impressions, recommendations, or opinions recorded in the complaint follow-up report would not constitute factual data and would be exempt from disclosure. The holding herein is only that these reports are not categorically exempt as intra-agency material. Indeed, the Police Department is entitled to withhold complaint follow-up reports, or specific portions thereof, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" [Gould, Scott and DeFelice v. New York City Police Department, 653 NY2d 54, 89 NY2d 276-277 (1996).

Based on the foregoing, neither a police department nor an office of a district attorney can claim that complaint follow up reports can be withheld in their entirety on the ground that they constitute intra-agency materials. However, the Court was careful to point out that other grounds for denial might apply in consideration of those records, as well as others that you requested.

For instance, of potential significance is §87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". That provision might be applicable relative to the deletion of identifying details in a variety of situations, i.e., where a record identifies a confidential source or a witness, for example.

Often the most relevant provision concerning access to records maintained by law enforcement agencies is §87(2)(e), which permits an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in sub-paragraphs (i) through (iv) of §87(2)(e).

Another possible ground for denial is §87(2)(f), which permits withholding to the extent that disclosure "would endanger the life or safety of any person". The capacity to withhold on that basis is dependent upon the facts and circumstances concerning an event.

In a decision concerning a request for records maintained by the office of a district attorney that would ordinarily be exempted from disclosure under the Freedom of Information Law, it was held that "once the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public" [see Moore v. Santucci, 151 AD 2d 677, 679 (1989)]. Based upon that decision, it appears that records introduced into evidence or disclosed during a public judicial proceeding should be available.

However, in the same decision, it was also found that:

> "...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish

another copy upon payment of the appropriate fee...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13057

41 State Street, Albany, New York 12231
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November 27, 2001

Mr. Pleasant Carter
97-A-3601
3622 Wende Road
Alden, NY 14004-1187

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Carter:

I have received your letter in which you sought assistance from this office regarding a Freedom of Information Law request you submitted to the "Head Health Director of Wende Correctional Facility." You wrote that you have not received a response to your request and sought guidance on the matter.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of the correspondence, I offer the following comments.

First, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

It is noted that the person designated to determine appeals by the Department of Correctional Services 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.

With regard to medical records, the Freedom of Information Law, in my view, likely permits that some of those records may be withheld in whole or in part, depending upon their contents. For instance, medical records prepared by Department personnel could be characterized as "intra-agency materials" that fall within the scope of §87(2)(g) of the Freedom of Information Law. To the extent that such materials consist of advice, opinion, recommendation and the like, I believe that the Freedom of Information Law would permit a denial.

Notwithstanding the foregoing, §18 of the Public Health Law generally grants rights of access to medical records to the subjects of the records. As such, that statute may provide greater access to medical records than the Freedom of Information Law. It is suggested that you refer to §18 of the Public Health Law in any request for medical records.

To obtain additional information concerning access to medical records and the fees that may be charged for searching and copying those records, you may write to:

Access to Patient Information Coordinator
New York State Department of Health
433 Hedley Park Place
Troy, NY 12180

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13058

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 27, 2001

Mr. James Cassano
99-A-1689 C-2-36-B
Orleans Correctional Facility
3531 Gaines Basin Road
Albion, NY 14411-9199

Dear Mr.Cassano:

I have received your letter in which you sought advice pertaining to your ability to obtain a copy of your pre-sentence report.

In this regard, although the Freedom of Information Law provides broad rights of access to records, the first ground for denial, §87(2)(a), states that an agency may withhold records or portions thereof that "...are specifically exempted from disclosure by state or federal statute..." Relevant under the circumstances is §390.50 of the Criminal Procedure Law, which, in my opinion represents the exclusive procedure concerning access to pre-sentence reports.

Section 390.50(1) of the Criminal Procedure Law states that:

> "Any pre-sentence report or memorandum submitted to the court pursuant to this article and any medical, psychiatric or social agency report or other information gathered for the court by a probation department, or submitted directly to the court, in connection with the question of sentence is confidential and may not be made available to any person or public or private agency except where specifically required or permitted by statute or upon specific authorization of the court. For purposes of this section, any report, memorandum or other information forwarded to a probation department within this state is governed by the same rules of confidentiality. Any person, public or private agency receiving such material must retain it under the same conditions of confidentiality as apply to the probation department that made it available."

In addition, subdivision (2) of §390.50 states in part that: "The pre-sentence report shall be made available by the court for examination and copying in connection with any appeal in the case..."

In view of the foregoing, I believe that a pre-sentence report may be made available only upon the order of a court, and only under the circumstances described in §390.50 of the Criminal Procedure Law. It is suggested that you review that statute.

I hope that I have been of some assistance.

Sincerely,

David Treacy
Assistant Director

DMT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13059

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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 27, 2001

Mr. Dennis Hopkins, Sr.
00-B-2717
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. Hopkins:

I have received your letter in which you explained your difficulty in obtaining your "mental health records from the medical department of the Erie County Holding Center." You requested that this office investigate the matter.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of the correspondence, I offer the following comments.

First, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Second, although the Freedom of Information Law provides broad rights of access, the first ground for denial, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute." One such statute is §33.13 of the Mental Hygiene Law, which generally requires that clinical records pertaining to persons receiving treatment in a mental hygiene facility be kept confidential.

However, §33.16 of the Mental Hygiene Law pertains specifically to access to mental health records sought by the subjects of the records. Under that statute, a patient may direct a request for inspection or copies of his or her mental health records to the "facility", as that term is defined in the Mental Hygiene Law, which maintains the records. If the Erie County Holding Center maintains the records as a facility, I believe that it would be required to disclose the records to you to the extent required by §33.16 of the Mental Hygiene Law.

Alternatively, it is possible that the records in question were transferred when you were placed in a state correctional facility. If that is so, the records may be maintained by a different agency. It is my understanding that mental health "satellite units" that operate within state correctional facilities are such "facilities" and are operated by the New York State Office of Mental Health. Further, I have been advised that requests by inmates for records of such "satellite units" pertaining to themselves may be directed to the Director of Sentenced Services, Bureau of Forensic Services, Office of Mental Health, 44 Holland Avenue, Albany, NY 12229. Lastly, it is noted that under §33.16, there are certain limitations on rights of access.

I hope that I have been of some assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13060

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 27, 2001

Mr. Anthony Medina
99-A-2999
Box AG
Fallsburg, NY 12733

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Medina:

I have received your letter in which you sought information on obtaining "records of a witness who testified" against you at your trial. You wrote that you would like "to obtain all of his department of corrections records and county corrections records."

In this regard, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

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, 234AD2d 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 such records pursuant to a request under the Freedom of Information Law.

Lastly, it is 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,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13061

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 28, 2001

Mr. John DiSalvo
97-R-2482
Sing Sing Correctional Facility
354 Hunter Street
Ossining, 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. DiSalvo:

I have received your letter in which you explained your difficulty in obtaining records you believe to be contained within a "hearing packet" and sought assistance from this office. You indicated that the Inmate Records Coordinator at Fishkill Correctional Facility did not respond to your request. You also wrote that, in response to your appeal, the agency's appeals officer informed you that the record "did not seem to exist in the tier hearing packet" and that you "should contact the Inmate Records Coordinator" at your facility "to review the hearing packet."

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of the correspondence, I offer the following comments.

First, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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 and perhaps most importantly, the Freedom of Information Law pertains to existing records. Further, §89(3) of that statute provide in part that an agency need not create a record in response to a request. If indeed the Wallkill Correctional Facility does not maintain the records sought, the Freedom of Information Law would not apply.

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.

Fourth, when requested materials exist as records and can be located, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Lastly, if you still have not received the record sought, as suggested by Mr. Annucci, you should direct a Freedom of Information Law request to the Inmate Records Coordinator at your facility.

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

cc: Anthony J. Annucci
Inmate Records Coordinator

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13062

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 29, 2001

Mr. Harold Stauffer
00-R-4014
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. Stauffer:

I have received your letter in which you referred to difficulty in obtaining medical records under the Freedom of Information Law from your facility.

In this regard, I offer the following comments.

First, by way of background, the Freedom of Information Law pertains to agency records, including those maintained by a state correctional facility. In terms of rights granted by the Freedom of Information Law, the Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

With regard to medical records, the Freedom of Information Law, in my view, likely permits that some of those records may be withheld in whole or in part, depending upon their contents. For instance, medical records prepared by Department personnel could be characterized as "intra-agency materials" that fall within the scope of §87(2)(g) of the Freedom of Information Law. To the extent that such materials consist of advice, opinion, recommendation and the like, I believe that the Freedom of Information Law would permit a denial.

Second, §18 of the Public Health Law generally grants rights of access to medical records to the subjects of the records. As such, that statute may provide greater access to medical records than the Freedom of Information Law. It is suggested that you refer to §18 of the Public Health Law in any request for medical records.

To obtain additional information concerning access to medical records and the fees that may be charged for searching and copying those records, you may write to:

Access to Patient Information Coordinator
New York State Department of Health
430 Hedley Park Place
Troy, NY 12180

I hope that I have been of some assistance.

Sincerely,

David Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13063

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 29, 2001

Mr. Dennis Hopkins, Sr.
00-B-2717
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. Hopkins:

I have received your letter in which you sought assistance in obtaining a variety of documents from your attorney and requested that this office "monitor" your Freedom of Information Law request.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of the correspondence, I offer the following comments.

First, I note that the Freedom of Information Law pertains to agency records, and §86(3) of that statute defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, the Freedom of Information Law applies, in general, to records of entities of state and local government in New York. It would not apply to a private organization or a private attorney.

On the other hand, §716 of the County Law states in part that the "board of supervisors of any county may create an office of public defender, or may authorize a contract between its county and one or more other such counties to create an office of public defender to serve such counties." Therefore, a county office of public defender in my opinion is an agency subject to the Freedom of Information Law that is required to disclose records to the extent required by that statute.

In a case in which an attorney is appointed, while I believe that the records of the governmental entity required to adopt a plan under Article 18-B of the County Law are subject to the Freedom of Information Law, the records of an individual attorney performing services under Article 18-B may or may not be subject to the Freedom of Information Law, depending upon the nature of the plan. For instance, if a plan involves the services of a public defender, for reasons offered earlier, I believe that the records maintained by or for an office of public defender would fall within the scope of the Freedom of Information Law. However, if it involves services rendered by private attorneys or associations, those persons or entities would not in my view constitute agencies subject to the Freedom of Information Law.

Second, when it is applicable, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 portions of the records sought might properly be withheld, it is likely that other portions may be available under the Freedom of Information Law.

Third, in regard to the "incident and accident report" which "led to your arrest", and a "warrant/detainer", if you are unsuccessful in obtaining them from your attorney, it is suggested that you direct a request for those records directly to the appropriate local agencies which maintain the records.

I note that in a decision concerning a request for records maintained by the office of a district attorney, it was held 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" [Moore v. Santucci, 151 AD2d 677, 678 (1989)].

Lastly, with respect to obtaining your "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."

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,

David Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1306

41 State Street, Albany, New York 12231
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Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 29, 2001

Mr. Jabarie Allen
00-R-5684
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. Allen:

I have received your letter in which you explained your difficulty and sought assistance in obtaining records from the New York City Police Department and the Greene Correctional Facility.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of the correspondence, 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 [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of 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 of some assistance.

Sincerely,

David Treacy
Assistant Director

DT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13065

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 29, 2001

Mr. Howard Ostrander
[redacted]

Dear Mr. Ostrander:

I have received your correspondence in which you appealed a denial of access to a record. In short, you have attempted without success to obtain a copy of a purchase agreement involving the Borden Hose Company. Your requests have been made to the Town of Guilford and the Company.

In this regard, first, 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. For your information, the provision dealing with the right to appeal, §89(4)(a) of the Freedom of Information Law, states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Second, with respect to your request to the Town, I note that the Freedom of Information Law pertains to records maintained by or for an agency. Therefore, if the Town does not possess the agreement of your interest, I do not believe that it would be required to obtain a copy on your behalf.

Third, assuming that the hose company is a volunteer fire company, I believe that it is required to comply with the Freedom of Information Law and to enable you inspect and/or copy the record of your interest. You may recall that an expansive opinion dealing with access to records of a volunteer fire company was prepared at your request on July 2. I have enclosed a copy of that opinion, and it is suggested that you provide a copy to the Company.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Hon. Jane P. Winchester

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13066

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 30, 2001

Mr. Andrew M. Dunn
[redacted]

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. Dunn:

I have received your letter in which you requested this office to follow-up on your "request to the Madison County Clerk's office for a copy of the deed" and "tax information" regarding an apartment in which you appear to reside.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of the correspondence, 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 [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

As a general matter, the Freedom of Information is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Assuming that the records sought are maintained by the Clerk or a different agency, it appears that they would be accessible.

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13067

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 30, 2001

Ms. Linda Gilbert
Records Management Officer
Town of Caroga
Municipal Office Building
1840 Sthwy 10, P.O. Box 328
Caroga Lake, NY 12032

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. Gilbert:

I have received your correspondence in which you sought guidance concerning a request made under the Freedom of Information Law for records of the Town of Caroga.

As I understand the matter, a resident sought records indicating the residence address of a certain Town employee. The request was denied on the ground that disclosure would constitute an unwarranted invasion of personal privacy. A second request was made and you acknowledged its receipt, indicating that the information sought would be available to the applicant on November 30. In another request, the applicant sought "All Newspaper advertising" since 1998 and "All Nick Stoner Municipal Golf Course Golf Receipts Weekly Reports" since 1998. Again, you acknowledged the receipt of the request and offered an approximate date indicating when the records would be made available. Dissatisfied with your response, he served a notice of claim on the Town based on the Town's "unlawful delays...in processing..." his request. You wrote that the information sought by the applicant has in some instances been requested and made available in the past.

In this regard, I offer the following comments.

First, it is noted that §89(7) of the Freedom of Information Law specifies that the residence address of a present or former public officer or employee need not be disclosed. Therefore, I believe that your denial of access to that information was consistent with law.

Second, based on judicial decisions, if a record has in the past been made available to an applicant or his or her representative, an agency in receipt of a request for the same record is not required to make a second copy available, unless the applicant can demonstrate that neither he or she

nor that person's representative maintains a copy [see Moore v. Santucci, 151 AD2d 677 (1989)].

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..."

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."

If the determination of the appeal affirms the initial denial of access, the appellant would have exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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 short, an Article 78 proceeding is the vehicle under which a member of the public may seek judicial review of an agency's actions in relation to the Freedom of Information Law. I do not believe that a notice of claim would serve as a proper vehicle for contesting or reviewing an agency's actions under that statute.

Fourth, an issue of possible significance in relation to some aspects of the requests involves the extent to which the request "reasonably describes" the records sought as required by §89(3) of the Freedom of Information Law. I point out that it has been held by the Court of Appeals that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

The Court in Konigsberg found that the agency could not reject the request due to its breadth and also stated that:

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency'])" (id. at 250).

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping system. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number.

While I am unfamiliar with the recordkeeping systems of the Town, to extent that the records sought can be located with reasonable effort, I believe that the request would have met the requirement of reasonably describing the records. On the other hand, if the records are not maintained in a manner that permits their retrieval except by reviewing perhaps hundreds or even thousands of records individually in an effort to locate those falling within the scope of the request, to that extent, the request would not in my opinion meet the standard of reasonably describing the records.

Lastly, since some aspects of a request involve a "breakdown" or a "total", I point out that the Freedom of Information Law pertains to existing records and that §89(3) of that statute states in part that an agency is not required to create a record in response to a request. Therefore, if, for

example, the Town does not maintain the kind of breakdown or total requested, it would not be required to prepare a new record or records on behalf of the applicant.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

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December 6, 2001

Mr. Anthony R. Gray
[redacted]

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. Gray:

I have received your letter in which you sought an advisory opinion concerning a denial of access to certain meetings the Board of the University Auxiliary Services Corporation("UAS"). UAS is a not-for-profit corporation that contracts with SUNY/Albany to carry out a variety of functions "in furtherance of the educational goals of the University," according to UAS tax forms, including the operation of the food service, the campus bookstore and beverage vending. You indicated that "UAS by-laws require not less than one-third, nor more than one-half, of the board members be students of the University [and] the remainder is faculty and administrators of the University at Albany." You added that you were informed that a "meal plan rate increase was approved" at a meeting of the UAS Board from which you and others were "ordered to leave." You also wrote that the executive director of UAS "maintains that the UAS is a private organization that is subject to neither the Freedom of Information Law nor the Open Meetings Law."

From my perspective, based on judicial decisions, UAS is required to comply with both of those statutes. In this regard, I offer the following comments.

First, even if UAS has no independent responsibility to comply with the Freedom of Information Law, I believe that its records fall within the coverage of that statute.

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."

While the status of UAS as an "agency" has not been determined judicially, it is clear that the State University is an "agency" required to comply with the Freedom of Information Law.

In this regard, §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 Court of Appeals, the state's highest court, found that documents maintained by the Auxiliary Services Corporation, a not-for-profit corporation providing services for a different branch of the State University, were kept on behalf of the University and constituted agency "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. Auxillary Services Corporation of the State University of New York at Farmingdale, 87 NY 2d 410, 417 (1995)]. Therefore, if a document is produced for an agency, it constitutes an agency record, even if it is not in the physical possession of the agency. In the context of the situation that you described, irrespective of whether UAS is an "agency", its records would be maintained for the University at Albany and would, based on Encore, constitute agency records subject to the Freedom of Information Law.

Second, while profit or not-for-profit corporations would not in most instances be subject to the Freedom of Information Law because they are not governmental entities, there are several judicial determinations in which it was held that certain not-for-profit corporations, due to their functions and the nature of their relationship with government, are "agencies" that fall within the scope of the Freedom of Information Law.

In the first decision in which it was held that a not-for-profit corporation may indeed be an "agency" required to comply with the Freedom of Information Law, [Westchester-Rockland Newspapers v. Kimball [50 NYS 2d 575 (1980)], a case involving access to records relating to a lottery conducted by a volunteer fire company, the Court of Appeals found that volunteer fire companies, despite their status as not-for-profit corporations, are "agencies" subject to the Freedom of Information Law. In so holding, the State's highest court stated that:

> "We begin by rejecting respondent's contention that, in applying the Freedom of Information Law, a distinction is to be made between a volunteer organization on which a local government relies for performance of an essential public service, as is true of the fire department here, and on the other hand, an organic arm of government, when that is the channel through which such services are delivered. Key is the Legislature's own unmistakably broad

> declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (emphasis added; Public Officers Law, §84).
>
> For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objections cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" (id. at 579].

In the same decision, the Court noted that:

> "...not only are the expanding boundaries of governmental activity increasingly difficult to draw, but in perception, if not in actuality, there is bound to be considerable crossover between governmental and nongovernmental activities, especially where both are carried on by the same person or persons" (id., 581).

In Buffalo News v. Buffalo Enterprise Development Corporation [84 NY 2d 488 (1994)], the Court of Appeals found again that a not-for-profit corporation, based on its relationship to an agency, was itself an agency subject to the Freedom of Information Law. The decision indicates that:

> "The BEDC principally pegs its argument for nondisclosure on the feature that an entity qualifies as an 'agency' only if there is substantial governmental control over its daily operations (see, e.g., Irwin Mem. Blood Bank of San Francisco Med. Socy. v American Natl. Red Cross, 640 F2d 1051; Rocap v Indiek, 519 F2d 174). The Buffalo News counters by arguing that the City of Buffalo is 'inextricably involved in the core planning and execution of the agency's [BEDC] program'; thus, the BEDC is a 'governmental entity' performing a governmental function for the City of Buffalo, within the statutory definition.
>
> "The BEDC's purpose is undeniably governmental. It was created exclusively by and for the City of Buffalo...In sum, the constricted construction urged by appellant BEDC would contradict the expansive public policy dictates underpinning FOIL. Thus, we reject appellant's arguments," (id., 492-493).

Perhaps most analogous to the situation described is a decision in which it was held that a community college foundation associated with a CUNY institution was subject to the Freedom of Information Law, despite its status as a not-for-profit corporation. In so holding, it was stated that:

> "At issue is whether the Kingsborough Community College Foundation, Inc (hereinafter 'Foundation') comes within the definition of an 'agency' as defined in Public Officers Law §86(3) and whether the Foundation's fund collection and expenditure records are 'records' within the meaning and contemplation of Public Officers Law §86(4).
>
> "The Foundation is a not-for-profit corporation that was formed to 'promote interest in and support of the college in the local community and among students, faculty and alumni of the college' (Respondent's Verified Answer at paragraph 17). These purposes are further amplified in the statement of 'principal objectives' in the Foundation's Certificate of Incorporation:
>
> > '1 To promote and encourage among members of the local and college community and alumni or interest in and support of Kingsborough Community College and the various educational, cultural and social activities conducted by it and serve as a medium for encouraging fuller understanding of the aims and functions of the college'.
>
> "Furthermore, the Board of Trustees of the City University, by resolution, authorized the formation of the Foundation. The activities of the Foundation, enumerated in the Verified Petition at paragraph 11, amply demonstrate that the Foundation is providing services that are exclusively in the college's interest and essentially in the name of the College. Indeed, the Foundation would not exist but for its relationship with the College" (Eisenberg v. Goldstein, Supreme Court, Kings County, February 26, 1988).

As in the case of the foundation in Eisenberg, that entity, and, in this instance, the UAS, would not exist but for their relationships with CUNY and SUNY respectively. Due to the similarity between the situation you have described and that presented in Eisenberg, as well as the functions of the UAS and its relationship to the University, I believe that it is subject to the Freedom of Information Law.

Next, 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."

By breaking the definition into components, I believe that each condition necessary to a finding that the board of UAS is a "public body" may be met. It is an entity for which a quorum is required pursuant to the provisions of the Not-for-Profit Corporation Law. It consists of more than two members. In view of the degree of governmental control exercised by and its nexus with the University at Albany, I believe that it conducts public business and performs a governmental function for a governmental entity.

In Smith v. City University of New York [92 NY2d 707 (1999)], the Court of Appeals held that a student government association carried out various governmental functions on behalf of CUNY and, therefore, that its governing body is subject to the Open Meetings Law. In its consideration of the matter, the Court found that:

> "in determining whether the entity is a public body, various criteria or benchmarks are material. They include the authority under which the entity is created, the power distribution or sharing model under which it exists, the nature of its role, the power it possesses and under which it purports to act, and a realistic appraisal of its functional relationship to affected parties and constituencies" (id., 713).

In consideration of those criteria and applying them to the matter at hand, the UAS would not exist but for its relationship with the University; it carries out a variety of functions that the University would otherwise perform; the University has substantial control over the UAS board in the terms of membership. Further, one of the actions to which you referred, increasing the cost of the meal plan, involves the assertion of authority that could be exercised only by or on behalf of the University.

Based on the foregoing, I believe that the UAS board is a "public body" required to comply with the Open Meetings Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt
cc: Julia Filippone, Executive Director UAS
Wendy Kowalczyk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 6, 2001

Mr. Michael A. Kless
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Kless:

I have received your correspondence in which you wrote that the City of Buffalo Fire Department and an Erie County department failed to respond to your requests made under the Freedom of Information Law.

In this regard, the Freedom of Information 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 [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of 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: Christopher M. Putrino
Corporation Counsel
Frederick A. Wolf, County Attorney
Commissioner Billittier

STATE OF NEW YORK
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December 6, 2001

Ms. Patricia Pagano
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Pagano:

I have received your letter and the materials relating to it. You have sought my views concerning the propriety of a denial of access to certain records by the Village of Manorhaven. The records in question, as I understand the matter, include two letters addressed by the Village Attorney to the Mayor of the Village; the remaining record is a letter sent by the Town Attorney of the Town of North Hempstead to the Village Attorney. Each of the letters was withheld. "based on attorney /client privilege."

In this regard, as a general matter the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Pertinent to claim of the attorney-client privilege is §87(2)(a), which 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.

In a discussion of the parameters of the attorney-client relationship and the conditions precedent to its initiation, it has been held that:

> "In general, 'the privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client'" [People v. Belge, 59 AD 2d 307, 399 NYS 2d 539, 540 (1977)].

If the conditions described above are applicable with respect to the communications between the Village Attorney and the Mayor are present, I believe that the assertion of the attorney/client privilege would be proper.

With respect to the remaining letter, a communication between the Village Attorney and the Town Attorney, I do not believe that there is a privileged relationship between the two; neither is the client of the other. That being so, the assertion of the attorney-client privilege as a means of denying access to that communication would, in my view, be inconsistent with law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Rose Marie Pernice
Kenneth A. Gray

FOIL-AO-1307

From: Robert Freeman
To: gbashor@co.dutchess.ny.us
Date: 12/7/01 4:59PM
Subject: Dear Lt. Bashor:

Dear Lt. Bashor:

I have received your inquiry concerning the status of email under FOIL and a requirement that email be retained permanently. In short, I believe that the position taken by the County's "computer people", as you described it, is inaccurate.

While email constitutes a "record" that falls within the coverage of the FOIL, like any other record, it may be available or exempt from disclosure, in whole or in part, depending on its contents and the effects of disclosure. It has been advised that email be considered as if it existed on paper in determining whether or the extent to which it must be disclosed.

Provisions in the Arts and Cultural Affairs Law, Article 57-A, deal with the retention and disposal of records. Pursuant to those provisions, the State Archives develops schedules indicating minimum retention periods for various kinds of records. The more significant the records are, the longer they must be kept. Some records, because they are insignificant, may be destroyed immediately.

The State Archives has printed materials concerning the retention and disposal of email, and it is suggested that you or the County's records management officer (likely the County Clerk) obtain copies. In addition, I prepared an article involving email and the FOIL which is available on our website (the address appears below). When on the website, click on to "publications" and then to the article entitled "Email: Food for Thought." I believe that it addresses many of the questions that you might raise on the matter.

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
DEPARTMENT OF STATE
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December 10, 2001

Mr. Brad Heath
Press & Sun Bulletin
P.O. Box 1270
Binghamton, NY 13902

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Heath:

As you aware, I have received your letter in which you sought my views concerning a request made under the Freedom of Information to the State Department of Health nearly a year and half ago. In a June 23 acknowledgment of the receipt of your request of June 13, 2000, you were informed that it was "estimate[d] that it will take **approximately** 30-60 days to complete your request or determine the availability of documents responsive to your request" (emphasis added by the Department). You were informed by letter on April 25, 2001 that your request had been "partially completed", and some of the data sought was disclosed; equivalent but more recent data would presumably be made available at some time in the future. Other aspects of the request were denied on the basis of §2803-d of the Public Health Law. More time had passed, and you considered portions of the request to have been denied, and you appealed on that basis on October 25.

The information sought involves portions of a database known as the "Uniform Complaint Tracking System." Based on your discussions concerning the contents of the database with Department staff, it is my understanding that you agreed that various portions could be withheld to protect personal privacy. In this regard, I offer the following comments.

First, with respect to the delays that you have faced, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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 [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. The acknowledgement by the records access officer did not make reference to such a date.

I note that there is no precise time period within which an agency must grant or deny access to records. The time needed to do so may be dependent upon the volume of a request, the possibility that other requests have been made, the necessity to conduct legal research, the search and retrieval techniques used to locate the records and the like. In short, when an agency acknowledges the receipt of a request because more than five business days may be needed to grant or deny a request, so long as it provides an approximate date indicating when the request will be granted or denied, and that date is reasonable in view of the attendant circumstances, I believe that the agency would be acting in compliance with law. Notwithstanding the foregoing, in my view, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible.*" Therefore, if records are clearly available to the public under the Freedom of Information Law, and if they are readily retrievable, there may be no basis for a lengthy delay in disclosure.

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Second, with regard to rights of access, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Pertinent is another statute, §2803-d of the Public Health Law, entitled "Reporting abuses of persons receiving care or services in residential health care facilities." Reports of investigations fall within the first ground for denial of access, §87(2)(a), concerning records that are "specifically

exempted from disclosure by state or federal statute." Subdivision (e) of §2803-d serves as an exemption from disclosure, for it states that:

> "Except as hereinafter provided, any report, record of the investigation of such report and all other information related to such report shall be confidential and shall be exempt from disclosure under article six of the public officers law."

Most relevant in my view, however, is subdivision (f) of §2803-d, which states in pertinent part that:

> "Information relating to a report made pursuant to this section shall be disclosed...pursuant to article six of the public officers law after expungement or amendment, if any, is made in accordance with a hearing conducted pursuant to this section, or at least forty-five days after a written determination is made by the commissioner concerning such report, whichever is later; provided, however, that the identity of the person who made the report, the victim, or any other person named, except a person who the commissioner has determined committed an act of physical abuse, neglect or mistreatment, shall not be disclosed unless such person authorizes such disclosure..."

Based on the foregoing, it appears that the contents of the database are accessible after certain actions are taken, or in some instances, after a prescribed period of time, and following the redaction of any name, except the name of a person found to have committed an act of physical abuse, neglect or mistreatment, or the name of any other person who has authorized disclosure. The information contained in the database following proper redactions would, as I understand its contents, consist of factual information accessible under §87(2)(g)(i) of the Freedom of Information Law. That provision requires the disclosure of "statistical or factual tabulations or data" found within inter-agency or intra-agency materials, unless a separate ground for denial may properly be asserted. In short, I believe that portions of the database must be disclosed.

Lastly, 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 disc. On the other hand, if information sought can be generated only through the use of new programs, so doing would in my opinion represent the equivalent of creating a new record.

Questions and issues have arisen in relation to information maintained electronically concerning §89(3) of the Freedom of Information Law, which states in part that an agency is not required to create or prepare a record in response to a request. In this regard, often information stored electronically can be extracted by means of keystrokes or queries entered 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. Transferring the data from one electronic storage medium to another involved relatively little effort and cost; preparation of a printout, however, involved approximately a million pages and a cost of ten thousand dollars for paper alone. 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)].

In another decision which 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).

Perhaps most pertinent and timely is a decision rendered less than four months ago concerning a request for records, data and reports maintained by the New York City Department of Health regarding "childhood blood-level screening levels" (New York Public Interest Research Group v. Cohen and the New York City Department of Health, Supreme Court, New York County, July 16, 2001; hereafter "NYPIRG"). The agency maintained much of the information in its "LeadQuest" database, and I believe that the principles enunciated in that decision would likely be applicable in the context of your request.

In NYPIRG, the Court described the facts, in brief, as follows:

> "...the request for information in electronic format was denied on the following grounds:

> '[S]uch records cannot be prepared in an electronic format with individual identifying information redacted, without the Department creating a unique computer program, which the Department is not required to prepare pursuant to Public Officer's Law §89(3).'
>
> "Instead, the agency agreed to print out the information at a cost of twenty-five cents per page, and redact the relevant confidential information by hand. Since the records consisted of approximately 50,000 pages, this would result in a charge to petitioner of $12,500."

It was conceded by an agency scientist that:

> "...several months would be required to prepare a printed paper record with hand redaction of confidential information, while it would take only a few hours to program the computer to compile the same data. He also confirmed that computer redaction is less prone to error than manual redaction."

In consideration of the facts, the Court wrote that:

> "The witnesses at the hearing established that DOH would only be performing queries within LeadQuest, utilizing existing programs and software. It is undisputed that providing the requested information in electronic format would save time, money, labor and other resources - maximizing the potential of the computer age.
>
> "It makes little sense to implement computer systems that are faster and have massive capacity for storage, yet limit access to and dissemination of the material by emphasizing the physical format of a record. FOIL declares that the public is entitled to maximum access to public records [Fink v. Lefkowitz, 47 NY2d 567, 571 (1979)]. Denying petitioner's request based on such little inconvenience to the agency would violate this policy."

Based on the foregoing, it was concluded that:

> "To sustain respondents' positions would mean that any time the computer is programmed to provide less than all the information stored therein, a new record would have been prepared. Here all that is involved is that DOH is being asked to provide less than all of the available information. I find that in providing such limited information DOH is providing data from records 'possessed or maintained' by it. There is no reason to differentiate between data redacted by a computer and data redacted manually insofar as

> whether or not the redacted information is a record 'possessed or maintained' by the agency.
>
> "Moreover, rationality is lacking for a policy that denies a FOIL request for data in electronic form when to redact the confidential information would require only a few hours, whereas to perform the redaction manually would take weeks or months (depending on the number of employees engaged), and probably would not be as accurate as computer generated redactions."

Assuming that your request involves similar considerations, in my opinion, a response to the request, based on the precedent offered in NYPIRG, would involve the disclosure of data stored electronically for which there is no basis for a denial of access.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: John Signor
James O'Meara

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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FOIL-AO-13073

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December 11, 2001

Mr. Michael J. Derevlany
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Derevlany:

I have received your letter in which you sought guidance "as to access to records and meetings of semi-autonomous governmental agencies such as those set up by statute that may not or do not report to the executive branch or any other (higher) agency or other authority."

In this regard, the coverage of both the Freedom of Information and Open Meetings Law is expansive, and if I understand your inquiry correctly, the entities to which you referred would be subject to those statutes. The former applies to agencies, and §86(3) of that statute defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, any governmental entity performing a governmental function constitutes an "agency" that falls within the coverage of the Freedom of Information Law.

Similarly, 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."

If an entity consisting of two or more members is a creation of law and has decision making authority, or if performs a necessary function in the decision making process, I believe that it would constitute a "public body" required to comply with the Open Meetings Law.

Typical of a "semi-autonomous" or what some have characterized as a "quasi-governmental" agency would be an industrial development agency. The provisions concerning industrial development agencies are found in Article 18-A of the General Municipal Law, and §856(2) of the General Municipal Law states in part that an industrial development agency "shall be a corporate governmental agency, constituting a public benefit corporation". A public benefit corporation is a "public corporation" as that term is defined by §66(1) of the General Construction Law. Further, §856(3) of the General Municipal Law states that a majority of the members of an industrial development agency "shall constitute a quorum".

Based upon the foregoing, it is clear in my view that the members of an industrial development agency constitute a "public body" subject to the Open Meetings Law, for they perform a governmental function for a public corporation. Based on the language of the General Municipal Law, an industrial development agency clearly is a governmental entity performing a governmental function that is required to give effect to the Freedom of Information Law.

If you or your client may have questions concerning a particular entity, and if the foregoing does not provide a clear conclusion, please feel free to contact me.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
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December 11, 2001

Mr. Michael J. Capozzi
Superintendent of Schools
Mr. Robert M. Tartaglia
Plant & Facilities Administrator
East Islip School District
Craig B. Gariepy Avenue
Islip Terrace, N Y 11752-2800

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Capozzi and Mr. Tartaglia:

I appreciate having received correspondence from you concerning a denial of a request made under the Freedom of Information Law. The denial of access was based on your finding that the records in question are "intra-agency communications which are not subject to being produced..."

For purposes of clarification and to enhance compliance with and understanding of the Freedom of Information Law, I point out that the mere characterization of records as "inter-agency" or "intra-agency" communications is inadequate in determining rights of access to those records; rather, the specific contents of those communications serve as the factors in determining the extent to which those materials may be withheld.

As you are aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

One of the grounds for denial, §87(2)(g), focuses on the records in question. However, due to its structure, it often requires substantial disclosure. Specifically, the cited provision authorizes an agency, such as a school district, to withhold records that:

"are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those 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, having reviewed the District's application for public access to records, I noticed that applicants must indicate whether they reside in the District and the purpose of the request. In my view, the District cannot in most instances require applicants to include the information sought. In short, the Freedom of Information Law does not distinguish among applicants. I note that the Education Law, §2116, which was enacted in 1947, states that district records are available to qualified voters of the district. However, with the enactment of the Freedom of Information Law in 1974, it was held that that statute broadens the class of those enjoying rights of access to records to the general public and that persons who do not reside in a school district have the same rights of access as those who do [see Duncan v. Bradford Central School District, 394 NYS2d 362 (1977)]. With respect to the purpose for which a request is made, it has consistently been advised by this office and held by the courts that records accessible under the Freedom of Information Law must be made equally available to any person, without regard to status or interest [see Burke v. Yudelson, 51 AD2d 673 (1976); Farbman v. New York City, 62 NY2d 75 (1984)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
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December 11, 2001

Mr. Victor Maltsev
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Maltsev:

I have received your letter in which you indicated that you are an employee of a New York City agency and that you have made several requests to your agency under the Freedom of Information Law during the past several months. The requests have not been answered, and the agency's records access officer appears to have "informed [your] supervisor about [the] requests." You wrote that it is your understanding that "all FOIL requests are to be considered confidential" and asked whether you have "any legal rights to fight back."

In this regard, I offer the following comments.

First, in brief, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

It has generally been advised that requests made under the Freedom of Information Law are accessible. The only instances in which they may be withheld in whole or in part in my opinion would involve situations in which requests, by their nature, would if disclosed constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)]. 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 withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy. If, however, a person seeks records concerning contracts, policies, procedures and the like, the request would not likely indicate anything of a personal or intimate nature concerning the applicant for the records, and there would likely be no basis for withholding the request or the name of the applicant.

I point out, too, that the Freedom of Information Law is permissive. While an agency *may* withhold records or portions of records in accordance with the grounds for denial of access, it not *required* to do so. Therefore, even if a City agency determined that disclosure would constitute "an unwarranted invasion of personal privacy", it could choose to disclose, despite its ability to deny access.

Second, notwithstanding the foregoing and in view of the agency's failure to respond, it is noted that the Freedom of Information Law provides direction concerning the time and manner in which an agency is must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Lastly, while I have not seen your requests, 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. Therefore, if, for example, there are no records containing the statistics of your interest, the agency would not be required to prepare new records containing the information sought on your behalf.

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

FOIL-AO-13076

From: Robert Freeman
To: [redacted]
Date: 12/11/01 12:01PM
Subject: Dear Mr. Brieaddy:

Dear Mr. Brieaddy:

I have received your letter in which you wrote that the Office of Mental Retardation and Developmental Disabilities has "ignored" a request made under the FOIL on November 28.

In this regard, as you are likely aware, that statute requires that an agency respond to a request for records within five business days of its receipt of the request by granting access, denying access in writing, or acknowledging the receipt of the request in writing and indicating that more than five business days will be needed to grant or deny access. If an agency takes none of those actions, i.e., if five business days have passed and the agency has not responded in any way, the request may considered to have been constructively denied. When a request is denied, the denial may be appealed to the head of the agency or that person's designee. Section 89(4)(a) of the law requires that the person designated to determine an appeal is required to do so within ten business days by either granting access to the records or fully explaining in writing the reasons for further denial. In short, an agency has a specified and limited time within which an appeal must be determined.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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December 12, 2001

Mr. Angelos Peter Romas
[redacted]

The staff of the Committee 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. Romas:

I have received your letter and thank you for your kind words. You have sought an opinion concerning the adequacy of a response to your request under the Freedom of Information Law by the Susquehanna Cultural Park/Susquehanna Heritage Area (hereafter "the entity").

First, because I am unfamiliar with the entity, I contacted its Executive Director, Ms. Gail Domin, to obtain information concerning its functions and duties. She informed me that the entity is an intermunicipal commission formed by the City of Binghamton and the Villages of Endicott and Johnson City. In this regard, the Freedom of Information Law is applicable to agencies, and §86(3) of that statute defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, I believe that the entity is an "agency" that falls within the scope of the Freedom of Information Law.

Notwithstanding the preceding remarks, the entity, as described by Ms. Domin, is not typical of government agencies. It does not take in or pay out public moneys; rather it assists in developing programs and functions largely as a technical adviser.

Second, having reviewed your request, it consists in great measure of a series of questions and seeks chronological or other "lists" of certain items. Here I point out that the title of the

Freedom of Information Law may be somewhat misleading, for it is not a vehicle that requires agencies to provide information *per se* or to answer questions. Rather it requires agencies to disclose existing records to the extent required by law. Further, §89(3) of the Freedom of Information Law states in relevant part that an agency is not required to create a record in response to a request. In short, while agencies and their staffs *may* provide information by responding to questions, they are not required to do so. Similarly, while an agency or its staff *may* provide a chronological list of particular items by creating a new record, if no such record exists, it would not be required to do so.

In short, in consideration of the nature of your request, it appears that Ms. Domin's response was consistent with law. Moreover, she indicated that the brochures and other printed materials sent to you include much of the information that you requested.

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: Gail Domin

STATE OF NEW YORK
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December 12, 2001

Ms. Bonnie Forbes-Mills
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Forbes-Mills:

I have received your letter in which you sought assistance in obtaining your son's medical records from the Bassett Hospital of Schoharie County. In addition, you indicated that you requested, by phone, policy manuals pertaining to foster care from the Office of Children and Family Services.

In this regard, it is emphasized at the outset the Committee on Open Government is authorized to provide advice and opinions concerning public access to government agency records, primarily under the New York Freedom of Information Law. That statute is applicable to agency records, and §86(3) defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, as a general matter, the Freedom of Information Law applies to records of units of state and local government; it does not apply to private entities, such as private hospitals. I believe that Bassett Hospital is a private facility. If that is so, the Freedom of Information Law would not be applicable, and that aspect of your request for assistance would fall beyond the jurisdiction of this office. You indicated that you had been in contact with Mr. Farr of the Department of Health. I believe that he has expertise with respect access to patient records pursuant to §18 of the Public Health Law that are maintained by hospitals or physicians.

Second, the Office of Children and Family Services clearly is an agency required to comply with the Freedom of Information Law. With respect to your request by phone, I point out that an agency may accept an oral request for records. However, under §89(3) of that statute, an agency may require that a request be made in writing. That provision also states that an applicant must "reasonably describe" the records sought. Therefore, when seeking records, the applicant must provide sufficient detail to enable agency staff to locate and identify the records.

Third, 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 requests, and requests should be directed to that person.

With respect to rights of access to agency records, 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, assuming that a request reasonably describes them, an agency's policies on a given subject would be available, for §87(2)(g) specifies that final agency policies are accessible under the law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT PPPL-AO-FOIL-AO-13079

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December 13, 2001

Mr. Michael J. Fournier
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Fournier:

I have received your letter in which you sought assistance in obtaining your "arrest record" from the Village of Malone Police Department. Having requested the record from that agency, under the Freedom of Information and Personal Privacy Protection Laws, you were informed that the kind of record in question, as a matter of "policy" is not disclosed. From my perspective, it is unclear on the basis of your letter whether your request involves a particular incident in which there may have been an arrest, or whether you have requested a criminal history record. Consequently, I will attempt to address both situations.

It is noted at the outset that the Personal Privacy Protection Law specifically excludes units of local government from its coverage [see definition of "agency", §92(1)]. Therefore, that statute would not provide rights of access to records maintained by a municipal police department.

The Freedom of Information Law, however, is applicable to entities of state and local government and is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

With respect to criminal history records, which are also known as rap sheets, the general repository of those records for the state is the Division of Criminal Justice Services. Although an individual may contact the Division to obtain his or her own criminal history record, it has been found that those records are exempt from disclosure to the public. Further, when a local police department acquires criminal history records from the Division, it is prohibited from disclosing those records. If you are interested in obtaining your own criminal history record from the Division, it is suggested that you contact its Office of Public Inquiry at (518)457-6113.

If you are interested in a particular arrest or arrests by the Police Department, the record or records would be available in whole or in part, depending on the circumstances. If, for instance, you were convicted, the matter would be closed, and it is unlikely that there would be a basis for a denial of access. If you were charged and the charges were dismissed, the records would be sealed pursuant to §160.50 of the Criminal Procedure Law. If you were arrested and the matter is pending, some aspects of the records would be available, but others might be withheld. Under §87(2)(e) of the Freedom of Information Law, records compiled for law enforcement purposes may be withheld disclosure would:

> "i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

If you could provide clarification concerning the records of your interest, perhaps I could offer more specific guidance. Nevertheless, I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
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December 12, 2001

Ms. Janice M. Pennington
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solcly upon the information presented in your correspondence.

Dear Ms. Pennington:

I have received your letter in which you sought an advisory opinion concerning rights of access to photographs taken during an autopsy. The autopsy was performed following the death of a victim of a shooting, and your husband was convicted as a result of the event.

You wrote that the autopsy was performed by Dr. Baik, the Erie County Associate Medical Examiner, and that photographs were taken by Dr. Baik and State Police Investigator Raymond Motyka. You added that "[t]hrough pre-trial discovery, it was learned that the 35mm autopsy photographs taken by Dr. Baik were exposed and failed to develop", that "[t]he photographs taken by Inv. Motyka were the only photographic evidence of the autopsy", and that "[t]hese photographs were used during the criminal trial."

Having requested the photographs from the Office of the Erie County District Attorney, you were denied access on the basis of §677 of the County Law. You have contended that §677 is inapplicable because the photographs were taken by the State Police, rather than the Medical Examiner and that they should be available based on the holding in Moore v.Santucci [151 AD2d 677 (1989)].

In this regard, I offer the following comments.

First, as you are likely aware, pursuant to §677 of the County Law, an autopsy report and related records are available as of right only to a district attorney and the next of kin of the deceased. Subdivision (1) of that statute provides that:

> "The writing made by the coroner, or by the coroner and coroner's physician, or by the medical examiner, at the place where he takes charge of the body, shall be filed promptly in the office of the coroner

> or medical examiner. The testimony of witnesses examined before him and the report of any examination made or directed by him shall be made in writing or reduced to writing and thereupon filed in such office."

With respect to access to the records described in subdivision (1), paragraph (b) of subdivision (3) 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.

Nevertheless, according to your description of the facts, the photographs at issue were not taken by the Associate Medical Examiner, but rather by a State Police Investigator. If that is so, it is questionable in my view whether §677 applies. If it is the governing statute, I believe that a court order would ordinarily be required to gain access to the records. If it does not apply, the Freedom of Information Law, in my opinion, would govern rights of access.

Second, notwithstanding the foregoing, even though records might ordinarily be withheld under the Freedom of Information Law, it has been held that there is no basis for denial once the records have been presented in a public judicial proceeding. In Moore, the decision to which you referred, the Court found that:

> "...while statements of the petitioner, his codefendants and witnesses obtained by the respondent in the course of preparing a criminal case for trial are generally exempt from disclosure under FOIL (*see, Matter of Knight v Gold*, 53 AD2d 694, *appeal dismissed* 43 NY2d 841), once the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public" [151 AD2d 677,679 (1989)].

In short, by disclosing the photographs in open court, a public disclosure would have already been made. Once that occurs, unless a record is later sealed, nothing in the Freedom of Information Law would serve to enable an agency to deny access to that record.

That principle appears to have been recognized in a case involving an attempt by a new organization to obtain a videotape from the court, which denied the request "based on the court's concerns that the integrity of the evidence in question would be placed in jeopardy" (see People v. Shulman, Supreme Court, Suffolk County, NYLJ, December 24, 1998).
Although the trial judge's refusal to provide the videotape was based on its fear that the tape, as evidentiary material, might in some way be damaged, he emphasized that:

> "...there are other mechanisms which have already been confirmed by the court in that they could simply file a Foil request with the district attorney's office for a copy of the tape, and based on the appellate law, it's clear that the district attorney's office, if they have a copy, would have to turn it over to News 12...It seems to me that would be the appropriate way to proceed" (Transcript of Order by Hon. Arthur G. Pitts, pp. 5-6, November 6, 1998, County Court, Suffolk County).

In consideration of the foregoing, while the trial judge denied the request for the court's copy of the videotape based on concern for the physical integrity and security of the tape, he essentially recommended that a copy be sought from the District Attorney and recognized that a duplicate must be disclosed by the District Attorney in response to a request made under the Freedom of Information Law.

Lastly, another aspect of Moore may be equally significant, for it was also held that if a record sought was previously made available to the defendant or his or her attorney, there must be a demonstration that neither 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 the attorney to determine whether he or she continues to possess the record. If the attorney no longer maintains the record, he or she, as well as your husband, should prepare affidavits so stating that can be submitted to the office of the district attorney.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: John DeFranks

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13081

41 State Street, Albany, New York 12231
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December 17, 2001

Ms. Patricia Pagano
80 Orchard Beach Boulevard
Port Washington, NY 11050

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Pagano:

I have received your letter of November 15 and the materials relating to it. You have sought assistance concerning a request for "the documentation that substantiates the entry" in an independent audit recently prepared for the Village of Manorhaven. It is your view that the entry is "erroneous" and "misrepresents the village's finances."

In this regard, I offer the following comments.

First, in a letter of November 15 addressed to Rose Marie Pernice, the Village Clerk/Treasurer, you asked that she "verify" that she reviewed the audit and asked "how that entry was able to remain." If you considered your questions to be requests made under the Freedom of Information Law, I note that that statute pertains to requests for existing records. It does not require that government officials provide information by answering questions, and §89(3) states in part that an agency is not required to create a record in response to a request. In short, the Clerk/Treasurer may supply information in response to questions, but I do not believe that she is obliged to do so by the Freedom of Information Law.

Second, insofar as records exist, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, the kinds of records of your interest as described in the correspondence would be accessible insofar as they exist, for none of the grounds for denial would be applicable.

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 [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of 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: Rose Marie Pernice

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3386
FOIL-AO-13082

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December 19, 2001

Mr. Michael McGuire
[redacted]

The staff of the Committee on Open 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 in which you raised questions concerning the implementation of the Freedom of Information and Open Meetings Laws in the Village of Tuckahoe.

The initial area of inquiry involves a member of the Board of Trustees "actively participating" in a meeting of the Planning Board. The same question was recently raised by a Trustee, and my response to you reiterates that given to the Trustee. Specifically, there is nothing in the Open Meetings Law or any other statute of which I am aware that addresses the matter. However, I note that the Board of Trustees, the Zoning Board of Appeals and the Planning Board are each distinct public bodies with distinct membership, and a member of one such board does not serve as a member of the others.

On occasion, a governing body, such as a board of trustees, designates one of its members to serve as liaison with other entities within the municipality. In that circumstance, it would not be unusual for the liaison to "sit" with the board. Nevertheless, I believe that a determination of the matter falls within the jurisdiction, in this instance, of the Board of Trustees. If there is currently no rule or policy regarding the issue, you might consider offering a recommendation to clarify any controversy that might now exist.

The next question relates to a limitation on the hours during which records are available for inspection. In this regard, it has been advised by this office and held judicially that an agency cannot limit the ability of the public to inspect records to a period less than its regular business hours. By way of background, §89 (1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural implementation of the Law (see 21 NYCRR Part 1401). In turn, §87 (1) requires agencies to adopt rules and regulations consistent with the Law and the Committee's regulations.

Section 1401.2 of the regulations, provides in relevant part that:

> "(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so..."

Section 1401.4 of the regulations, entitled "Hours for public inspection", states that:

> "(a) Each agency shall accept requests for public access to records and produce records during all hours they are regularly open for business."

Relevant to the matter is a decision rendered by the Appellate Division, Second Department. Among the issues was the validity of a limitation regarding the time permitted to inspect records established by a village pursuant to regulation. The Court held that the village was required to enable the public to inspect records during its regular business hours, stating in part that:

> "...to the extent that Regulation 6 has been interpreted as permitting the Village Clerk to limit the hours during which public documents can be inspected to a period of time less than the business hours of the Clerk's office, it is violative of the Freedom of Information Law..." [Murtha v. Leonard, 620 NYS 2d 101 (1994), 210 AD 2d 411].

Based on the foregoing, the Village, in my view, cannot limit the 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.

Lastly, having requested copies of records, you were informed that the Village "is not required to search for records." You noted that the request involved permits relating to a "driveway located at the corner of Lake Avenue and Cedar Street." By way of historical background, when the

Freedom of Information Law was initially enacted in 1974, it required that an applicant request "identifiable" records. Therefore, if an applicant could not name the record sought or "identify" it with particularity, that person could not meet the standard of requesting identifiable records. In an effort to enhance its purposes, when the Freedom of Information Law was revised, the standard for requesting records was altered. Since 1978, §89(3) has stated that an applicant must merely "reasonably describe" the records sought. I point out that it has been held by the Court of Appeals that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

The Court in Konigsberg found that the agency could not reject the request due to its breadth and also stated that:

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency'])" (id. at 250).

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping system. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number.

While I am unfamiliar with the record keeping systems of the Village, 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. In Ruberti, Girvin & Ferlazzo v. Division of State Police [218 AD2d 494, 641 NYS2d 411 (1996)], one element of the decision pertained to a request for a certain group of personnel records, and the agency argued that it was not required to search its files for those requested "because such records do not exist in a 'central file' and, further, that FOIL does not require that it review every litigation or personnel file in search of such information" (id., 415). Nevertheless, citing Konigsberg, the court determined that:

> "Although the record before this court contains conflicting proof regarding the nature of the files actually maintained by respondent in this regard, an agency seeking to avoid disclosure cannot, as respondent essentially has done here, evade the broad disclosure

> provisions FOIL by merely asserting that compliance could potentially require the review of hundreds of records" (id.).

If the Village can locate the records sought with a reasonable effort analogous to that described above, i.e., even if a search involves the review of hundreds of records, it apparently would be obliged to do so. As indicated in Konigsberg, only if it can be established that the Village maintains its records in a manner that renders its staff unable to locate and identify the records would the request have failed to meet the standard of reasonably describing the records.

In an effort to enhance compliance with and understanding of open government laws, copies of this opinion will be forwarded to Village officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees
Village Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 20, 2001

E-Mail

TO: Robert Reninger

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. Reninger:

As you are aware, I have received your letter in which you questioned the right to appeal under the Freedom of Information Law when an agency indicates that requested records are lost or missing or were destroyed.

To reiterate, in my view, an appeal may be made when an agency denies access by informing an applicant that it has a record, but the applicant does not have the right to inspect or copy that record based on one or more of the grounds for withholding the record appearing in §87(2) of the Freedom of Information Law. By means of example, if you requested your income tax records from this office, the response would be that this office does not maintain records of that nature. I do not believe that a response to that effect constitutes a denial of access to records, or that it would make legal or logical sense to appeal.

In your correspondence, I believe that the inference is that the Town should have certain records, and if it does, that it should have the ability to locate them. As suggested in my letter to you of November 1, you may seek a certification, which would be in the nature of an affidavit, in which it is asserted that, having made a diligent search, the Town officials could not locate the records or that the Town does not maintain the records.

It is possible that the your difficulty in obtaining records gives rise to other issues. One involves the obligation of an agency to search for its records. By way of historical background, when the Freedom of Information Law was initially enacted in 1974, it required that an applicant request "identifiable" records. Therefore, if an applicant could not name the record sought or "identify" it with particularity, that person could not meet the standard of requesting identifiable records. In an

effort to enhance its purposes, when the Freedom of Information Law was revised, the standard for requesting records was altered. Since 1978, §89(3) has stated that an applicant must merely "reasonably describe" the records sought. I point out that it has been held by the Court of Appeals that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

The Court in Konigsberg found that the agency could not reject the request due to its breadth and also stated that:

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency'])" (id. at 250).

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping system. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number.

While I am unfamiliar with the record keeping systems of the Town, to the extent that the records sought can be located with reasonable effort, I believe that the request would have met the requirement of reasonably describing the records. In Ruberti, Girvin & Ferlazzo v. Division of State Police [218 AD2d 494, 641 NYS2d 411 (1996)], one element of the decision pertained to a request for a certain group of personnel records, and the agency argued that it was not required to search its files for those requested "because such records do not exist in a 'central file' and, further, that FOIL does not require that it review every litigation or personnel file in search of such information" (id., 415). Nevertheless, citing Konigsberg, the court determined that:

> "Although the record before this court contains conflicting proof regarding the nature of the files actually maintained by respondent in this regard, an agency seeking to avoid disclosure cannot, as respondent essentially has done here, evade the broad disclosure provisions FOIL by merely asserting that compliance could potentially require the review of hundreds of records" (id.).

If the Town can locate the records sought with a reasonable effort analogous to that described above, i.e., even if a search involves the review of hundreds of records, it apparently would be obliged to do so. As indicated in Konigsberg, only if it can be established that the Department maintains its records in a manner that renders its staff unable to locate and identify the records would the request have failed to meet the standard of reasonably describing the records.

Also pertinent may be requirements imposed on the Town in relation to records management under Article 57-A of the Arts and Cultural Affairs Law, the "Local Government Records Law." 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."

Section 57.25 states in relevant part that:

> "1. It shall be the responsibility of every local officer *to maintain records to adequately document the transaction of public business and the services and programs for which such officer is responsible; to retain and have custody of such records for so long as the records are needed for the conduct of the business of the office; to adequately protect such records*; to cooperate with the local government's records management officer on programs for the orderly and efficient management of records including identification and management of inactive records and identification and preservation of records of enduring value; to dispose of records in accordance with legal requirements; and to pass on to his successor records needed for the continuing conduct of business of the office...
>
> 2. No local officer shall destroy, sell or otherwise dispose of any public record without the consent of the commissioner of education. The commissioner of education shall, after consultation with other state agencies and with local government officers, determine the minimum length of time that records need to be retained. Such commissioner is authorized to develop, adopt by regulation, issue and distribute to local governments retention and disposal schedules establishing minimum retention periods..." (emphasis added).

In view of the foregoing, records must be retained, adequately protected 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. The provisions relating to the retention and disposal of records are carried out by the State Archives, a unit of the State Education Department.

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 OML-AO-3387
FOIL-AO-13084

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December 20, 2001

E-Mail

TO: John Solak

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. Solak:

I have received your letter in which you asked whether gatherings of "focus groups conducted by paid consultants for school boards and local government [are] public meetings."

From my perspective, the Open Meetings Law would not be applicable to the events of your interest. That statute pertains to meetings of public bodies, and §102(2) defines the phrase "public body" to mean:

> "...any entity for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

Based on the foregoing, in general, the Open Meetings Law applies to entities consisting of two or more members who are elected or designated by law to carry out a governmental function collectively, as a body. Examples would be boards of education, town boards, village boards of trustees, city councils and the like. Focus groups consisting of members of the public who have no authority take final and binding action would not constitute public bodies, and the Open Meetings Law would not be implicated.

Notwithstanding the foregoing, it is possible that records relating to focus groups would be subject to the Freedom of Information Law, which deals with public access to government records. That law applies to agency records, and §86(4) defines the term "record" expansively to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Therefore, if, for example, records are prepared by a consultant *for* an agency, such as a school district or a municipality, they would constitute agency records that fall within the coverage of the Freedom of Information Law.

In brief, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. It is noted that statistical or factual information prepared by an agency or for an agency by a consultant would typically be available.

The text of the Freedom of Information and Open Meetings Laws, as well as a variety of related material, is available on our website.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13085

41 State Street, Albany, New York 12231
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December 20, 2001

Mr. Robert Andersen
[redacted]

Dear Mr. Anderson:

I have received your letter in which you asked that this office "inform" your HMO of its "legal mandate to supply [you] with copies of [your] medical records as per New York State's Freedom of Information Law."

While I believe that you have a right of access to medical records pertaining to yourself, it is unlikely that the Freedom of Information Law is the provision that would grant access to those records. In this regard, I offer the following comments.

First, the Freedom of Information Law applies to agency records, and §86(3) of that law defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, as a general matter, the Freedom of Information Law is applicable to records maintained by entities of state and local government. If the HMO is not a governmental entity, it would not be required to comply with the Freedom of Information Law.

Second, however, a different statute, §18 of the Public Health Law, generally grants rights of access to medical records to the subjects of the records. It is suggested that you send your request to the HMO and make specific reference to §18 of the Public Health Law when seeking medical records.

To obtain additional information concerning access to medical records and the fees that may be charged for searching and copying those records, you may write to:

Access to Patient Information Program
New York State Department of Health
Hedley Park Place
Suite 303
433 River Street
Troy, NY 12180

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 26, 2001

Mr. Richard C. Cahn
Cahn Wishod & Knauer, LLP
425 BroadHollow Road, Suite 315
Melville, NY 11747

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Cahn:

I have received your letter of November 29 and the correspondence attached to it. You have sought an advisory opinion concerning the propriety of a denial of access to records by the Long Island Power Authority ("LIPA"). The records sought involve those "related to any agreement or contract entered into between LIPA and KeySpan regarding LIPA's promise to purchase output or megawatts from the proposed Spagnoli Road Energy Center."

In response to your appeal following a constructive denial of your request, LIPA's appeals officer cited §87(2)(d) of the Freedom of Information Law as the basis for withholding portions of records that contain "commercially sensitive, trade secret information." Specifically, he wrote that:

> "The redacted information consists of rate, cost, financial, and other key commercial terms concerning a Letter of Intent and Project Term Sheet for a power purchase agreement between LIPA and KeySpan, and its disclosure would cause substantial injury to the competitive position of both parties. In this regard, the purchase and sale of wholesale electric power in New York State is highly competitive and release of the information would seriously jeopardize LIPA's ability to negotiate effectively with other electric suppliers in order to obtain the lowest possible rates (and most favorable terms) for the benefit of LIPA and its electric customers. Release of the information also would seriously injure KeySpan because its competitors would then have detailed knowledge of the rate, cost, financial, and other key commercial terms that KeySpan was willing to agree to and they could use such information to KeySpan's disadvantage in competing against KeySpan in the future. Further, to my knowledge, competitors could not otherwise obtain this information. For these

> reasons, nondisclosure of the information under Section 87(2)(d) of the FOIL is appropriate."

It is your view that LIPA's redaction of "all rate, cost, financial and key commercial terms concerning a Letter of Intent and Project Term Sheet" is "restrictive", and you added that although LIPA is "a public agency....it strikes us that its FOIL response was designed to protect the interests of KeySpan, a private corporation, rather than the interests of the public in securing full disclosure of terms of a contract entered into by a public authority."

In this regard, I offer the following comments.

First, while I am unfamiliar with the records that were disclosed in response to your request, others were withheld in great measure or perhaps in their entirety. It appears, too, that the response might not have adequately addressed your request in terms of scope of the request. As I interpret the request, it encompasses records "related to" the agreement between LIPA and KeySpan, and not only those to which the appeal specifically and directly referred. If the agreement serves as the culmination of negotiations, communications between the parties, the preparation of documentation by LIPA staff in the nature of analyses, estimates and the like, it would seem that the volume of material falling within the scope of the request would be more extensive than the response suggests.

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 expressed 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, the Department contended that DD5's could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g). The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276), and stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, stating that:

> "...to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents (*Matter of Fink vl. Lefkowitz, supra*, 47 N.Y.2d, at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material (*see, Matter of Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 133, 490 N.Y.S. 2d, 488, 480 N.E.2d 74; *Matter of Farbman & Sons v. New York City Health & Hosps. Corp., supra*, 62 N.Y.2d, at 83, 476 N.Y.S.2d 69, 464 N.E.2d 437)" (id.).

In the context of your request, insofar as records have been withheld in their entirety, the determination would, in my view, be inconsistent with the language of the law and judicial interpretations. 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*... as long as the requisite particularized showing is made" (id., 277; emphasis added).

Third, the basis for denial cited by LIPA, §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 a substantial injury to the competitive position of the subject enterprise."

While LIPA, a public authority, is, as you suggested, a "public agency", it is my understanding that it functions in some respects as competing entity in a competitive marketplace. In this regard, 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, insofar as LIPA is engaged in competition with private firms engaged in the same area of commercial activity, I believe that §87(2)(d) might be cited as a basis for a denial of access to records that it has prepared in appropriate circumstances. In short, I believe that §87(2)(d) potentially serves as ground for a denial of access with respect to records prepared by LIPA, as well as those received from KeySpan.

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, 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 contemplated as part of FOIA's principal aim of promoting openness in government (id., 419-420)."

From my perspective, it is likely that the records in question may have *some* value to competitors, but whether every aspect of every record that has been withheld would, if disclosed, cause *substantial injury* to the competitive position of LIPA or KeySpan is questionable, and that is the standard that must be met to justify a denial of access. Further, in many instances, it is not the terms of an agreement which if disclosed would be damaging to a commercial enterprise; rather it is often the data that is used in reaching the agreement, such as computer models, economic projections and similar technical analyses that would be most valuable to competitors and, therefore, most damaging if disclosed.

In sum, in consideration of the nature of the request and LIPA's determination, it appears that the denial of access may have been overbroad.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Seth D. Hulkower

STATE OF NEW YORK
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December 26, 2001

Ms. Mona Goodman
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Goodman:

I have received your note and the correspondence attached to it relating to a request for records made to the City of Long Beach on August 21 that had not been answered as of November 27. The request involved agreements between the City and Phillips International from 1998 to the present.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

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)].

Lastly, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, contracts and agreements between a municipality and a private entity must be disclosed, for none of the grounds for denial would be applicable.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:tt
cc: Noreen Costello

STATE OF NEW YORK
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December 26, 2001

Ms. Carolyn K. Foley
Davis Wright Tremaine LLP
1740 Broadway
New York, NY 10019-4315

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, except as otherwise indicated.

Dear Ms. Foley:

As you are aware, I have received your letter, as well as a variety of correspondence pertaining to your request for records kept by the Nassau County Police Department concerning the arrest, investigation and guilty pleas of three named individuals. Two of the three pled guilty to charges of sexual abuse; the third paid a fine to resolve a charge of attempted assault on a police officer. With the exception of photographs of the two convicted of sexual abuse, the request was denied in its entirety pursuant to §50-b of the Civil Rights Law.

Subdivision (1) of §50-b states that:

> "The identity of any victim of a sex offense, as defined in article one hundred thirty or §255.25 of the penal law, shall be confidential. No report, paper, picture, photograph, court file or other documents, in the custody or possession of any public officer or employee, which identifies such victim shall be made available for public inspection. No such public officer or employee shall disclose any portion of any police report, court file, or other document, which tends to identify such a victim except as provided in subdivision two of this section."

The initial ground for denial in the Freedom of Information Law, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." Section 50-b exempts records identifiable to a victim of a sex offense from disclosure, and consequently, the Freedom of Information Law in my view provides no rights of access to those records.

As you are likely aware, the Freedom of Information Law generally requires agencies to review records to determine which portions, if any, fall within one or more of the grounds for a denial of access appearing in §87(2). Following such review, agencies are required to make appropriate redactions and disclose the remainder of the records. However, the Court of Appeals held nearly twenty years ago that:

> "...[t]he statutory authority to delete identifying details as a means to remove records from what would otherwise be an exception to disclosure mandated by the Freedom of Information Law extends only to records whose disclosure without deletion would

> constitute an unwarranted invasion of personal privacy, and does not extend to records excepted in consequence of specific exemption from disclosure by State or Federal statute" [Short v. Board of Managers, 57 NY2d 399, 401 (1982)].

Based on the specific language of §50-b of the Civil Rights Law, in a manner consistent with Short, the Court of Appeals in Fappiano v. New York City Police Department [95 NY2d 738 (2001)] held that any record maintained by a public officer or employee that tends to identify the victim of a sex offense must be withheld in its entirety, except as provided in subdivision (2) of that statute. Similarly, in Karlin v. McMahon, the Court found that "the police are not obligated to provide the records even though redaction might remove all details which 'tend to identify the victim'" [96 NY2d 842 (2001)].

In response your appeal sustaining the initial denial of access, the Department's appeals officer wrote that he "had the investigative files in this matter reviewed and...determined that virtually all of the documents and evidence in these files, with the exception of the arrest photographs, identifies victims of sex offenses, hence this Department is prohibited from disclosing such records..." Further, since you found it "hard to believe that all documents in the Department's files regarding this matter would invade the privacy rights of a victim of a sex crime", he added that "the arrest reports prepared in 1987 and 1988 specifically name and identify victims, a procedure or process not currently employed in those types of cases."

The Court of Appeals appears to have recognized the potential breadth of the exception to rights of access and imposed a substantial responsibility upon agencies to demonstrate that requested records include information that would tend to identify a victim of a sex offense. In Fappiano, the court stressed that:

> "Notwithstanding our holding, we conclude that respondent police departments did not meet their burden of showing that the statutory privilege of Civil Rights Law §50-b applies to all of the records that petitioners seek (*Matter of Gould v. New York City Police Dept.*, 89 N.Y. 2d 808, supra). Although Civil Rights Law §50-b shields documents containing information that tends to identify the victim of a sex crime, the police departments here made no attempt to show that each requested document contained identifying information. While Civil Rights Law §50-c mandates caution by imposing civil liability upon governmental entities that disclose the identity of a sex crime victim in violation of section 50-b, that fact does not justify a blanket denial of a request for any documents relating to a sex crime. If a requested document does not contain information that tends to identify the victim of a sex crime, and the FOIL request is otherwise valid, the document must be disclosed. In those cases where there is as legitimate dispute as to whether the information contained in any given document tends to identify the victim, the police still bear the burden of making a particularized showing as to why it should not be disclosed (supra, 748)."

In consideration of the foregoing, although the Freedom of Information Law ordinarily does not require that an agency do so, in the interest of avoiding litigation involving the *in camera* review of records by a court, it will be suggested by sending a copy of this response to the Department, that it prepare an inventory of all records falling within the scope of your request. I note that the request was expansive, for it included "arrest reports, mug shots and any other photographs in the files, police reports, investigator's reports, investigator's notes, evidence seized and anything else in the files" pertaining to the arrest of the three individuals. The inventory should briefly describe each and every record sought, and when it is clearly so, an assertion or certification that a record would, if

disclosed, identify or tend to identify a victim. If upon the preparation of an inventory and a review of every record falling within the ambit of your request, it is found that certain of those records do not include information identifiable to a victim of a sex offense, the Department would be required to disclose the records to you in accordance with the Freedom of Information Law.

If the Department does not agree to prepare the kind of inventory and engage in the review process described above, it would appear that the only remaining avenue of review would involve the initiation of a proceeding under Article 78 of the CPLR.

I hope that I have been of assistance.

Sincerely,

Robert J, Freeman
Executive Director

RJF:tt

cc: John G. Kennedy

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December 26, 2001

E-MAIL

TO: Dave Mack [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. Mack:

As you are aware, I have received your letter of November 28, in which you raised a series of questions concerning access to certain records.

Since some of the issues raised involve the possibility that records are maintained by a court, I note that the Freedom of Information Law excludes the courts and court records from its coverage. That statute pertains to agency records, and §86(3) defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, § 86(1) defines "judiciary" to mean:

> "the courts of the state, including any municipal or district court, whether or not of record."

While court records are not subject to the Freedom of Information Law, those records are often available under other statutes. For example, in the context of your inquiry, §2019-a of the Uniform Justice Court Act, entitled "Justices' criminal records and docket", states in relevant part that "[t]he records and dockets of the court except as otherwise provided by law shall be at reasonable times open for inspection to the public..." I point out that, although court records are generally available to the public, the procedural elements of the Freedom of Information Law (i.e., the time limits for responding to requests) do not apply to the courts.

When a request is made to an agency, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

With respect to "visitation logs", if such a log or similar documentation is kept in plain sight and can be viewed by any person, and if the staff at the facility have the ability to locate portions of

the log of your interest, I believe that those portions of the log would be available. If such records are not kept in plain sight and cannot ordinarily be viewed, it is my opinion that those portions of the log pertaining to persons other than an inmate could be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy [see FOIL, §87(2)(b)]. In short, the identities of those with whom a person associates is, in my view, nobody's business.

A potential issue involves the requirement imposed by §89(3) of the Freedom of Information Law that an applicant "reasonably describe" the records sought. In considering that standard, the State's highest court has found that to meet the standard, the terms of a request must be adequate to enable the agency to locate the records, and that an agency must "establish that 'the descriptions were insufficient for purposes of locating and identifying the documents sought'...before denying a FOIL request for reasons of overbreadth" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

Although it was found in the decision cited above that the agency could not reject the request due to its breadth, it was also stated that:

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency']" (id. at 250).

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping systems. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number.

I am unaware of the means by which correctional facilities keep or maintain visitation logs. If an inmate's name or other identifier can be used to locate records or portions of records that would identify the inmate's visitors, it would likely be easy to retrieve that information, and the request would reasonably describe the records. On the other hand, if there are chronological logs of visitors and each page would have to be reviewed in an effort to identify visitors of a particular inmate, I do not believe that agency staff would be required to engage in such an extensive search.

With regard to what you characterized as "behavioral records", the regulations of the Department of Correctional Services' regulations, 7 NYCRR §5.21(a), provide in relevant part that:

> "Upon request by the news media, the following information from an inmate record shall be made available: name, age, birthdate, birthplace, city of previous residence, physical description, commitment information, present facility in which housed, departmental actions regarding confinement and release, and when related to a newsworthy event, institutional work assignments, general state of health, nature of injury or critical illness and cause of death."

Since the news media have no special rights under the Freedom of Information Law, I believe that the information described in the provision quoted above would be accessible to any person.

Also of interest may be §500-f of the Correction Law, which pertains to county jails, states that:

> "Each keeper shall keep a daily record, to be provided at the expense of the county, of the commitments and discharges of all prisoners delivered to his charge, which shall contain the date of entrance, name, offense, term of sentence, fine, age, sex, place of birth, color, social relations, education, secular and religious, for what any by whom committed, how and when discharged, trade or occupation, whether so employed when arrested, number of previous convictions. The daily record shall be a public record, and shall be kept permanently in the office of the keeper."

Lastly, as you suggested, the general repository of criminal history records, the records of arrests and convictions, is the Division of Criminal Justice Services (DCJS), which maintains a centralized database including criminal history information. The functions and duties of that agency are described in Article 35 of the Executive Law, §§835 to 846. In Capital Newspapers v. Poklemba (Supreme Court, Albany County, April 6, 1989), it was held that conviction records maintained by DCJS are confidential in view of the legislative history of the statutes that govern the practices of that agency. Specifically, the first ground for denial in the Freedom of Information Law, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute", and it was found that:

> "Both the language of the statute and the consistent history of limited access to the criminal records maintained by DCJS lead this court to conclude that an exception to the mandate of FOIL exists with respect to the disclosure sought by petitioner.
>
> "Having determined that POL, §87(2)(a) is applicable to the records sought by petitioner, this court shall not address the issue of whether a further exemption might be had pursuant to POL 87(2)(b) as an unwarranted invasion of personal privacy, or whether the records may be available from any other centralized source."

Based on Poklemba and several other later decisions, criminal history records maintained by DCJS need not be disclosed by that agency. Moreover, when DCJS makes criminal history records available to local police departments, for example, those agencies are bound by a "dissemination agreement" precluding them from disclosing the records obtained from DCJS. The result is what may be an anomalous situation: if you know where a person was convicted, the record of the conviction would be available from the court in which the proceeding was conducted. The equivalent information, however, would not be available from DCJS or an agency that acquired it from DCJS.

I hope that I have been of assistance.

RJF:tt

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December 26, 2001

Mr. Reynell C. Andrews
[redacted]

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. Andrews:

I have received your letter in which you asked whether form "NYS-45-ATT" filed by town and village governments is accessible under the Freedom of Information Law.

The form, which is entitled "Quarterly Combined Withholding, Wage Reporting and Unemployment Insurance Return - Attachment", includes the name of the employer and five columns of information, including the names of employees, their social security numbers, "UI total remuneration/gross wages paid this quarter", gross wages subject to withholding and total tax withheld.

From my perspective, the columns indicating the names of public employees and the gross wages subject to withholding must be disclosed; the others may be withheld or deleted prior to disclosure. In this regard, I offer the following comments.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. It is emphasized that the introductory language of §87(2) refers to an agency's ability to withhold "records or portions thereof" that fall within the grounds that follow. The phrase quoted in the preceding sentence indicates that records might contain both accessible and deniable information, and that an agency is obliged to review records in their entirety to determine which portions, if any, may justifiably be withheld.

Although tangential to your inquiry, I point out that §87(3)(b) of the Freedom of Information Law states in relevant part that:

> "Each agency shall maintain...
>
> (b) a record setting forth the name, public office address, title and salary of every officer or employee of the agency... "

As such, a payroll record that identifies all officers or employees by name, public office address, title and salary must be prepared to comply with the Freedom of Information Law. Moreover, payroll information has been found by the courts to be available [see e.g., Miller v. Village of Freeport, 379 NYS 2d 517, 51 AD 2d 765, (1976); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NYS 2d 954 (1978)]. In Gannett, supra, the Court of Appeals held that the identities of former

employees laid off due to budget cuts, as well as current employees, should be made available. In addition, this Committee has advised and the courts have upheld the notion that records that are relevant to the performance of the official duties of public employees are generally available, for disclosure in such instances would result in a permissible as opposed to an unwarranted invasion of personal privacy [Gannett, supra; Capital Newspapers v. Burns, 109 AD 2d 292, aff'd 67 NY 2d 562 (1986) ; Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980; Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975) ; and Montes v. State, 406 NYS 664 (Court of Claims 1978)]. As stated prior to the enactment of the Freedom of Information Law, payroll records:

> "...represent important fiscal as well as operational information. The identity of the employees and their salaries are vital statistics kept in the proper recordation of departmental functioning and are the primary sources of protection against employment favortism. They are subject therefore to inspection" Winston v. Mangan, 338 NYS 2d 654, 664 (1972)].

Based on the foregoing, a record identifying agency employees by name, public office address, title and salary must in my view be maintained and made available.

It has been contended that W-2 forms and similar records, such as the form at issue, are specifically exempted from disclosure by statute on the basis of 26 USC 6103 (the Internal Revenue Code) and §697(e) of the Tax Law. In my opinion, those statutes are not applicable in this instance. In an effort to obtain expert advice on the matter, I contacted the Disclosure Litigation Division of the Office of Chief Counsel at the Internal Revenue Service to discuss the issue. I was informed that the statutes requiring confidentiality pertain to records received and maintained by the Internal Revenue Service; those statutes do not pertain to records kept by an individual taxpayer [see e.g., Stokwitz v. Naval Investigation Service, 831 F.2d 893 (1987)], nor are they applicable to records maintained by an employer, such as a school district. In short, the attorney for the Internal Revenue Service said that the statutes in question require confidentiality only with respect to records that it receives from the taxpayer.

In conjunction with the previous commentary concerning the ability to protect against unwarranted invasions of personal privacy, I believe that portions of W-2 forms, as well as the NYS -Att-45, may be withheld, such as social security numbers, and total tax withheld , for those items are largely irrelevant to the performance of one's duties. However, for reasons discussed earlier, those portions indicating public officers' or employees' names and gross wages must in my view be disclosed. Further, the same conclusion was reached in a judicial determination, and the court cited an advisory opinion rendered by this office (Day v. Town of Milton, Supreme Court, Saratoga County, April 27, 1992).

With respect to the column regarding unemployment insurance remuneration, I believe that portions of records indicating payments of unemployment insurance benefits may be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy. Although it is not directly applicable because it applies only to information maintained by the Unemployment Insurance Division of the State Department of Labor, pertinent is §537 of the Labor Law, which is entitled "Disclosures prohibited." That statute states in subdivision (1) that:

> "[I]nformation acquired from employers or employees pursuant to this article shall be for the exclusive use and information of the commissioner in the discharge of his duties hereunder and shall not be open to the public nor be used in any court in any action or proceeding pending therein unless the commissioner is a party to such action or proceeding, notwithstanding any other provisions of law.

> Such information insofar as it is material to the making and determination of a claim for benefits shall be available to the parties affected and, in the commissioner's discretion, may be made available to the parties affected in connection with effecting placement."

To the extent that the records sought fall within the scope of §537, they would be confidential, unless they are "material to the making and determination of a claim for benefits" or the Commissioner of Labor asserts his discretionary authority to disclose records for the purpose of effecting placement in a job.

In a judicial decision that describes the intent of §537 of the Labor Law, which had been §524 of the Labor Law, it was found that:

> "...section 524 of the Labor Law prohibits the use of such records in the courts unless the Industrial Commissioner is a party to the action or proceeding. While the act does not disclose the object of the Legislature, it undoubtedly was to prevent exposure to public gaze of the names of applicants who are receiving benefits under the auspices of the statute and under which the employer bears the burden. This is a reasonable objective" [Andrews v. Cacchio, 35 NYS 2d 259, 260; 264 App. Div. 791 (1942)].

Although Andrews, supra, was decided in 1942, there is no decision of which I am aware that indicates a different intent than that quoted above. Moreover, the Andrews decision has been cited as precedent [see Clegg v. Bon Temps., Ltd., 452 NYS 2d 825 (1982)].

Based on the foregoing, and the intent to protect personal privacy, I believe that records maintained by towns or villages may be withheld insofar as they indicate payments of unemployment insurance benefits.

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-13091

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December 26, 2001

Ms. Noreen O. Costello
City of Long Beach
1 West Chester Street
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 facts presented in your correspondence.

Dear Ms. Costello:

I have received your letter and appreciate your kind words. You have sought an opinion and assistance relating to a request made under the Freedom of Information Law by the City of Long Beach for "rent rolls", lists of rent stabilized buildings located within the City, maintained by the State Division of Housing and Community Renewal ("the Division"). You indicated that those records had been made available in the past with a "pledge of confidentiality" and that they are needed by the City to properly assess real property. The Division, however, denied access on the basis of certain provisions in the Emergency Tenant Protection Act and its regulations.

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.

Relevant in this instance is the initial ground for denial, which pertains to records that "are specifically exempted from disclosure by state or federal statute." The Emergency Tenant Protection Act is found in the Unconsolidated Laws, Chapter 249-B. Section 12-a of Chapter 249-B, which is the same statute as that published in McKinney's as §8632-a of the Unconsolidated Laws, refers in subdivision (a) to rent registration. That provision requires that a variety of information be transmitted by "housing accommodations" to the Division, such as the addresses of buildings, the number of housing accommodations within those buildings, the rents charged, the number of rooms and the like. Subdivision (b) specifies that:

"Registration pursuant to this section shall not be subject to the freedom of

> information law, provided that registration information relative to a tenant, owner, lessor or subtenant shall be made available to such party or his authorized representative."

Based on the foregoing, I believe that the records of your interest are specifically exempted from disclosure by statute and are beyond rights of access conferred by the Freedom of Information Law.

In consideration of the language of the provision quoted above, it is suggested that the records be requested, but not under the Freedom of Information Law. As you are aware, that statute serves as a vehicle under which any member of the public, regardless of status or interest, may seek and often obtain records maintained by entities of state and local government in New York. As I understand the situation, the request was not made by a person in his or her capacity as a member of the public, but rather by an official of the City of Long Beach in his official capacity. While the Freedom of Information Law may have been referenced, it is clear in my view that the request was made by a City official in conjunction with the performance of his official duties; the request was not made for any personal use, but rather for the purpose of carrying out a governmental function.

If the Division had disclosed the records sought to the City in response to a request citing the Freedom of Information Law, it would have acted in contravention of §8632-a(b) of the Unconsolidated Laws. However, it may be contended that a disclosure made to another governmental entity that has sought records to carry out a governmental function cannot be equated with a disclosure made to a member of the public under the Freedom of Information Law. For that reason, again, it is suggested that a second request be made, specifying that the request is not being made under the Freedom of Information Law, but as a governmental entity needing the records to carry out its governmental functions and activities.

I note that there have been many instances in which records need not be disclosed to the public at large under the Freedom of Information Law, but in which the same records have been shared with other government agencies when it is clear that the agencies have sought the records in the performance of their official duties. Unless a statute forbids an agency from so doing, cooperation among agencies has been encouraged and fostered.

In an effort to enhance the possibility of disclosure and cooperation, copies of this response will be forwarded to Division officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt
cc: Gregory C. Fewer
Angelique Joseph

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT PPPL-AO-FOIL-AO-1392

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December 26, 2001

E-MAIL

TO: Pam Greene [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 Ms. Greene:

I have received your letter of November 29 in which you sought an advisory opinion relating to a request for records directed to the Department of Correctional Services.

You wrote that you requested "records of misconduct concerning all superintendents, deputy superintendents, deputy commissioners or commissioners over the past 10 years." Although you received records relating to a case that was concluded in 1984, it is your understanding that there have been other incidents in which persons in the positions to which you referred have been the subjects of disciplinary action. Further, you and/or your editor were apparently informed that if a disciplinary matter had been concluded by means of a settlement rather than arbitration, records relating to or reflective of the settlement must be withheld pursuant to §95 of the Public Officers Law, which is part of the Personal Privacy Protection Law.

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 evaluate performance toward continued employment or promotion are confidential. Insofar as

persons who are the subjects of the records sought are not or are no longer correction officers, I do not believe that §50-a would be applicable.

The Court of Appeals, the state's highest court, 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)]. Again, if a person has never been a correction officer, §50-a would not in my opinion serve as a basis for a denial of access.

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.*" If a correction officer has retired, or no longer serves in that title, there is no issue involving continued employment or promotion; he is no longer an employee or a correction officer. That being so, in my opinion, the rationale for the confidentiality accorded by §50-a would no longer be present, and that statute no longer would be neither applicable nor pertinent.

Second, also relevant to an analysis of rights of access is the Personal Privacy Protection Law, which deals in part with the disclosure of records or personal information by state agencies concerning data subjects. A "data subject" is "any natural person about whom personal information has been collected by an agency" [Personal Privacy Protection Law, §92(3)]. "Personal information" is defined to mean "any information concerning a data subject which, because of name, number, symbol, mark or other identifier, can be used to identify that data subject" [§92(7)]. For purposes of that statute, the term "record" is defined to mean "any item, collection or grouping of personal

information about a data subject which is maintained and is retrievable by use of the name or other identifier of the data subject" [§92(9)].

With respect to disclosure, §95 of the Personal Privacy Protection Law deals with requests by data subjects for records pertaining to themselves; §96(1) deals with disclosure of personal information to others and 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, paragraph (c), 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. Conversely, if disclosure would not constitute an unwarranted invasion of personal privacy, the Personal Privacy Protection Law would not bar disclosure, and a record would be subject to rights conferred by the Freedom of Information Law.

Third, if there is a finding or admission of misconduct, or a settlement agreement reached following an allegation of misconduct, it has generally be advised by this office and held by the courts that records of that nature are available in great measure, if not in their entirety.

I note that it has been held in variety of circumstances that a promise or assertion of confidentiality cannot be upheld, unless a statute specifically confers confidentiality. In Gannett News Service v. Office of Alcoholism and Substance Abuse Services [415 NYS 2d 780 (1979)], a state agency guaranteed confidentiality to school districts participating in a statistical survey concerning drug abuse. The court determined that the promise of confidentiality could not be sustained, and that the records were available, for none of the grounds for denial appearing in the Freedom of Information Law could justifiably be asserted. In a decision rendered by the Court of Appeals, it was held that a state agency's:

> "long-standing promise of confidentiality to the intervenors is irrelevant to whether the requested documents fit within the Legislature's definition of 'record' under FOIL. The definition does not exclude or make any reference to information labeled as 'confidential' by the agency; confidentiality is relevant only when determining whether the record or a portion of it is exempt..." [Washington Post v. Insurance Department, 61 NY 2d 557, 565 (1984)].

In a related vein, it is also important to point out that there is nothing in the Freedom of Information Law that deals specifically with personnel records or personnel files. Further, the nature and content of so-called personnel files may differ from one agency to another, and from one employee to another. In any case, neither the characterization of documents as "personnel records"

nor their placement in personnel files would necessarily render those documents "confidential" or deniable under the Freedom of Information Law (see Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980). On the contrary, the contents of those documents serve as the relevant factors in determining the extent to which they are available or deniable under the Freedom of Information Law. Two of the grounds for denial are relevant to an analysis of the matter; neither, however, would in my view serve to justify a denial of access.

As suggested earlier, 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 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..."(id.).

While I believe that settlement agreements must generally be disclosed for the reasons discussed in the preceding paragraphs, charges that were never proven, could, in my view, be withheld. When allegations or charges of misconduct have not yet been determined or did not result in a finding of misconduct, admission or settlement, the records relating to such allegations must, 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 must be withheld to comply with the Personal Privacy Protection Law.

In some instances, settlement agreements may include intimate personal information. For instance, if part of such an agreement includes a requirement that a person engage in an alcohol or drug treatment program, I believe that information of that kind is in the nature of medical or mental health information, and consequently, that portion of a settlement agreement may, in my view, be withheld.

Lastly, if you believe or have knowledge that correction officers have been found or have admitted to have engaged in misconduct or are the subjects of settlement agreements following claims of misconduct, it is suggested that you so inform the Department's records access officer. So doing in my opinion could only enhance compliance. I note, too, that when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

I hope that I have been of assistance.

RJF:tt

cc: William Gonzalez
Anthony J. Annucci
James Flateau

FOIL-AO-13093

From: Robert Freeman
To: [redacted]
Date: 12/26/01 9:27AM
Subject: Dear Mr. Tampone:

Dear Mr. Tampone:

I have received your email and apologize for the delay in response. Please understand that we have a substantial backlog of written inquiries, and we generally respond in the order of receipt. In the future, I suggest that you telephone me; the response will be quicker and often immediate.

You wrote that you are interested in obtaining documentation indicating that, contrary to Chemung County Jail policy, a guard signed a document removing an inmate from a suicide watch, rather than a nurse. You added that "actual document taking her off suicide watch is considered a medical record" that you cannot obtain. I am not sure why you would necessarily consider the document in question to be a medical record, and I would seek it under the Freedom of Information Law. I would conjecture that it may not be a medical record per se, for it may not involve treatment. Rather, it may be a record specifying orders or instructions to staff. There are many instances in which records may contain information relating to a medical condition but which are not medical records themselves, i.e., as in a case involving the possibility that reference to a disability appeared on a driver license application. Although the court in that instance found that disclosure of an item relating to a medical condition could be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see FOIL, section 89(2)(b)], there is a distinction in the situation that you described: the subject is now deceased. That being so, I would contend that the privacy exception no longer applies.

Another possibility would relate to the ability of the family of the deceased to obtain the record, which could be shared with you, or to sign a waiver, conferring its rights of access to you. That would be particularly effective if indeed the document is a medical record.

Finally, I am unaware of whether there may be separate logs or forms that must be completed in relation to a suicide watch, or whether there may be logs or similar information that include reference to entries regarding that kind of event. Additionally, attendance records relating to jail staff would be public, and you could likely find out who was on duty during the day or period in question. Perhaps there was no nurse on duty, or perhaps she (or he) left work early.

If you would like to discuss the issue further, please feel free to contact me, and thanks for remembering me in your class!

Bob Freeman

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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Albany, NY 12231
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STATE OF NEW YORK
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December 27, 2001

Mr. Wayne Jackson
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Jackson:

I have received your letter of December 5 and the correspondence attached to it. In brief, you have asked whether a request for records made under the Freedom of Information Law may be transmitted by use of a fax machine, rather than by mail.

In this regard, I know of no judicial decision dealing with the issue. However, §87(1) of the Freedom of Information Law requires that agencies promulgate rules and regulations to implement that statute in a manner consistent with the statute and the regulations issued by the Committee on Open Government (21 NYCRR Part 1401). Neither the statute nor the Committee's regulations refers specifically to requests made by fax. Consequently, the issue in my opinion is whether the policy of an agency is inconsistent with the Freedom of Information Law or the Committee's regulations or is otherwise unreasonable.

In general, it is my view that an agency must accept requests made via a fax machine, unless the use of the machine adversely impacts on the agency's capacity to carry out its duties. For example, if a law enforcement agency uses a fax machine to carry out essential law enforcement functions, interference with the use of the machine could hamper its ability to perform its duties effectively. In short, in a circumstance in which public use of a fax machine would interfere with an agency's functions, its use for making requests under the Freedom of Information Law might be restricted, so long as requests traditionally made are accepted, i.e., requests made in writing by mail or by personal delivery. In that event, such a policy would likely be valid, for it would not unreasonably inhibit the public's ability to seek records under the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Colleen M. Fondulis

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 27, 2001

Mr. Emilio C. Torres
92-B-0308
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. Torres:

I have received your letter in which you sought assistance in obtaining various court records under the federal Freedom of Information Act and Privacy Act.

In this regard, it is emphasized that those federal statutes are applicable only to federal agency records. The New York State Freedom of Information Law pertains to records of state and local government, and §86(3) of that statute defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines the term "judiciary" to mean:

> "the courts of the state, including any municipal or district court, whether or not of record."

Based on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law (see e.g., Judiciary Law, §255) may grant broad public access to those records. Even though other statutes may deal with access to court records, the

procedural provisions associated with the Freedom of Information Law (i.e., those involving the designation of a records access officer or the right to appeal a denial) would not ordinarily be applicable.

It is suggested that you resubmit your request to the clerk of the court, citing an applicable provision of law as the basis for your request.

I hope that the foregoing serves to clarify your understanding of the matter and that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:jm

STATE OF NEW YORK
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December 27, 2001

Mr. Carl Young
00-B-0574
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. Young:

I have received your letter in which you sought assistance in obtaining records related to your arrest from the Erie County District Attorney's Office.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of the correspondence, I offer the following comments.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. While some aspects of the records sought might properly be withheld, relevant is a decision by the Court of Appeals concerning complaint follow up reports and police officers' memo books in which it was held that a denial of access based on their characterization as intra-agency materials would be inappropriate.

The provision at issue, §87(2)(g) of the Freedom of Information Law, enables an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

In its analysis of the matter, the decision states that:

"...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)...

"...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][i]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on

op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182).

"Against this backdrop, we conclude that the complaint follow-up reports contain substantial factual information available pursuant to the provisions of FOIL. Sections of the report are devoted to such purely factual data as: the names, addresses, and physical descriptions of crime victims, witnesses, and perpetrators; a checklist that indicates whether the victims and witnesses have been interviewed and shown photos, whether crime scenes have been photographed and dusted for fingerprints, and whether neighborhood residents have been canvassed for information; and a blank space denominated 'details' in which the officer records the particulars of any action taken in connection with the investigation.

"However, the Police Department argues that any witness statements contained in the reports, in particular, are not 'factual' because there is no assurance of the statements' accuracy and reliability. We decline to read such a reliability requirement into the phrase 'factual data', as the dissent would have us do, and conclude that a witness statement constitutes factual data insofar as it embodies a factual account of the witness's observations. Such a statement, moreover, is far removed from the type of internal government exchange sought to be protected by the intra-agency exemption (see, Matter of Ingram v. Axelrod, 90 AD2d 568, 569 [ambulance records, list of interviews, and reports of interviews available under FOIL as 'factual data']). By contrast, any impressions, recommendations, or opinions recorded in the complaint follow-up report would not constitute factual data and would be exempt from disclosure. The holding herein is only that these reports are not categorically exempt as intra-agency material. Indeed, the Police Department is entitled to withhold complaint follow-up reports, or specific portions thereof, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" [Gould, Scott and DeFelice v. New York City Police Department, 653 NYS2d 54, 89 NYS2d 267 (1996); emphasis added by the Court].

Based on the foregoing, neither the Police Department nor an office of a district attorney can claim that complaint follow up reports can be withheld in their entirety on the ground that they constitute intra-agency materials. However, the Court was careful to point out that other grounds for denial might apply in consideration of those records, as well as others that you requested.

For instance, of potential significance is §87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof when disclosure would constitute "an

unwarranted invasion of personal privacy". That provision might be applicable relative to the deletion of identifying details in a variety of situations, i.e., where a record identifies a confidential source or a witness, for example.

Often the most relevant provision concerning access to records maintained by law enforcement agencies is §87(2)(e), which permits an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in sub-paragraphs (i) through (iv) of §87(2)(e).

Another possible ground for denial is §87(2)(f), which permits withholding to the extent that disclosure "would endanger the life or safety of any person". The capacity to withhold on that basis is dependent upon the facts and circumstances concerning an event.

Lastly, in a decision concerning a request for records maintained by the office of a district attorney that would ordinarily be exempted from disclosure under the Freedom of Information Law, it was held that "once the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public" [see Moore v. Santucci, 151 AD 2d 677, 679 (1989)]. Based upon that decision, it appears that records introduced into evidence or disclosed during a public judicial proceeding should be available.

However, in the same decision, it was also found that:

> "...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the

> requested record was previously furnished to the petitioner or his counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

I hope that I have of some assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 27, 2001

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 in which you questioned whether Executive Law, §295-k, allows the Division of Parole to "withhold all documents as confidential circumventing FOIL entirely." You wrote that you sought portions of a parole form which if disclosed "would not circumvent privacy concerns." You specifically sought an opinion on the availability of Parole Board Discharge Decision Sheets (Form 930), Discharge Summary and Recommendations (Form 340), and Parole Board Deferment of Discharge Referrals (Form 9030b) "that have been filed in the last five complete years."

In this regard, I offer the following comments.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Section 87(2)(a) pertains to records that "are specifically exempted from disclosure by state or federal statute." Section 259-a of the Executive Law requires the Division of Parole to maintain certain kinds of records and §259-k(2) provides 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)].

It has been held that parole records of named inmates or former inmates may be withheld in their entirety [see Matter of Collins v. NYS Division of Parole, 251 AD2d 738 (3rd Dept. 1998) and Matter of Carty v. NYS Division of Parole, 277 AD2d 633 (3rd Dept. 2000)]. However, in my opinion, a request for parole records, covering a given period of time, with names and other identifying details redacted, would not endanger the life or safety of any person or constitute an unwarranted invasion of personal privacy.

Another exception, §87(2)(g), would appear to be relevant in consideration of the nature of the records in question. 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, a key issue may involve the extent to which your request "reasonably describes" the records sought as required by §89(3) of the Freedom of Information Law. I point out that it has been held by the Court of Appeals that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

The Court in Konigsberg found that the agency could not reject the request due to its breadth and also stated that:

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf.

> National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency'])" (id. at 250).

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping system. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number.

While I am unfamiliar with the recordkeeping systems of the 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.

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 of Parole.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:jm

cc: Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 27, 2001

Mr. Phillip Cannon
93-A-6412
Clinton Correctional Facility Annex
P.O. Box 2002
Dannemora, NY 12929

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Cannon:

I have received your letter in which you requested that this office "look into" a situation concerning the failure of a FOIL Appeals Officer at the Queens County District Attorney's Office "to respond within the lawful time limits."

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of the correspondence, I offer the following comments.

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 [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body,

> who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of 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,

David Treacy
Assistant Director

DT:jm

STATE OF NEW YORK
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December 27, 2001

Mr. Ben Davis
97-B-0858
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. Davis:

I have received your letter in which you questioned whether this office could produce records related to ownership of various correctional facilities and private companies.

In this regard, this office does not maintain records of other agencies. I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of the correspondence, I offer the following comments.

I note that the Freedom of Information Law pertains to agency records and §86(3) of that statute defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, an "agency" generally is an entity of state or local government. Typically, a private entity or a not-for-profit corporation would not constitute an agency, for it would not be a governmental entity. However, requests for records of agencies that would fall within the coverage of the Freedom of Information Law should be submitted directly to the records access officers at the agencies of your interest.

I hope that I have of some assistance.

Sincerely,

David Treacy
Assistant Director

DT:jm

STATE OF NEW YORK
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December 27, 2001

Mr. John Kelch
99-B-0213
Gouverneur Correctional Facility
P.O. Box 370
Scotch Settlement Road
Gouverneur, NY 13642

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Kelch:

I have received your letter in which you requested assistance in obtaining "daily log worksheets" from your facility that indicate "rates and calibrations" of a machine that analyzes urine. You wrote that while you understand that names and details which would identify individuals may be redacted, the records provided to you also had the rates and calibrations "blacked out."

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of the correspondence, I offer the following comments.

With respect to rights of access, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

It appears that the only ground for denial of significance under the circumstances is §87(2)(g). Due to the structure of that provision, however, it frequently requires substantial disclosure. Specifically, the cited provision permits an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

The language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

Pertinent in my view is a decision rendered by the Court of Appeals in which the Court focused on what constitutes "factual data", stating that:

> "...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132, 490 N.Y.S. 2d 488, 480 N.E.2d 74 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549, 442 N.Y.S.2d 130]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][i]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, 463 N.Y.S.2d 122, mod on other grounds, 61 NY2d 958, 475 N.Y.S.2d 272, 463 N.E. 2d 613; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182. 417 N.Y.S.2d 142)" [Gould v. New York City Police Department, 89 NY2d 267, 276, 277 (1996)].

From my perspective, the specific language of §87(2)(g), coupled with the direction offered by the Court of Appeals, provide the basis for determining the extent to which "rates and calibrations" in the records in question might justifiably be withheld.

In my opinion, if the rates and calibrations are indicated as numeric figures, they would clearly be factual data that would be available unless another ground for denial under the Freedom of Information Law is applicable.

I hope that I have of some assistance.

Sincerely,

David Treacy

David M. Treacy
Assistant Director

DMT:jm

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December 27, 2001

Mr. German Cuadrado
90-T-2777
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. Cuadrado:

I have received your letter in which you sought advice pertaining to your Freedom of Information Law request to the Division of Parole for "statistical data of the past 15 years which would provide" various information. You sought an opinion regarding the availability of the requested records and whether the Division of Parole is "in violation of F.O.I.L." for not responding within the time indicated in its letter acknowledging the receipt of your request for records.

In this regard, I offer the following comments.

First, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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 and perhaps most important, the Freedom of Information Law pertains to existing records. Further, §89(3) of that statute provide in part that an agency need not create a record in response to a request. If the Division of Parole does not maintain the records sought, the Freedom of Information Law would not apply, and the agency would not be obliged to prepare a record containing the information sought on your behalf.

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.

Lastly, when requested materials exist as records and can be located, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:jm

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

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December 27, 2001

Mr. Albert Sanabria
92-A-3536
Woodbourne Correctional Facility
P.O. Box 1000
Woodbourne, PA 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. Sanabria:

I have received your letter in which you sought assistance in obtaining a copy of your "Tier III hearing." You wrote that you have been unable to obtain a copy of the tape from your facility and have not received a written reply to your repeated requests.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of the correspondence, 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 [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

The person designated by the Department of Correctional Services to determine appeals is Anthony J. Annucci, Counsel to the Department.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 27, 2001

Mr. Njasang Nji
99-A-0792
Cayuga Correctional Facility
P.O. Box 1186
Moravia, NY 13118

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Nji:

I have received your letter in which you questioned whether fees for records could be waived if you have no funds in your inmate account. You also questioned whether this office has the "wherewithal to investigate refusals to comply with F.O.I.L."

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee does not conduct investigations nor does it have the authority to compel an agency to grant or deny access to records.

Second, while the federal Freedom of Information 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)].

Lastly, as requested, enclosed is pamphlet that further explains the functions of this office and the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13104

41 State Street, Albany, New York 12231
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December 27, 2001

Ms. Patricia Pagano
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Pagano:

I have received your note of December 7 in which you again sought assistance in obtaining records from the Village of Manorhaven.

According to a letter addressed to the Village Attorney, you requested records from the Village Clerk, the "supporting documents for a specific entry in the Independent Audit..." The Clerk responded by indicating that "this is a matter that is still in litigation and I am unable to divulge any detail...", and she wrote that further questions on the matter be directed to the village attorney.

In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to agency records, and §86(4) defines the term "record" expansively to mean:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, records kept by or for the Village, including those in the physical custody of the Village Attorney, fall within the coverage of the Freedom of Information Law.

Second, that records relate to a matter in litigation is likely irrelevant to rights of access. As stated by the Court of Appeals, the state's highest court, in a case concerning a request made under

the Freedom of Information Law by a person involved in litigation against an agency: "Access to records of a government agency under the Freedom of Information Law (FOIL) (Public Officers Law, Article 6) is not affected by the fact that there is pending or potential litigation between the person making the request and the agency" [Farbman v. NYC Health and Hospitals Corporation, 62 NY 2d 75, 78 (1984)]. Similarly, in an earlier decision, the Court of Appeals determined that "the standing of one who seeks access to records under the Freedom of Information Law is as a member of the public, and is neither enhanced...nor restricted...because he is also a litigant or potential litigant" [Matter of John P. v. Whalen, 54 NY 2d 89, 99 (1980)]. The Court in Farbman, supra, discussed the distinction between the use of the Freedom of Information Law as opposed to the use of discovery in Article 31 of the Civil Practice Law and Rules (CPLR). Specifically, it was found that:

> "FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on governmental decision-making, its ambit is not confined to records actually used in the decision-making process (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request.
>
> "CPLR article 31 proceeds under a different premise, and serves quite different concerns. While speaking also of 'full disclosure' article 31 is plainly more restrictive than FOIL. Access to records under CPLR depends on status and need. With goals of promoting both the ascertainment of truth at trial and the prompt disposition of actions (Allen v. Crowell-Collier Pub. Co., 21 NY 2d 403, 407), discovery is at the outset limited to that which is 'material and necessary in the prosecution or defense of an action'" [see Farbman, supra, at 80].

Based upon the foregoing, the pendency of litigation generally would not, in my opinion, affect either the rights of the public or a litigant under the Freedom of Information Law.

Second, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

The first ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." From my perspective, although §3101(c) and (d) of the Civil Practice Law and Rules (CPLR) authorize confidentiality regarding, respectively, the work product of an attorney and material prepared for litigation, those kinds of records remain confidential in my opinion only so long as they are not disclosed to an adversary or a filed with a court, for example. I do not believe that materials that are served upon or shared with an adversary could be characterized as confidential or exempt from disclosure.

It appears that the records sought were prepared in the ordinary course of business. If that is so, again, the pendency of litigation would be irrelevant in determining rights of access. Only if records clearly consist of material prepared for litigation would they be beyond the scope of rights of access conferred by the Freedom of Information Law. In that instance, they would be exempt from disclosure pursuant to §3101(d) of the CPLR. I note that it has been determined judicially that if records are prepared for multiple purposes, one of which includes eventual use in litigation, §3101(d) does not serve as a basis for withholding records; only when records are prepared solely for litigation can §3101(d) be properly asserted to deny access to records [see e.g., Westchester-Rockland Newspapers v. Mosczydlowski, 58 AD 2d 234 (1977)].

Lastly, assuming that the supporting documents used in preparation of the audit are not exempt from disclosure under the CPLR, I believe that rights of access would be governed by §87(2)(g) of the Freedom of Information Law. Although that provision serves as a potential basis for a denial of access, due to its structure, it often requires substantial disclosure. Specifically, 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. I would conjecture that supporting documentation regarding an entry in an audit would consist of statistical or factual information available under §87(2)(g)(i).

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this response will be sent to Village officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Rose Marie Pernice
Gerard Terry

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 27, 2001

Mr. Joseph J. Welch
99-B-2087
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. Welch:

I have received your letter in which you requested intervention from this office regarding your request to the Oneida County Clerk for real estate records.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of the correspondence, I offer the following comments.

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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 regard to fees that may be assessed by county clerks, §§8018 through 8021 of the Civil Practice Law and Rules require that county clerks charge certain fees in their capacities as clerks of court and other than as clerks of court. Since those fees are assessed pursuant to statutes other than the Freedom of Information Law, the fees may exceed those permitted under the Freedom of Information Law. Section 8019 of the Civil Practice Law and Rules provides in part that "The fees of a county clerk specified in this article shall supersede the fees allowed by any other statute for the same services...".

Lastly, I note that §8019(f) of the Civil Practice Law and Rules, entitled "Copies of records", states in relevant part that:

> "The following fees, up to a maximum of thirty dollars per record shall be payable to a county clerk or register for copies of the records of the office except records filed under the uniform commercial code:
>
> 1. to prepare a copy of any paper or record on file in his office, except as otherwise provided, fifty cents per page with a minimum fee of one dollar."

I point out that there is nothing in that statute pertaining to the waiver of fees, and it has been held that an agency subject to the 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,

David Treacy
Assistant Director

DT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 28, 2001

Ms. Boga Dannenberg
[redacted]

The staff of the Committee 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. Dannenberg:

I have received your letter addressed to David Tracy of this office. You have sought assistance in relation to a request for records directed to the Town of Riverhead. The request relates to a burglary that occurred at your residence in 1985.

In consideration of the materials that you forwarded, the time of the event, and a review of the correspondence between yourself and Town officials, I contacted the Town in an attempt to learn more of the matter. In short, I was informed that the entirety of the file regarding the incident, with the exception of two documents, have been made available to you. One of the records withheld is a confession by the person who pled guilty to the burglary; the other is the arrest report, which, based on the information provided to me, includes a variety of personal information relating to the person who was arrested. Both were withheld pursuant to §89(2) of the Freedom of Information Law on the ground that disclosure would constitute "an unwarranted invasion of personal privacy."

It appears to be your belief that more records regarding the matter are maintained by the Town. In this regard, while I am unaware of the facts of the matter, since the burglary occurred more than sixteen years ago, it is likely that many records relating to the event might have legally been destroyed in accordance with Article 57-A of the Arts and Cultural Affairs Law. That series of statutes pertains to records management by entities of local government and provides direction concerning the retention and disposal of records by local governments. Based on schedules developed by the State Archives, a unit of the State Education Department, depending on their relative significance, records must be retained for various periods of time before they can be discarded. In some instances, records must be kept permanently, as in the case of minutes of town board meetings; in others, records may have a retention period of zero (i.e., telephone message slips after calls have been returned); in still others, records might be kept for a year, two years, five or ten, for example, in consideration of their legal, fiscal or historical value.

If records have been destroyed, the Freedom of Information Law would not be applicable. That statute pertains to existing records, and §89(3) states in relevant that an agency is not required to create or prepare a record in response to a request. When an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) also provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

Lastly, if you believe that records have been withheld in a manner inconsistent with law, you have the right to seek judicial review of an agency's final determination to deny access to records by initiating a proceeding under Article 78 of the Civil Practice Law and Rules. I note that such a proceeding must be commenced within four months of the agency's final determination.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Diane M. Stuke
Scott DeSimone

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 28, 2001

Ms. Amy Kleitman
Assistant Counsel
New York City Parks & Recreation
The Arsenal
Central Park
New York, NY 10021

Dear Ms. Kleitman:

I appreciate having received a copy of Mr. Olivieri's determination of an appeal made under the Freedom of Information Law by Ms. Paula Chabrowe. Her request involved "written documentation of the procedure for the issuance of summonses for unleashed dogs in the park by Parks Enforcement Patrol officers." Both you and Mr. Olivieri denied access on the basis of §87(2)(e)(i), stating that the records sought were compiled for law enforcement purposes and would, if disclosed, "interfere with law enforcement investigations or judicial proceedings..."

With all due respect, in consideration of the general subject of the request, dealing with unleashed dogs, it is difficult to understand how every aspect of the procedures in question would, if disclosed, result in harm or disadvantage to the Department, let alone interference with law enforcement investigations or judicial proceedings. I would conjecture that enforcement of matters relating to unleashed dogs rarely results in detailed investigations or judicial proceedings that involve incidents resulting in penalties more serious than violations.

Even if some aspects of the records sought could justifiably be withheld, based on the language of the law and its judicial construction, a "blanket" denial of access would be inappropriate. As you are aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. It is emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In my view, the phrase quoted in the preceding sentence evidences a recognition on the part of the Legislature that a single record or report, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld. That being so, I believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

The Court of Appeals reiterated and expressed its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department [87 NY 2d 267 (1996)], stating that:

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see,* Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" (id., 275).

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the agency contended that complaint follow up reports, also known as "DD5's", could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g), an exception separate from those cited in response to your request. The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276). The Court then stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, directing that:

> "...to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents (*Matter of Fink v. Lefkowitz, supra*, 47 N.Y.2d, at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material (*see, Matter of Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 133, 490 N.Y.S. 2d, 488, 480 N.E.2d 74; *Matter of Farbman & Sons v. New York City Health & Hosps. Corp., supra*, 62 N.Y.2d, at 83, 476 N.Y.S.2d 69, 464 N.E.2d 437)" (id.).

In a recent decision that relates in some respects to the instant situation, Capruso v. New York State Police (Supreme Court, New York County, NYLJ, July 11, 2001), the request involved the "operator's manual for any radar speed detection device used" by the New York State Police and the New York City Police Department. The Division of State Police contended that disclosure would interfere with the ability to effectively enforce the law concerning speeding. Nevertheless,

following an *in camera* inspection of the records, it was found that the Division could not meet it burden of proving that the harmful effects of disclosure appearing in the exceptions to rights of access would in fact arise.

In its attempt to deny access to the records, the Division relied upon §87(2)(e)(i) and (iv) of the Freedom of Information Law as a means of justifying its denial. The latter permits an agency to withhold records that are "compiled for law enforcement purposes" to the extent that disclosure would "reveal criminal investigative techniques or procedures, except routine techniques and procedures."

With respect to the possibility that disclosure would interfere with law enforcement investigations or judicial proceedings, it was found that there was no "causal link" that justified such a contention and that the Division's claims were "speculative." With regard to reliance on §87(2)(e)(iv), the court referred to the leading decision on the matter, Fink v. Lefkowitz [47 NY2d 567 (1979)], which was cited in Gould, supra. That decision involved access to a manual prepared by a special prosecutor that investigated nursing homes in which the Court of Appeals held that:

> "The purpose of this exemption is obvious. Effective law enforcement demands that violators of the law not be apprised the nonroutine procedures by which an agency obtains its information (see Frankel v. Securities & Exch. Comm., 460 F2d 813, 817, cert den 409 US 889). However beneficial its thrust, the purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution.
>
> "To be distinguished from agency records compiled for law enforcement purposes which illustrate investigative techniques, are those which articulate the agency's understanding of the rules and regulations it is empowered to enforce. Records drafted by the body charged with enforcement of a statute which merely clarify procedural or substantive law must be disclosed. Such information in the hands of the public does not impede effective law enforcement. On the contrary, such knowledge actually encourages voluntary compliance with the law by detailing the standards with which a person is expected to comply, thus allowing him to conform his conduct to those requirements (see Stokes v. Brennan, 476 F2d 699, 702; Hawkes v. Internal Revenue Serv., 467 F2d 787, 794-795; Davis, Administrative Law [1970 Supp], section 3A, p 114).
>
> "Indicative, but not necessarily dispositive of whether investigative techniques are nonroutine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel (see Cox v.

United States Dept. of Justice, 576 F2d 1302, 1307-1308; City of Concord v. Ambrose, 333 F Supp 958)."

In applying those criteria to specific portions of the manual, which was compiled for law enforcement purposes, the Court found that:

> "Chapter V of the Special Prosecutor's Manual provides a graphic illustration of the confidential techniques used in a successful nursing home prosecution. None of those procedures are 'routine' in the sense of fingerprinting or ballistic tests (see Senate Report No. 93-1200, 93 Cong 2d Sess [1974]). Rather, they constitute detailed, specialized methods of conducting an investigation into the activities of a specialized industry in which voluntary compliance with the law has been less then exemplary.
>
> "Disclosure of the techniques enumerated in those pages would enable an operator to tailor his activities in such a way as to significantly diminish the likelihood of a successful prosecution. The information detailed on pages 481 and 482 of the manual, on the other hand, is merely a recitation of the obvious: that auditors should pay particular attention to requests by nursing homes for Medicaid reimbursement rate increases based upon projected increase in cost. As this is simply a routine technique that would be used in any audit, there is no reason why these pages should not be disclosed" (id. at 573).

As the Court of Appeals has suggested, to the extent that the records in question include descriptions of investigative techniques which if disclosed would enable potential lawbreakers to evade detection or endanger the lives or safety of law enforcement personnel or others [see also, Freedom of Information Law, §87(2)(f)], a denial of access would be appropriate. Again, even if there may be portions of the records sought which if disclosed would result in those deleterious effects, the remainder of the records must, in my view, be disclosed.

If you would like to discuss the matter, please feel free to contact me. I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Alessandro G. Olivieri
Paula Chabrowe

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13108

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December 28, 2001

David H. Pearl, Esq.
Hamburger, Maxson & Yaffe, LLP
225 Broadhollow Road, Suite 310E
Melville, NY 11747

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Pearl:

I have received your letter of December 13 in which you sought an advisory opinion concerning the propriety of a denial of access to records by the Wappingers Central School District.

The rejection involves "the names of all current teachers who were eligible to receive the benefit of a salary elective program prior to July 1, 2001 but who declined to do so." The collective bargaining agreement between the District and the Wappingers Congress of Teachers in Article 9 includes the terms of the "Salary Elective Program" and provides in relevant part that:

> "A unit member who meets all three of the following eligibility requirements [when the member has];
>
> (1) 15 years of District service,
> (2) 20 years of member service in the New York State Teachers' Retirement System, and
> (3) eligibility for a service retirement pursuant to the rules and regulations of the New York State Teachers' Retirement System..."

The District denied access based on a contention that "to release any information relating, even in part, to an employee's age would constitute an unwarranted invasion of privacy."

From my perspective, a denial of access is illogical, for records reflecting each of the requirements for participation in the Program would be accessible under the Freedom of Information Law. In this regard, I offer the following comments.

As you are likely aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Pertinent to the matter is §87(2)(b), which states that agencies may withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." While the

standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public officers employees. It is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public officers and employees are required to be more accountable than others. Further, with regard to records pertaining to public officers and employees, the courts have found that, as a general rule, records that are relevant to the performance of a their official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)].

Although tangential to your inquiry, I point out that §87(3)(b) of the Freedom of Information Law states in relevant part that:

> "Each agency shall maintain...
>
> (b) a record setting forth the name, public office address, title and salary of every officer or employee of the agency... "

As such, a payroll record that identifies all officers or employees by name, public office address, title and salary must be prepared to comply with the Freedom of Information Law. Moreover, those items were determined to be available even before the enactment of the Freedom of Information Law, for it was found that they:

> "...represent important fiscal as well as operational information. The identity of the employees and their salaries are vital statistics kept in the proper recordation of departmental functioning and are the primary sources of protection against employment favoritism. They are subject therefore to inspection" Winston v. Mangan, 338 NYS 2d 654, 664 (1972)].

Because it is clearly relevant to the duties of all public employees, a record identifying public employees by name, public office address, title and salary must be maintained and made available to any person.

I note that §89(2)(b) of the Freedom of Information Law includes a series of examples of unwarranted invasions of personal privacy, the first of which pertains to the disclosure of "employment...histories." Notwithstanding that provision, it has been advised, based on logic in relation to rights of access to a variety of records pertaining to public employees, that elements of public employees' employment histories must be disclosed, and the advice of this office has been sustained by the courts. In a decision that was affirmed by the Appellate Division, the lower court referred to a request for employment histories of certain public employees (identified by initials) and wrote as follows:

> "Petitioner contends that GP and LG have no reasonable expectation of privacy to the extent that their employment histories include public employment. This position is in accord with the view taken by the Committee on Open Government (the 'Committee'). 'Since the Committee is the state agency charged with administering the Freedom of Information Law, its interpretation of the statute, if not

> irrational or unreasonable, should be upheld' (Miracle Mile Associates v. Yudelson, 68 AD2d 176, 181, 417 NYS2d 142 [4th Dept], lv denied, 48 NY2d 706, 422 NYS2d 68 [1979], lv denied 48 NY2d 606, 421 NYS2d 1031 [1979], see also, Sheehan v. City of Binghamton, 59 AD2d 808, 398 NYS2d 905 [3d Dept 1977].
>
> "In FOIL-AO-7065, the Committee advised as to a request for the resume of a public employee. The Committee opined...that:
>
> > Although some aspect 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 section 87(3)(b)].
>
> "Accordingly, to the extent that the records sought by petitioner contain data which would be available from the public employers under FOIL or similar statutes, employment histories of GP and LP are not exempt from disclosure. While such employment histories fit within the exemption provided under Public Officers Law §89(2), the statute merely provides a ground on which the agency 'may' withhold a document. Since this information is otherwise subject to disclosure, and has no legitimate claim to confidentiality, its inclusion in an employment history on a resume or job application does not endow it with protection which it otherwise would not have" [Kwasnik v. The City of New York, Supreme Court, New York County, September 26, 1997].

In affirming the foregoing, the Appellate Division stated that: "We reject CUNY's argument that the public employment history of its employees...should be shielded from disclosure as an unwarranted invasion of the employees' privacy....This result is supported by the Committee on Open Government, to which courts should defer..." [262 AD2d 171, 691 NYS2d 525, 526 (1999)].

In a somewhat related vein, the Court of Appeals has held that records indicating a public employee's dates of attendance, including days and dates of sick leave, must be disclosed [Capital Newspapers v. Burns, 67 NY2d 562 (1986)].

In consideration of the foregoing, I believe that the requirements for eligibility in the Salary Elective Program involve information that is otherwise available under the Freedom of Information Law. In short, the date of one's initial employment (or the date of one's initial payment) and other items indicating the duration of one's public employment, are found in various records determined to be public in judicial decisions construing the Freedom of Information Law. That being so, I do not believe that disclosure would constitute an unwarranted invasion of privacy or that the District's determination is justifiable.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this opinion will be forwarded to District officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Wayne F. Gersen
Joseph DiDonato